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The Journal of the Federalist Society Practice Groups

Volume 9, Issue 1 February 2008

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Engage

Volume 9, Issue 1

Letter from the Editor...

Engage, the journal of the Federalist Society Practice Groups, provides original scholarship on current, important legal and policy issues. The journal is a collaborative effort, involving the hard work and voluntary dedication of each of the organization's fifteen Practice Groups. Through its publication, the Groups aim to contribute to the marketplace of ideas in a way that is collegial, measured, and insightful—and hope to spark a higher level of debate and discussion than is all too often found in today's legal community.

This is the first issue following on the close of our year-long twenty-fifth anniversary celebration. Audio and video recordings from all the panels, speaking engagements, and debates from our 25th National Lawyers Convention are now online. In addition, we are pleased to announce that the transcripts of nearly all of the panel debates will be published in various law reviews this coming year, including *The Harvard Journal of Law and Public Policy, The Georgetown Journal of Law and Public Policy, The Texas Review of Law and Policy, The William and Mary Environmental Law and Policy Review, The New York Journal of Law and Liberty, Ave Maria Law Review, Hofstra Law Review, Regent University Law Review, The Southern New England Roundtable Symposium Law Journal, The SMU Technology Law Review, The University of Miami International and Comparative Law Review,* and *The Georgetown Journal of Legal Ethics*. Publication details appear on the individual webpage for each panel in our new Multimedia Archive.

Also new to the website (www.fed-soc.org) are two projects from our Faculty Division: SCOTUScast and Originally Speaking, providing commentary on Supreme Court decisions and cases before the High Court as they occur. Members can podcast the former through iTunes or the RSS feed in the SCOTUScast section of our website. We hope all these new features provide our members with the high standard of scholarship and excellence that they have come to expect from the Federalist Society.

As always, readers can expect upcoming issues of Engage to feature articles on matters of importance to them. We hope that you find the work in these pages well-crafted and informative, and strongly encourage you to send us your feedback at info@fed-soc.org.

Volume 9, Issue 1 **ENGAGE** *February 2008*

Administrative Law and Regulation

Climate Change Litigation Since *Mass v. EPA*

*By David Rivkin, Jr., Darin R. Bartram & Lee A. Casey**

Although Congress failed to pass climate change legislation in 2007, the year was nevertheless highly significant for climate change litigation. Many courts are increasingly willing to interpret existing statutes (particularly the Clean Air Act and the National Environmental Policy Act) to require federal agencies to address some aspect of global warming. At the same time, they generally have proven far more reluctant to frame judicial climate change relief under federal or state common law nuisance theories. Such claims have largely been dismissed on standing or justiciability grounds.

Nevertheless, a pattern is clearly emerging in which states and private groups that are impatient with federal efforts to deal with global climate change on the international level seek to force U.S. domestic action either directly under existing statutory schemes (or through new state laws) or indirectly by targeting the industries they believe should be the subject of regulation in this area. At this point, it is by no means safe to assume that these efforts will be found by the courts to be preempted by federal law.

Massachusetts v. EPA

On April 2, 2007, the United States Supreme Court ruled that the Environmental Protection Agency (EPA) already has the authority to regulate greenhouse gas ("GHG") emissions under the Clean Air Act, at least GHG emissions from new motor vehicles and motor vehicle engines. That case, *Massachusetts v. EPA*, was one of the most closely watched and decided by the Court last year.[1]

The controversy underlying *Massachusetts v. EPA* dates to 1999, when several environmental groups petitioned EPA to set GHG motor vehicle emissions standards, including and especially for carbon dioxide. CAA § 202(a) requires EPA to establish "standards applicable to the emissions of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines" which in its "judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[2]

After considering the matter for nearly four years, EPA rejected the petition in September, 2003. In its final rule, the Agency concluded that carbon dioxide was not a "pollutant" within the CAA's meaning, and that, as a result, it did not have the authority to regulate carbon emissions under that law. Moreover, EPA also explained that it would not have exercised that authority even if the CAA had granted it the power. Here the Agency noted in particular that the United States was determined to promote a global strategy for addressing climate change issues, and that unilateral American action in this area would undermine that goal.

EPA's denial of the petition was challenged by a number of environmental groups and seventeen state and local governments. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Agency's decision, but in a badly fractured series of opinions.[3] The Supreme Court noted the unusual importance of the underlying issues and determined to review the case. In the event, the Court addressed three questions: (1) whether the plaintiffs had "standing" to raise the claims; (2) whether EPA had CAA § 202(a) authority to regulate carbon dioxide and other air emissions associated with climate change; and (3) whether, if the Agency had that authority, it could decline to exercise it for the essentially foreign policy reasons articulated in the final rule.

In granting that Massachusetts at least had standing to challenge EPA's decision (because its coastline is allegedly threatened by rising sea levels attributable to global warming), the Court articulated a new and relaxed threshold of standing for state claims—granting them what it termed a "special solicitude." Writing for the majority, Justice Stevens noted that it is of "considerable relevance that the party seeking review here is a sovereign state and not, as it was in *Lujan,* a private individual," citing the century-old case of *Georgia v. Tennessee Copper Co*.[4]

In dissent, Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito) attacked the majority's reliance on the *Tennessee Copper* case, noting that it had not involved a state's standing to sue under Article III of the Constitution, but the remedies a state might seek in a case where it clearly had that standing—which explained why this precedent was not cited by the parties or the D.C. Circuit below. The Chief Justice went on to criticize the majority's use of established standing doctrines, and especially its failure to link Massachusetts supposed injury—loss of coastal land—to EPA's failure to regulate GHG emissions from motor vehicles, and to show how reversal of that decision would prevent that harm:

> The Court's sleight-of-hand is in failing to link up the different elements of the three-part standing test [injury in fact, causation and redressibility]. What must be likely to be redressed is the particular injury in fact.... But even if regulation does reduce emissions—to some indetermine degree, given events elsewhere in the world—the Court never explains why that makes it likely that the injury in fact—the loss of land—will be redressed.[5]

The "special solicitude" shown to Massachusetts here suggests that this standing analysis, as noted by the dissenters, is limited to this case. At the same time, there are twenty-four states and the District of Columbia with coastlines, oceanic or tidal, that might be affected by sea levels.

On the merits, the Court determined that EPA did have CAA authority to regulate greenhouse gases, and especially carbon dioxide, as "air pollutant[s]," which are defined as "any air pollution agent... including any physical, chemical... substance or matter which is emitted into or otherwise enters the ambient air..."[6] Concluding that carbon dioxide, methane,

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nitrous oxide, and hydrofluorocarbons are clearly "physical [and] chemical substance[s] which [are] emitted into... the ambient air," the Court found that such gases "fit well within the Clean Air Act's capacious definition of 'air pollutant'" and thus held that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles and new motor vehicle engines sold in the United States.

Finally, the Court addressed EPA's decision that, even if it had the authority to regulate greenhouse gases under the CAA, "it would be unwise to do so." EPA had explained in denying the original petition for rulemaking that a causal connection between greenhouse gases and global surface temperatures was not unequivocally established, and that piecemeal attempts to address climate change would—in any case—conflict with the President's decision to promote a comprehensive approach to these issues. This approach included support for technological innovations, voluntary emission reduction and sequestration measures, additional research, and attempts to involve developing countries (which account for an increasing percentage of worldwide GHG emissions) in any global solution.

The majority found this explanation inadequate to support EPA's decision because it was "divorced from the statutory text." That text, the Court concluded, requires EPA to adopt standards to regulate an air pollutant emitted from new motor vehicles if the Agency concludes that those emissions endanger the public welfare, including by contributing to climate change. Significantly, however, the Court did not require regulation. Rather, it made clear that EPA could decline to regulate GHG emissions under § 202(a), but only if the Agency concluded that the emissions do not contribute to climate change, or if it were to provide a reasoned explanation for why it cannot undertake a determination as to the effects of such greenhouse gas emissions on climate change at this time.

This portion of the Court's decision was also met with a vigorous dissent, written by Justice Scalia and joined by Justices Alito, Thomas, and the Chief Justice. Justice Scalia began by noting that nothing in the CAA requires EPA to make a "judgment" about any particular air pollutant in response to a rulemaking petition and that still less does the statute require the Agency's refusal to make a judgment be related to the public health and welfare considerations applicable when it does decide to regulate.[7] On the question of whether the CAA even permits the regulation of GHG, the dissenters argued that the CAA's definition of "air pollutant," subject to regulation under section 202, was ambiguous, and that the majority had failed to explain why EPA's interpretations of the statute were "incorrect, let alone so unreasonable as to be unworthy of *Chevron* deference."[8]

Whether the Supreme Court's decision in *Massachusetts v. EPA* will have a long-term, substantial impact on climate change initiatives remains to be seen. The Court manifestly did not require EPA to make an "endangerment finding" under CAA § 202(a), or to regulate GHG emissions from new motor vehicles and motor vehicle engines. It made clear that GHG emissions, including carbon dioxide, are pollutants under the statute, and that if EPA chooses not to regulate its reasons must properly relate to the law's public health and welfare requirements.

Thus, although EPA could certainly conclude that an endangerment finding is inappropriate because unilateral U.S. regulation would undercut efforts to reach a global solution to the climate change issue, it must relate this to the statute's public health and welfare requirements—*i.e.,* because unilateral U.S. reductions will actually lead to greater GHG emission on a global basis, making the problem worse—rather than simply referencing the clear foreign policy problems that a unilateral approach creates. As Justice Stevens, writing for the majority, noted clearly, EPA still "has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."[9]

Perhaps the most immediate impact of the *Massachusetts v. EPA* decision, however, is in the standing area. By effectively granting state governments a new, special standing status, the Court has all but guaranteed additional litigation by those states determined to force federal policy on the global climate change issue. Ironically, however, the Court's decision in *Massachusetts v. EPA* has arguably undercut one of the state's core arguments against private parties (rather than the federal government): that GHG emissions and "global warming" constitute common law nuisances. Indeed, as discussed below, some lower court decisions that consider *Massachusetts v. EPA* have already concluded that the states' ability to seek redress from the federal government supports their decision to not consider common-law-based nuisance claims brought by those states. This aspect points to a narrower impact than the victorious states and environmental groups might have anticipated.

Central Valley Chrysler-Jeep v. Goldstone

In 2002, the California legislature enacted Assembly Bill 1493, which required the California Air Resources Board (CARB) to develop regulations to achieve the "maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles."[10] CARB was required to apply these regulations starting with the 2009 model year. It adopted regulations in 2004, addressing the greenhouse gases of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons.

On December 7, 2004, a coalition of automobile manufacturers, dealers, and related associations challenged those regulations, claiming that they were preempted by the federal Energy Policy and Conservation Act of 1975 (EPCA)[11]—under which the National Highway Traffic Safety Administration (NHTSA) sets corporate average fuel economy, or "CAFE," standards, by CAA § 209(a) (which permits California to adopt stricter motor vehicle emissions standards in certain circumstances), and by federal foreign policy considerations.[12] Although the district court initially ruled in the manufacturers' favor, finding that the state's effort to regulate GHG emissions from motor vehicles was preempted by § 209(a), the bulk of the case was stayed early in 2007, pending the Supreme Court's resolution of *Massachusetts v. EPA*. Following the Supreme Court's *Massachusetts v. EPA* decision on April 2, 2007, the *Central Valley Chrysler-Jeep* court reconsidered its initial ruling, and resolved the remainder of the case.

The pre-emption challenge to California's program required the court to consider the interplay between EPCA and the CAA. CAA § 202(a)(1), of course, empowers EPA to prescribe motor vehicle emissions standards, and the statute

generally preempts states from also regulating motor vehicle emissions. California is the exception, as it may impose more stringent standards under CAA § 209—assuming the requisite criteria are established for the grant of an EPA waiver.[13] In addition, other states may adopt California's EPA-approved regulations—although they may not adopt their own regulatory regime requiring automobile manufacturers to produce a "third" car.

Under EPCA, the Department of Transportation's NHTSA sets federal fuel economy standards for new vehicles on a fleet-wide basis.[14] In adopting these "CAFE" standards, NHTSA must consider "(1) technological feasibility; (2) economic practicability; (3) the effect of other Federal motor vehicle standards on fuel economy; and (4) the need of the nation to conserve energy."[15] In addition, EPCA contains an express preemption provision which states that "a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter."[16] EPCA does not contain a waiver provision for this preemption.

Following the Supreme Court's *Massachusetts v. EPA* discussion of whether NHTSA's exclusive right to establish fuel economy standards for energy conservation purposes precluded EPA from establishing similar requirements as a means of limiting GHG emissions under the CAA, the court concluded that California's regulations were not pre-empted—assuming an EPA waiver was, in due course, actually granted under § 209. It reasoned that EPCA and the CAA established different, if related, standards for regulation, and that EPA's regulatory authority—in the "public health and welfare"—was broader.[17] It was, therefore, NHTSA that must take EPA's regulations into account in establishing its CAFE rules, and California rules approved by EPA under CAA § 209 were not, as a result, preempted either expressly or by implication because of EPCA.

The court also considered whether the California program is barred on foreign policy preemption grounds. It acknowledged that "[i]ntrusions of state law on the Federal Government's exercise of its authority to conduct foreign affairs are subject to preclusion."[18] However, the court also concluded that United States foreign policy with respect to climate change—at least as proven by the parties before it—did not prevent private or state efforts, even those compelled by law, to reduce GHG emissions. It concluded that "[t]o the extent [the] United States has articulated a concrete policy with respect to its international approach to control of greenhouse gas emissions from the motor vehicle sector," it is found in the "G8 Summit Report of 2007 which provides that the member states will ask their governments to: '... foster a large number of possible measures and various instruments that can clearly reduce energy demand and CO2 emissions in the transport sector....'"[19] California's regulations, it determined, were not in conflict with this policy.

The fear, raised both by the manufacturers in this case and by EPA in its September 8, 2003 order declining to regulate under CAA § 202, that state regulation would undercut the President's bargaining position *vis-à-vis* other countries, by effectively reducing his collateral, was dismissed by the court as a "strategy," rather than a statement of national policy.[20] The court refused, as a logical matter, to interfere with the U.S.'s supposed stated policy on the basis of the loss of "bargaining chips," suggesting that this would require invalidation of virtually all state efforts to improve energy efficiency, from encouraging the use of florescent light bulbs to "enhanced energy efficiency building codes."[21]

Significantly, however, the court did not have before it an authoritative statement by the executive branch that state regulation of GHG emission from motor vehicles would undercut the U.S.'s negotiating position abroad. In this respect, the court disallowed both arguments advanced ("without offer of proof") by the Solicitor General before the Supreme Court in *Massachusetts v. EPA*, and EPA's statements in its September 8, 2003, rule. Again following the majority in *Massachusetts v. EPA*, the court noted that Congress had tasked the State Department—rather than EPA—to formulate American foreign policy on climate change matters.[22] Its holding, therefore, is based on a lack of federal foreign policy interest, rather than the suggestion that the President's bargaining position cannot be such an interest.

Green Mountain Chrysler Plymouth v. Crombie

The *Central Valley Chrysler Jeep* decision built upon a similar decision issued on September 12, 2007 by the U.S. District Court for the District of Vermont: *Green Mountain Chrysler Plymouth v. Crombie*.[23] That case involved a challenge by vehicle manufacturers to Vermont's version of the California GHG emissions limitation program at issue in *Central Valley Chrysler-Jeep*. Vermont had adopted the program under CAA § 177, which permits other states to adopt California—rather than federal—motor vehicle emissions standards. The principal issue was whether these standards were preempted by the EPCA and NHTSA's CAFE requirements.

The *Green Mountain* court cited the Supreme Court's views, expressed in *Massachusetts v. EPA,* on the relationship between EPA's authority under the Clean Air Act, and NHTSA's authority under EPCA, and concluded that the "Court rejected outright the argument that EPA is not permitted to regulate carbon dioxide emissions from motor vehicles because it would have to tighten mileage standards, which is the province of the Department of Transportation under EPCA." The court's legal analysis was similar to that of the *Central Valley Chrysler Jeep* decision, although the *Green Mountain* Court had determined that an approved California program becomes "federalized" and therefore cannot be preempted by a federal regulation. The *Central Valley* Court avoided conferring this status on the California regulations, instead concluding that NHTSA had to harmonize its CAFE standards with the California rules, just like it would have to do relative to any EPA regulations.

The Vermont decision is notable because it was the first trial to host a battle of experts. During the sixteen-day trial, the judge overruled the manufacturers' evidentiary objections and found Vermont's expert scientists to be more credible and reliable than the industry's. In particular, the judge found NASA scientist James Hanson, often identified as the nation's most well-known climatologist, and other experts supporting the state, to be persuasive. They offered testimony on the existence

and generally adverse consequences of climate change, leading the court to conclude that "evidence presented to this Court... supports the conclusion that regulation of greenhouse gases emitted from motor vehicles has a place in the broader struggle to address global warming."[24]

The automakers appealed the judge's decision to the Second Circuit on October 5, 2007.

Center for Biological Diversity v. NHTSA

Federal courts have also considered directly NHTSA's obligation to take into account the impact of GHG emissions under both EPCA (in setting fuel economy standards), and the National Environmental Policy Act,[25] which requires federal actors to assess the environmental impact of their decisions. In *Center for Biological Diversity v. NHTSA*, the petitioner/environmental organization claimed that NHTSA, in its calculation of the costs and benefits of alternative fuel economy standards for light trucks, improperly applied a zero value to the benefit of carbon dioxide emissions reductions.[26] Under NEPA, the petitioners claimed that NHTSA had not given a "hard look" to the greenhouse gas implications of its rulemaking and failed to analyze a reasonable range of alternatives because it had not examined the rule's cumulative impact. The U.S. Court of Appeals for the Ninth Circuit ruled that NHTSA had failed to give due consideration to greenhouse gases under either statute.

In considering revision of its CAFE standards, NHTSA was obliged to set the standard at the "maximum feasible" level, considering "technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy."[27] In setting these levels, NHTSA had monetized some externalities—such as the emission of criteria pollutants during gasoline refining and distribution—and crash and noise costs associated with driving. However, NHTSA did not monetize the benefit of reducing carbon dioxide emissions, finding the value of such reductions "too uncertain to support their explicit valuation and inclusion among the savings in environmental externalities from reducing gasoline production and use."[28]

The court reviewed a number of studies presented by the petitioners that showed the benefit of carbon emissions reductions, including one from the National Commission on Energy Policy, which found the benefit to be between $3 to $19 per ton of carbon dioxide equivalent. Environmental Defense and Union of Concerned Scientists recommended a minimum of $13.60 per ton carbon dioxide. NHTSA acknowledged the value of such reductions but found that the wide variation in estimates rendered the values too uncertain to support their explicit valuation. The court rejected this, finding that the record showed a range of values, and concluded that NHTSA's assignment of a zero-dollar value (which was outside the range) was arbitrary and capricious. In addition, the court noted that NHTSA had monetized other uncertain benefits, and that its failure to do so for reduced carbon emissions was arbitrary and capricious.

The court also noted that GHG emissions have the kind of cumulative impact that NEPA was designed to address. NEPA requires the federal government to assess the environmental ramifications of its decisions before acting.[29] NEPA requires federal agencies to prepare a detailed statement on the environmental impact of major federal actions "significantly affecting the quality of the environment."[30] If there is a substantial question of whether the action may have a significant effect, either individually or cumulatively, on the environment, the agency must prepare an Environmental Impact Statement ("EIS").[31]

The court faulted NHTSA for failing to consider the actual impact of the proposed CAFE standard, and directed the agency to "evaluate the 'incremental impact' that [those] emissions will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions such as other light truck and passenger automobile CAFE standards."[32] When NHTSA claimed that a cumulative impact assessment was not warranted because climate change is affected by contributions outside the agency's control, the court responded that this "does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming."[33] This decision provides further support that courts will interpret existing laws to require a consideration of climate change impacts that may not have been understood when the laws were passed.[34]

California v. General Motors Corp.

In September 2006, the State of California sued the six largest automobile manufacturers, claiming that the emissions from their products, automobile exhaust, contributed to global warming and was therefore a public nuisance under both federal common law and California state common law. The automobile manufacturers asked the court at the outset to dismiss the case because, among other reasons, the complaint raised "nonjusticiable claims" reserved for resolution by the political branches of government.

In September 2007, a federal judge agreed that the complaint was non-justiciable and dismissed the case.[35] The court began by examining the activities of the federal government in the climate change area, starting with the 1978 National Climate Program Act[36] and continuing with the 1987 Global Climate Protection Act and the 1990 Global Change Research Act. It noted President George H.W. Bush's signature and the subsequent ratification of the United Nations Framework Convention on Climate Change in 1992, as well as President Clinton's signing of the Kyoto Protocol and the Senate's unanimous resolution urging the President not to sign any agreement that would result in serious harm to the U.S. economy or did not include provisions regarding the emissions of developing nations. Finally, the court noted the current administration's stance against Kyoto.

While the non-justiciability doctrine has many manifestations, the court felt that the most appropriate inquiry, indicated by the tests laid out in the Supreme Court's leading decision in *Baker v. Carr*,[37] asks the question of whether a court can decide a case "'without [making] an initial policy determination of a kind clearly for nonjudicial discretion.'"[38] The vehicle manufacturers argued that any court reviewing the question of whether a particular industry sector's emissions contribution was a public nuisance would have to first consider the broad array of other domestic and international activities

that contribute to climate change. Citing the prior district court decision in *Connecticut v. AEP*[39] (discussed below) on non-justiciability, the court agreed that to decide California's claim would require it to balance the "competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development."[40] The court concluded that this is the type of initial policy determination that is to be made by the political branches of government, not by the court.

The court also concluded that *Massachusetts v. EPA* supported its view that the political branches of government are best tasked with addressing climate change. As explained above, the *Massachusetts* Court created a new, relaxed standing requirement that permitted Massachusetts—as a state potentially affected by GCC impacts—"special solicitude" to seek review of decisions by federal administrative agencies regarding climate change. Because the Supreme Court found that Congress had given EPA the authority to regulate carbon emissions, the district judge in *California v. General Motors Corp.* concluded that a state that is dissatisfied with the federal government's approach to global warming can advance its interests first through the administrative channels and then through the courts if it feels that the rejection of its rulemaking petition is arbitrary and capricious.

While the court found sufficient for dismissal the requirement that it would have otherwise needed to make an impermissible policy decision, it also found other grounds to reinforce its decision to dismiss the case. First, it found that, by seeking to impose damages for the lawful sale of automobiles worldwide, the case implicated the political branches' powers over interstate commerce and foreign policy. In considering non-justiciability, *Baker v. Carr* requires a court to consider whether there has been a textually demonstrable constitutional commitment of the issues to the political branches of government—such as, in this case, the Commerce Clause and foreign affairs powers of the Constitution.

The court also discussed the lack of judicially discoverable or manageable standards by which it could resolve California's claims against the manufacturers. This bears on non-justiciability under *Baker v. Carr*. The court distinguished a raft of trans-boundary pollution cases presented by California, and concluded that none of these cases implicated the number of national and international policy issues presented by climate change challenges.

California has appealed the district court's dismissal of its case.

Connecticut v. AEP

The dismissal of the California nuisance claim followed by several years the dismissal of another nuisance claim brought by states against another industry sector: electric utilities. In *State of Connecticut v. American Electric Power* and *Open Space Institute v. American Electric Power*,[41] the Attorneys General from eight states and the City of New York, along with two environmental groups, sued American Electric Power Co., Inc., Cinergy Corp., Southern Co., Xcel Energy Inc., and the Tennessee Valley Authority over their carbon dioxide emissions. The suit, filed in the Southern District of New York in July, 2005, claimed that the electric utilities' carbon dioxide emissions from coal-fired electric power plants contributed to global warming. The plaintiffs sought an injunction restricting the amount of allowed carbon dioxide emissions from the defendants' plants in eight states.

Judge Loretta Preska, on September 15, 2005, dismissed the case because it raised non-justiciable political questions. In her decision, she found that explicit statements from both the legislative and executive branch, dating back to the earliest consideration of climate change issues, indicated a specific refusal to impose limits on carbon dioxide emissions. Applying the standard for determining non-justiciability, the court found that the case would require it to make an initial policy determination as to how to address global climate change, and that this responsibility was vested in the political branches of government, not in the courts.

Judge Preska's decision was appealed to the Second Circuit on September 22, 2005, and has been briefed and argued. In June, 2007, the Second Circuit ordered supplemental briefing on the impact of *Massachusetts v. EPA*. A decision is expected in 2008.

Comer v. Murphy Oil[42]

At the end of August, a district court judge in Mississippi dismissed a class-action lawsuit brought by some individuals against energy companies, including coal, electric utility, and chemical companies. The lawsuit, filed in April 2006, alleged that the defendant's carbon emissions contributed to climate change.

The lawsuit was filed by Ned Comer, and other Gulf Coast residents who suffered storm damage from Hurricane Katrina. It alleged that the energy companies knew that their emissions produced the conditions whereby a storm of the strength and size of Katrina would form and strike the Gulf Coast. The plaintiffs' claims included damages for personal injury, loss of property, and business interruption, and sought to apply tort theories of unjust enrichment, civil conspiracy, and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment.

Coal companies filed a motion to dismiss the case. In dismissing the case, Judge Louis Guirola determined that the plaintiffs did not have standing. Ruling from the bench, he noted that the alleged injuries are "attributable to a larger group that [is] not before this Court, not only within this nation but outside of our jurisdictional boundaries as well." He also decided that the claims raised in the class-action suit were political questions that were reserved for resolution by Congress and the executive branch. This was the first climate-change decision following the Supreme Court's ruling in *Massachusetts v. EPA*. While the Court was willing to extend "special solicitude" to the states in that case, the dismissal of the *Comer* case suggests that non-state plaintiffs will not similarly benefit.

While it was the coalition of coal company defendants that brought the motion to dismiss the case against them, the judge, on his own initiative, dismissed the remaining defendants as well. The plaintiffs have appealed the dismissal to the U.S. Court of Appeals for the Fifth Circuit.

Endnotes

1 127 S. Ct. 1438 (2007).

2 42 U.S.C. § 7521(a)(1).

3 *See* Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005).

4 206 U.S. 230 (1907).

5 *Mass. v. EPA*, 127 S. Ct. at 1470.

6 42 U.S.C. § 7602(g).

7 *Mass v. EPA*, 127 S. Ct. at 1473.

8 *Id.* at 1477.

9 *Mass. v. EPA*, 127 S. Ct. at 1459.

10 A.B. 1493 § 43018.4(a).

11 49 U.S.C. §§ 32901-32919.

12 In addition, plaintiffs claimed that the regulations violated the "dormant" Commerce Clause and the Sherman Antitrust Act. The District Court granted CARB's motion for summery judgment on these claims in 2006.

13 California sought a § 209 waiver from EPA on December 21, 2005. EPA-HQ-OAR-2006-0173. EPA announced that it had denied this waiver request on December 19, 2007. It is expected that California and other states who adopted California's emissions standards will seek judicial review of this denial.

14 49 U.S.C. §§ 32902(a), (c).

15 49 U.S.C. § 32902(f).

16 49 U.S.C. § 32919.

17 2007 U.S. Dist. LEXIS 91309 at *48-*49.

18 2007 U.S. Dist. LEXIS 91309 at *82.

19 *Id.* at *109-111.

20 *Id.* at *104.

21 *Id.* at *107-08.

22 *Id.* at *99.

23 508 F. Supp. 2d 295 (D. Vt. 2007).

24 508 F. Supp. 2d at 340.

25 42 U.S.C. §§ 4321-4347.

26 508 F.3d 508 (9th Cir. 2007).

27 49 U.S.C. § 32902(f).

28 71 Fed. Reg. 17,566, 17,638 (Apr. 6, 2006).

29 *See, e.g.,* Friends of the Earth, Inc. v. Watson, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. 2005).

30 42 U.S.C. § 4332(2)(C)(i).

31 *See* 40 C.F.R. 1508.7 (defining "cumulative impact").

32 508 F.3d at 550.

33 *Id.* at 549.

34 Among other cases attempting to address GCC concerns through existing federal statutory regimes are the following:

In *Montana Environmental Information Center v. Johanns,* Civ. No. 07-1311 (D.D.C, filed on July 23, 2007) the plaintiffs claim that the US Department of Agriculture's Rural Utilities Service prepared an Environmental Impact Statement that failed to consider the contribution of a proposed 250 megawatt coal-fired plant in Montana. The complaint also claims that the EIS failed to consider alternatives, such as renewable energy sources or conservation, to address power needs. This case is pending

In *Natural Resources Defense Council v. Kempthorne,* an environmental group challenged a biological opinion by the U.S. Fish & Wildlife Service on the basis that FWS assumed that the hydrology of water bodies affected by a proposed water diversion project would remain constant for twenty years. The court found that it was arbitrary and capricious for the FWS to ignore evidence that climate change will produce earlier flows, more floods, and drier summers. 2007 WL 1577896 (E.D. Cal. May 25, 2007)

The Center for Biological Diversity has sued the U.S. Climate Change Science Program for failing to prepare a periodic scientific assessment of climate change, as required by the Global Change Research Act of 1990. A federal district court ordered the body to do so. *Center for Biological Diversity v. Brennan*, 2007 WL 2408901 (N.D. Cal. Aug. 21, 2007).

35 California v. General Motors Corp., 2007 U.S. Dist. LEXIS 68547 (N.D. Ca. Sept. 17, 2007).

36 15 U.S.C. §§ 2901.

37 369 U.S. 186, 217 (1962).

38 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007), at *18.

39 406 F. Supp 2d 265 (S.D.N.Y. 2005).

40 Citing *AEP,* 406 F. Supp. 2d at 272.

41 406 F Supp. 2d 265 (S.D.N.Y. 2005).

42 05-CV-00436-LG-HW (S.D. Miss.).

Point-Counterpoint: House Representation for the District of Columbia

A Capital Offense Against the Constitution

*By Matthew J. Franck**

The U.S. House of Representatives has grown in membership in its more than two centuries of history, from the sixty-five seats allocated in the original Constitution (Art. I, sec. 2, cl. 3) to a more than fivefold increase (356 seats) a century later, following the 1890 census, to its present size of 435 seats—unchanged since the forty-seventh and forty-eighth states were admitted in 1912. In all its history, there have been only two mechanisms by which the membership of the House has been augmented: by the admission of new states, whose people thereby take on the character of a political unit amenable to representation in the House; or by the addition of new seats to be distributed proportionally among the existing states of the Union to reflect population growth. Both of these steps are of course accomplished by act of Congress.

For apparently the first time in history, Congress has recently considered expanding the membership of the House by neither of these methods. Instead it has contemplated legislation by which "the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives," in the language of both H.R. 1905 (passed on April 19, 2007) and S. 1257 (which failed on a cloture vote on September 18, 2007). Each of these bills would expand the House by two seats, with one going to the District of Columbia and the other to the state next in line for a newly reallocated one under the last census enumeration—presumptively Utah.

It is hard to think of a more obviously unconstitutional legislative proposal in recent years. Neither bill would admit D.C. to statehood, and neither would grant it representation in the Senate. Each would simply "consider[]" D.C. a "Congressional district" and grant it a seat in the House. But the Constitution says nothing about the existence of congressional districts, which were not mandated by federal law under the "Times, Places, and Manner" clause concerning House elections (Art. I, sec. 4, cl. 1) until 1842. That old law could be repealed at any time, of course—underscoring the point that under the Constitution, members of the House do not represent "districts" but states.

But there is far more obvious evidence for this on the face of the Constitution. We may begin with Article I, sec. 2, cl. 1:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Not only are the "People" in each state the choosers of representatives, but their right of suffrage is defined here in such a way as to key it to choices locally made in each state, in respect of its legislature. The District of Columbia, not being a state, not only cannot have a "People" of a state to do the choosing of its representative, it also does not have a "State Legislature" with "Electors" among those people who can qualify to be the voters in a congressional election. A state legislature is the creature of a state constitution, and the qualifications of the voters in state legislative elections are set by that constitution and/or by the laws made by that legislature. D.C. has neither a constitution nor a legislature, properly speaking—and if it were to obtain either one without admission to statehood, it would be (as we will see below) by virtue of an act of Congress that could be repealed at any time.

The case for a D.C. seat in the House gets no better if we read on in the Constitution. Its next clause requires that a House member be "an Inhabitant of that State" he has been elected to represent. But no D.C. resident is an inhabitant of a state; could D.C.'s House member come from anywhere? Article I, sec. 4, cl. 1, already referenced above, places the regulation of congressional elections "in each State" in the hands of "the Legislature thereof," subject to Congress's own power to "make or alter such Regulations" itself. But Congress, in the proposed legislation for granting a House seat to a political unit that lacks a state legislature, would assume to itself the plenary power (perhaps delegated to local D.C. authorities, which makes no difference as to the question of power) to determine and administer the conduct of elections, and to fix the eligibility of candidates and voters—and ultimately the power to say whether the seat would continue to exist, since it would be created by legislative fiat, not as a consequence of a constitutional relationship between the Congress and the political community being represented.

Whence would come this unprecedentedly complete power of the Congress itself over one of its own member's seats? From the clause of the Constitution cited as the legislation's authority by its advocates: Article, sec. 8, cl. 17:

> [The Congress shall have Power] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States...

Much stress is laid by the bill's proponents on the language "exclusive Legislation in all Cases whatsoever," the argument being that the plenary power here is compendious enough to do anything to or for the District of Columbia—including treating it like a state for some purposes, but not others. And a landmark ruling of the Supreme Court is cited to sustain this proposition: *National Mutual Insurance Co.* v. *Tidewater Transfer Co.* (1949), in which the Court upheld by a 5-4 vote the extension of the Article III courts' diversity jurisdiction to cases in which one party was a D.C. resident.

First let us consider the "seat of government" clause itself.

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The reason such a complete power "in all Cases whatsoever" was given to the Congress over the district chosen for the capital's location was that once the handover of power over the district was complete, the district and its residents would be "stateless." No state government would have any jurisdiction there any longer, and Congress—ordinarily possessed only of the limited powers delegated elsewhere by the Constitution—would need the undifferentiated mass of powers (later to become known as the "police power") of a state legislature in order to govern the district fully.

And why was it regarded as imperative for the nation's capital to be located outside the boundaries of any particular state? Because the framers desired that the national government's institutions be completely shielded from any potential interference by state authorities. A corollary to this principle of the national government's control over its own affairs is that no state should benefit from the location of the capital within its borders, or be able to leverage something out of that "ownership" in the Congress. But the states are all represented in Congress. If these principles are to be preserved, it is therefore essential that the nation's capital go unrepresented there. It may seem to do little damage to this arrangement to permit D.C. to have congressional representation without statehood. But the proposed legislation represents the worst of all possible worlds—a political unit represented in the Congress at the sufferance of the Congress, and wholly under the legislative authority of the Congress. No other political unit represented in Congress would be so completely Congress's own creature. In that respect, the idea is an offense against the federalism of the Constitution.

But what of the "voting rights" of the District's residents—so prominently noticed in the official captions of the proposed bills? The fact is that there really are no such things in America as federal voting rights, titles on statutes like "Voting Rights Act" to the contrary notwithstanding. All voting rights in the United States—all those recognized by the Constitution for the filling of its great public offices—are accorded and defined by states. The Constitution speaks of political units—states—being represented in the Congress and in the electoral college, and leaves in the primary care of those states the representation of persons. Federal law, both constitutional and statutory, is confined to forbidding certain denials or restrictions of those state-level voting rights. In House, Senate, and presidential elections, with one exception, one's right to vote is entirely a function of state laws. That exception is the suffrage of D.C. residents in presidential elections—notably accomplished, as it only could be, by constitutional amendment (the Twenty-third) and the federal legislation pursuant thereto.

Now is not the *Tidewater Transfer* ruling support for the Congress's treating D.C. as though it were a state, although it is not one? This is a pretty thin reed to lean on, as was argued a year ago by Kenneth R. Thomas of the Congressional Research Service. *Tidewater Transfer* was very much a divided ruling—I would say a wrong one, but it is unlikely to be reversed—in which three different positions were staked out by the Justices: that D.C. residents could be admitted to the federal courts' diversity jurisdiction owing to the plenary power of Congress over D.C. in Art. I, § 8, cl. 17 (the view of Jackson, Black, and Burton); that such an extension of jurisdiction could go forward on a latitudinarian reading of the word "State" as having different meanings in different contexts in the Constitution (Rutledge and Murphy); and that the jurisdiction was forbidden by the unitary meaning of "State" and could not be expanded via the "seat of government" clause (Vinson, Douglas, Frankfurter, and Reed). As CRS's Mr. Thomas points out, only the first faction in *Tidewater Transfer* could even arguably—and somewhat doubtfully—be read as employing reasoning that would endorse the creation of a full-fledged House seat for D.C.

Even Justice Jackson, author of the controlling opinion, qualified Congress's power over the District in the following way: "We could not of course countenance any exercise of this plenary power... if it were such as to draw into congressional control subjects over which there has been no delegation of power to the Federal Government." Certainly there has been no delegation of power to Congress to alter the constitutive basis of its own power by expanding its membership beyond the states of the Union. The effort to sustain an anything-goes reading of the "seat of government" clause, even on the basis of *Tidewater Transfer*, collapses under its own weight.

This conclusion is strengthened by the 1923 ruling in *Keller* v. *Potomac Electric Power Co.*, in which a unanimous Supreme Court held that while Congress could, as akin to a state legislature for D.C. pursuant to the "seat of government" clause, authorize a local court to undertake essentially legislative duties sitting in review of the decisions of the District's public utilities commission, it was unconstitutional to permit appeal of such proceedings to the constitutional courts of the Union, which can only hear the genuine "cases" and "controversies" fit for judicial decision as marked out by Article III. *Keller* was undisturbed by *Tidewater Transfer*, and stands for the proposition that Congress's power to legislate for the capital or its residents cannot extend to matters that interfere with the constitutional basis of the national government's essential institutions. This is just what the so-called "District of Columbia House Voting Rights Act" would do.

A last-ditch argument employed by advocates of the bill is that it only restores what Congress took away in 1801—the argument being that when Maryland (and originally Virginia) ceded land for the capital's creation in 1789, and Congress "accepted" the cession of lands in 1790, District residents continued to vote in congressional elections until Congress took away their suffrage in 1801. This is a rewriting of history. For the duration of the 1790s, what had been identified as the District of Columbia *was not* the "Seat of the Government," and Congress did not fully employ its power to govern the District until the congressional session that began there in December 1800, at which point it *was* the capital. In legislation passed in February 1801 (the same law that famously made William Marbury a justice of the peace), Congress assumed full control of local government in the District. Only then did D.C. residents lose their status as congressional electors—but not owing to any language in the statute, which was completely silent on the subject. They lost that status because now, and only now, was their transition complete, from being state residents to no longer being so. This was a consequence not of the statute as such, but of a constitutional principle on which the statute

was predicated, and which it in turn served to activate. This is the constitutional principle that some in Congress today wish to turn on its head. Neither was the loss of congressional voting rights for the capital's residents a fluke or an oversight on the framers' part. It was clearly anticipated in *Federalist* No. 43, and was understood in 1801 to be the natural *and permanent* consequence of the Congress's assumption of its full power under the "seat of government" clause.

I have said nothing so far on the subject of any alleged unfairness or injustice to D.C. residents in their present lack of full representation in Congress. Here I have space only to aver that whatever merit there is in the case for "fairness" to D.C. residents, the remedy lies in a constitutional amendment, for the Constitution "as is" does not guarantee, or even permit, all good things. The only other possibility is a retrocession of the District's residential neighborhoods back to Maryland (as Virginia's original portion was retroceded in 1846), in keeping with the as-yet unaltered principle that only the residents of states may vote for members of Congress.

No Taxation Without Representation

*By Richard P. Bress**

In April 2007, the House of Representatives passed a bill that would give the District's residents a voting member in that body. The DC House Voting Rights Act of 2007 ("DC VRA") would create one House seat for the District of Columbia and one new seat for the state presently next in line to receive an additional representative (Utah). Although the House bill (H.R. 1905) garnered considerable bipartisan support—it was co-sponsored by Representative Tom Davis (R-VA) and Delegate Eleanor Holmes Norton (D-DC)—and easily passed in the House by a vote of 241 to 177, its counterpart in the Senate (S. 1257) stalled in September when a minority filibustered the bill.

The United States is the only democratic nation that deprives its capital city residents voting representation in the national legislature. Citizens in the District of Columbia are represented in Congress only by a non-voting delegate to the House of Representatives. These Americans pay federal income taxes, are subject to military draft, and are required to obey Congress's laws, but have no say in their enactment. Moreover, because Congress has authority over local District legislation, District residents have no voting representation in the body that controls the local budget to which they must adhere, and the local laws which they are required to obey. District residents thus lack what has been recognized by the Supreme Court as perhaps the single most important constitutional right.

Opponents of the DC VRA cite constitutional concerns and fears that the bill portends a slippery slope toward all manner of expansions in House and Senate membership. To be sure, the proposed legislation raises a legitimate constitutional question. But, in my view, Congress has the authority to pass the DC VRA; and there is no reason it should not get a final vote on the Senate floor.

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The Constitutional Question

Those who argue that Congress lacks the power to enact the proposed legislation (and must therefore proceed via retrocession or constitutional amendment) rely principally on the Constitution's express provision of voting representation to citizens of "States." That is not, however, the end of the constitutional inquiry. Another provision of the Constitution, the District Clause, gives Congress plenary power to "exercise exclusive Legislation in all Cases, whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[1] Congress and the federal courts have on a number of occasions applied to the District constitutional provisions that speak only of "States." Seen in light of these cases and the relevant history, the Framers' express guarantee of voting representation to citizens of the states should not be read as an implied prohibition against representation for citizens of the District.

The District Clause grants Congress broad authority to create and legislate for the protection and administration of a distinctly federal district. Congressional power is at its zenith when it legislates for the District, surpassing both the authority a state legislature has over state affairs and Congress's authority to enact legislation affecting the fifty states.[2] Although no case specifically addresses Congress's authority to provide the District voting representation in the House, Supreme Court precedent confirms the plenary nature of Congress's power to enact laws for the welfare of the District and its residents, absent express prohibition elsewhere in the Constitution. One Supreme Court case, *National Mutual Insurance Company v. Tidewater Transfer Company*, merits considerable attention, owing to its in-depth discussion of this issue.[3]

In order to appreciate fully the import of *Tidewater*, one must begin with an earlier case, *Hepburn v. Ellzey*.[4] In that case, the Court held that Article III, Section 2 of the U.S. Constitution—providing for diversity jurisdiction "between citizens of different *States*"—did not extend to suits between state residents and residents of the District of Columbia. The Court found it "extraordinary," however, that residents of the District should be denied access to federal courts that were open to aliens and residents in other states, and invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."

Nearly 145 years later, Congress accepted the *Hepburn* Court's invitation, enacting legislation that explicitly granted District residents access to federal courts on diversity grounds. That legislation was upheld by the Court in *Tidewater*. A plurality concluded that, although the District is not a "state" for purposes of Article III, Congress could nonetheless provide the same diversity jurisdiction to District residents under the District Clause. Because Congress unquestionably had the greater power to provide District residents diversity jurisdiction in new Article I courts, the *Tidewater* plurality explained, it

surely could accomplish the more limited result of granting District citizens diversity-based access to existing Article III courts.

Similarly, Congress's authority to grant the District full rights of statehood (or grant its residents voting rights through retrocession) by simple legislation suggests that it may by legislation take the more modest step of providing citizens of the District with a voice in the House of Representatives. Indeed, Congress has *already* granted voting representation to citizens not actually living in a state. Through the Overseas Voting Act, Congress ensured that Americans living abroad would retain the right to vote in federal elections, even though they no longer reside in a "state."[5] There is no reason to suppose that Congress lacks the authority to give the same right to the citizens of the nation's capital, as members of the House represent the people—not the states qua states.

Concurring in *Tidewater*'s result, two justices argued that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III. Of course we cannot know for certain, but it seems likely that these justices would also have concluded that the District is a "state" for purposes of voting representation. Observing that the Constitution had failed explicitly to accord District residents access to federal courts through diversity jurisdiction, Justice Rutledge remarked, "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."[6] Having concluded that the Framers did not intend to deprive District residents of access to the federal courts, Justice Rutledge reasoned that the term "state" should include the District of Columbia where it is used with regard to "the civil rights of citizens." Access to the federal courts via diversity jurisdiction, he concluded, fell within that category of usage. The same is, of course, true with respect to the right conferred by the D.C. Voting Rights bill, as the right to vote is among the most fundamental of civil rights; in the context of congressional elections, it is a right not of the states, but of the people "in their individual capacities." Based on Justice Rutledge's reasoning, the concurring justices in *Tidewater* would likely have upheld Congress's determination to redress the denial of voting representation to District residents.[7]

Admittedly fractured, the *Tidewater* decision does not stand alone. The Supreme Court and the D.C. Circuit have upheld at least three other federal statutes that treat the District as a "state" for constitutional purposes. In *Loughborough v. Blake*, a unanimous Supreme Court held that Congress had the authority, under the District Clause, to lay and collect taxes from District residents, notwithstanding Article I, Section 2's direction that "representatives and direct taxes shall be apportioned among the several *States* which may be included within this union."[8] In *Mills v. Duryee*, the Court upheld a federal statute that treated the District as a "state" for purposes of the "full faith and credit" clause.[9] Like Article I, Section 2, the Full Faith and Credit Clause speaks only of the *states*: "Full faith and credit shall be given *in each State* to the public acts, records, and judicial proceedings *of every other State*." And in *Kronheim & Co. Inc. v. District of Columbia*, the D.C. Circuit upheld Congress's authority under the District Clause to treat the District as a state for purposes of the 21st Amendment.[10]

Opponents of this bill read Article I, Section 2 of the Constitution—which requires that the House of Representative be chosen by the "people of the several States"—as an implied prohibition against extending District residents the right to vote. That is one plausible reading of the text. But, as *Tidewater*, *Loughborough*, *Mills*, and *Kronheim* demonstrate, that is not the only permissible inference to draw from the Framers' enumeration of "States" in a particular constitutional provision. And, reading the text of Article I, Section 2 in context, as we must, it is doubtful that the Framers intended to bar the door to district representation.

Indeed, there is simply no evidence that the Framers ever adverted to the rights of the District's residents when crafting the language of Article I, Section 2. Rather, the Framers' word choice reflects two compromises. First, they were divided over whether the House should be elected by the "people" or by state legislatures. They decided that members of the House should be elected by *the people*, not the states. Second, there was debate over whether voting qualifications should be set at the federal or state level—a debate that was resolved by letting states decide who would vote. At no point during either debate did anyone suggest that all residents of the new Federal "District" would lack this fundamental, individual right.

Nor do the debates leading to the creation of the District support the opponents' view. The Framers' insistence on a separate and insulated federal district arose from an incident that took place in 1783, while the Continental Congress was in session in Philadelphia. When a crowd of Revolutionary War soldiers who had not been paid gathered outside the building in protest, Congress requested protection from the Pennsylvania militia. Pennsylvania refused, and Congress was forced to adjourn and reconvene in New Jersey. The episode convinced the Framers that the seat of the national government should be under exclusive federal control, for its own protection and the integrity of the capital.[11] As James Madison remarked in *Federalist No. 43*, without a federal district, "the public authority might be insulted and its proceedings interrupted with impunity;" "the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence."[12]

The need for a federal district was fairly uncontroversial, and elicited relatively little debate. Moreover, nowhere in the historical record is there any evidence that the participants in the constitutional convention affirmatively intended to deprive the residents of the new district of their voting representation or other civil liberties by virtue of their residence in the new federal enclave. To the extent the problem of District representation was considered at all, debates at the state ratifying conventions suggest that it was assumed that the states from which the District was carved would take care of the residents of the ceded lands.[13] Indeed, delegates at the Virginia and North Carolina ratifying conventions repeatedly observed that the states donating the land for the District could be expected to protect their residents' liberties as a condition of the cession. James Madison, for example, dismissed as unwarranted the

Anti-Federalists' fear that Congress would exercise its power to strip the District's residents of basic liberties, because nothing could be done without the consent of the states.

In retrospect, it not surprising that the Framers failed specifically to address the voting rights of District residents. When the District Clause was drafted, the eligible citizens of every state possessed the same voting rights. The problem of ensuring the continuation of these voting rights for citizens in the lands that would be ceded to create the federal district received little attention until after the Constitution was ratified and the District had been established—unremarkable, given the purpose of the District and the fact that, at the time, it was merely a contemplated entity.[14]

It is understandable that, even once the District was situated and operating in its present location, few were concerned about the issue. Its 10,000 residents were too few to merit a separate representative, and the humble ten-square-mile home to the fledgling federal government was hardly the vibrant demographic and political entity it is today.

What is crystal clear from the historical records is that the Framers viewed the right to vote as the single most important of the inalienable rights that would be guaranteed to the citizens of their Nation. It seems quite implausible that they would have purposefully deprived those residents in areas that would later be ceded to form the national capital of their voting rights—much less that they intended to prohibit Congress from taking steps to ensure that those living in the capital would retain their right to vote.

The history of and policies behind the Framers' creation of the District, the purpose of the Framers' enumeration of "States" in the Constitution's provisions for congressional representation, and the fundamental importance of the franchise support the view that those who drafted the Constitution did not, by guaranteeing the vote to state residents, intend to withhold the vote from District residents. Since there is no prohibition to be found elsewhere in the Constitution, Congress may establish a voting representative for the District pursuant to the District Clause.

A Slippery Slope?

Some who oppose the enactment of the DC VRA have expressed concern that passage of the DC VRA might strengthen the federal territories' case for congressional representation. That argument is unpersuasive. As a matter of policy and politics, District and territorial residents are situated very differently. Unlike territorial residents, but like the residents of the several states, District residents bear the full burden of federal taxation and military conscription. Granting the District a House Representative readily flows from these obligations; it is both incongruous and constitutionally significant that District residents lack an equal voice in the legislative body that can spend their tax dollars and send them off to war. And unlike the territories, the District was part of the original thirteen states; until the Capital was established in 1801, residents of what is now the District enjoyed full voting representation in the Congress.

Even putting those practical considerations aside, as a constitutional and historical matter territories occupy a position fundamentally different from the District in the overall schema of American federalism and have long enjoyed disparate rights and privileges. Congress's authority over the territories stems from an entirely different constitutional provision, which empowers Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[15] Although this provision unquestionably grants Congress broad authority to manage and legislate over federal lands, the Framers' use of two different clauses suggests that they intended the District and the various territories to be constitutionally distinct.[16] The Supreme Court has recognized as much, specifically noting that, "[u]nlike either the States or Territories, the District is truly sui generis in our governmental structure."[17] Accordingly, the case law that supports Congress's power to provide District residents congressional voting representation cannot be applied uncritically to support the same argument for the territories.

Taken together, these differences between the territories and the District render unlikely the suggestion that granting voting rights to District residents would lead, as a legal or policy matter, to granting similar privileges to residents of the U.S. territories.

Finally, it bears noting that the "constitutional question" presented by the DC VRA should not further delay an up-or-down vote on the Senate floor. To be sure, the Congress is charged with supporting and defending the Constitution, and it should not legislate without regard to its limits. But the DC VRA and its predecessor bills have been the subject of lively academic and political debate for years; there can be no serious argument that the Congress would benefit from further debate on its constitutionality. The District now has a population of nearly 600,000 people—greater than the population of all of the thirteen original states. Congress may and should act to ensure those residents the same substantive representation that the Framers assured their fellow citizens.

Endnotes

1 U.S. Const. art. I, § 8, cl. 17.

2 *See* Palmore v. United States, 411 U.S. 389, 397-98 (1973); Nat'l Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 592 (1949) (District Clause grants Congress power over the District that is "plenary in every respect"); Gibbons v. District of Columbia, 116 U.S. 404, 408 (1886); *see also* Testimony of Hon. Kenneth W. Starr, House Government Reform Committee (Jun. 23, 2004); Viet Dinh & Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives (2004), *available at* http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf.

3 337 U.S. 582 (1949).

4 6 U.S. 445 (1805).

5 *See* 42 U.S.C. § 1973ff-1.

6 337 U.S. at 625.

7 Because interpreting the term "state" to include the District for purposes of voting representation would not have required overruling *Hepburn*, Justice Rutledge's opinion might have garnered additional votes if that issue had been presented to the *Tidewater* Court.

8 5 *Wheat*. 317 (1820).

9 7 *Cranch* 481 (1813).

10 91 F.3d 193, 201 (D.C. Cir 1996) ("[W]e will treat the District of Columbia as a state for purposes of Twenty-first Amendment analysis. As noted above, Congress determined at the time of the passage of the ABC Act in response to the repeal of Prohibition in the Twenty-first Amendment that the District would function in a state-like manner for alcohol regulation purposes. We have no warrant to interfere with Congress's plenary power under Art. I, sec. 8, cl. 17 [the District Clause] '[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District.'").

11 *See* Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of the American Capital, 30-34 (1991); *see also* The Federalist No. 43 (James Madison).

12 The Federalist No. 43, *supra*, at 279-80.

13 Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis,* 12 Harv. J. on Legis. 167, 172 (1975).

14 *See Tidewater, supra*, at 587 ("There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia…. This is not strange, for the District was then only a contemplated entity.").

15 U.S. Const. art. IV, § 3, cl. 2.

16 *See* Samuel B. Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 How. L.J. 333, 349-50 (1994) ("The Territories Clause is minimally relevant to the District. The existence of a separate District Clause strongly suggests that the District is not among the territories covered by the Territories Clause. Moreover, courts generally have agreed that the Territories Clause does not apply to the District.") (citing O'Donoghue v. United States, 289 U.S. 516, 543 -51 (1939) and Dist. of Columbia v. Murphy, 314 U.S. 441, 452 (1941)). *Cf.* Dist. of Columbia v. Carter, 409 U.S. 418, 430-31 (1973) (comparing Congress's exercise of power over the District and territories, noting federal control of territories was "virtually impossible" and had little practical effect.).

17 *Carter*, 409 U.S. at 432.

Civil Rights

A Round in the Chamber: *District of Columbia v. Heller* and the Future of the Second Amendment

*By Sandra S. Froman & Kenneth A. Klukowski**

A new shot will be fired in the development of constitutional law this term when the U.S. Supreme Court decides the meaning of the Second Amendment in *District of Columbia v. Heller*.[1] Although the Court has only touched upon the Second Amendment in a few dozen cases, only once has the Court even begun to address its meaning.[2] But the question presented in *Heller* requires a clear statement about its meaning.[3] The Court will have to choose between three competing interpretations of the Second Amendment,[4] a task made more difficult by a profoundly disappointing brief filed by the Justice Department in the case.[5] What it does, and does not, decide will likely forever shape the future of Second Amendment jurisprudence and gun rights in America.

I. The Underdeveloped State of Second Amendment Jurisprudence

Not only has the Court hardly given the Second Amendment any attention, only three federal appellate court decisions have exposited significantly on it,[6] all of them in the past decade. Though it has been part of the Constitution since it was ratified in 1791, there is no clear rule of law on the Second Amendment in the law books today, whether in the *U.S. Reports* or "Con Law" casebooks.

But this should not be surprising. The Free Speech Clause was largely a blank slate a hundred years ago; the First Amendment largely undeveloped before 1904.[7] But then, a number of watershed cases were decided on free speech,[8] the Establishment Clause,[9] and the Free Exercise Clause.[10] The progeny of those cases have given us so much case law that now entire textbooks and law school classes are taught on the First Amendment, even just a single clause of it.

If you think back to law school, you will recall from Criminal Procedure that the same holds true of much of the Bill of Rights. Many of the seminal "Crim Pro" cases we cite in criminal case briefs are Warren Court decisions.[11] And those provisions were incorporated against the states during that same era.[12] A broad jurisprudence of the Bill of Rights is largely a legacy of the past six decades or so; the Second Amendment just so happens to have been left out of this recent trend.

The reasons for this dearth are easy to understand. There was little in the way of federal gun controls before the National Firearms Act of 1934,[13] which imposed a tax and registration requirement on machine guns, short shotguns, and short rifles.[14] Then came the Federal Firearms Act of 1938, creating a licensing system for gun dealers.[15] Gun control began in earnest with the Gun Control Act of 1968.[16] It was a perfect example of LBJ-style government expansion, typical of that era's politics.[17] And it was during that period of urban riots, sharply rising violent crime rates, and political assassinations that the idea of the Second Amendment not applying to individuals firmly took hold in much of the legal professoriate. There was not much law review literature on the subject then, no major cases to spur research on both sides through lawyers committed to zealous representation in the adversarial system. And the National Rifle Association did not create its political/lobbying arm (called the Institute for Legislative Action) until 1975.[18] At that time, the gun rights community relied on the books and law reviews of a handful of talented scholars and lawyers to lay the academic predicate for the private right to keep and bear firearms. Lawyers and scholars such as David Caplan began exploring the legal history of the Second Amendment's origins.[19] Then a series of works by others, including Don Kates,[20] Stephen Halbrook,[21] David Hardy,[22] and Nelson Lund,[23] started the scholarly defense of the Second Amendment in earnest.

But none of that was present until the 1970s. So the big government view of the Second Amendment went entirely unopposed, and law on the Amendment remained undeveloped. There were various reasons why a case requiring exposition of the Second Amendment never made it to the Court.[24] And with no major cases to force the issue, the Supreme Court did not need to act. Scholarly attention to the Second Amendment grew exponentially only after the 1989 publication of Sanford Levinson's "The Embarrassing Second Amendment" in the *Yale Law Journal*.[25] Levinson, a prominent constitutional law scholar, wrote that law professors had been ignoring the Second Amendment because of fear that the arguments raised by lawyers such as Kates, Halbrook, and Lund might indeed be correct.[26] Of course, there is no rule that the Supreme Court can only grant certiorari on subjects about which law professors have been writing frequently. Beginning in the 1960s, as gun control laws grew more pervasive, there were many challenges to state or federal gun laws which raised Second Amendment arguments, but the Court never took them.

II. The Cipher of *United States v. Miller*

The only precedent dealing with the meaning of the Second Amendment in depth is *United States v. Miller*.[27] Although a couple of previous cases dealt in some way with the Second Amendment, they spoke to what the Second Amendment does not mean, rather than what it does.[28] (In both cases, the Court simply stated that the Second Amendment did not control because it only applied to federal action.)[29] *Miller* was the first—and, as of today, the only—case that actually expounded on the Amendment's meaning.

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That opinion is brief.[30] Two defendants were indicted for transporting unregistered short-barreled ("sawed-off") shotguns across state lines in violation of the National Firearms Act,[31] and challenged the law on Second Amendment grounds.[32] The Court made several observations regarding gun rights, noted that the record before the Court was insufficient to determine whether the sawed-off shotguns have "a reasonable relationship to the preservation or efficiency of a well regulated militia,"[33] and remanded the case.[34]

While gun-control advocates say that this implicitly rejects the idea that the Amendment secures a private right to bear arms, that notion is incorrect. The primary anti-gun argument presented by the government in *Miller* was that the Second Amendment does not apply to individuals.[35] The Court did not accept that argument, and instead chose to explore the secondary argument of what relationship a sawed-off shotgun might have to militia activities.[36] The brief opinion simply found that the record was too spotty to test possible theories that could govern this case, and remanded for an evidentiary hearing to develop that record.[37] But, criminals being what they are, Mr. Miller managed to get himself killed, thus preventing the case from returning to the Court.[38]

Consequently, to label *Miller* "unenlightening" is something of an understatement. Courts have consistently described it with words like "cryptic," leaving scholars to try to salvage something definitive from it—without success.[39]

Miller is so unhelpful, in fact, that all of the competing interpretations of the Second Amendment cite *Miller* as their authoritative basis.[40] Regardless of how *Heller* is resolved, at least one blessing sure to come from it is the liberation of legal scholars having to sift through the tea leaves of *Miller* by giving us another case over which to argue. The *Miller* cipher may be about to exit the stage of legal debate altogether.

III. Competing Views of the Second Amendment and the Current Circuit Split

The paucity of case law and cryptic nature of *Miller* have led to three competing interpretations of the Second Amendment, each of which has supporters in the academy and on the bench.

The 'individual right' model of the Second Amendment is the view embraced by conservative legal minds. It asserts that the Second Amendment guarantees an individual right to law abiding and peaceable adult citizens to have firearms for any lawful purpose.[41] Such advocates believe that the Second Amendment exists to secure a fundamental right to personal protection,[42] derived from both natural law and English common law.[43] In addition to ordinary purposes (such as self-defense, target shooting, hunting, or collecting), the Second Amendment is also seen as providing a last resort against tyranny. It is also what Chief Judge Alex Kozinski calls a "doomsday provision,"[44] designed as a last resort to protect freedom against a government that would cast off the Constitution and declare itself a law unto itself.[45] As Chief Judge Kozinski writes, "[h]owever improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once."[46]

The 'collective right' model is the interpretation historically favored by the political left. It argues that the purpose of the Second Amendment was to provide for an armed military force, while still addressing the Framers' apprehension of standing armies.[47] This theory says that the Second Amendment conveys no individual right whatsoever; it is intended to prevent federal interference with state militias.[48]

As the scholarly analysis of the Second Amendment grew over the 1990s, however, the collective right model became increasingly untenable. Gun prohibition advocates, including those in the academy, began announcing that they too agreed that the Second Amendment is an individual right. They described their theory as a "narrow individual right."[49]

This "narrow individual right" applies only to a person who is actually serving in a state militia (by which the "narrow individual right" means a person in the National Guard)—thus, so narrow that it nearly vanishes, individual right advocates retort. The sophisticated collective right model is then, critics say, a nuanced version of the second model, as its name suggests.[50] It attempts to split the baby by saying that the Second Amendment does have an element of individual right, but only insofar as such possession is related to keeping the citizen equipped to render state militia service if the government so requires.[51] The right does not inhere to the citizen in a private capacity.

The existence of the sophisticated collective right model is a tribute to the success of sound scholarship over the past quarter century. Former Chief Justice Warren Burger expressed the view that had been unchallenged for a quarter-century when he said that the individual right interpretation is "one of the greatest pieces of fraud … on the American public … ever seen."[52] The growing individual right scholarship mentioned above evinces the opposite, however—leading to one current justice on the Court to reference the "growing body" of literature in contention with Justice Burger's view,[53] a thought echoed by other judges as well.[54]

The controversy here revolves around the first phrase of the Amendment, which reads: "A well regulated militia, being necessary to the security of a free state."[55] Both collective theories assert that the militia refers to military units such as the National Guard, that "well regulated" means government-controlled,[56] and that the remainder of the Second Amendment should only be a "right" insofar as it provides for these instrumentalities for the projection of state force.

The individual right model has two alternative arguments which interpret the Second Amendment differently. One approach notes that, in the early Republic, the militia was composed of virtually every able-bodied young adult male, and that modern federal law uses the same definition for "militia." A form of this argument was used by the D.C. Circuit in *Parker* to rule that categorical bans of firearms satisfying *Miller*'s criteria for militia "arms" are unconstitutional.[57] There are significant problems with this position.[58]

The other approach posits that the first clause is a prefatory clause and the second clause is an operative clause. The first clause announces one non-exclusive civic purpose for the right, but does not in any way constrain the effectual nature of the operative clause. The Amendment's drafting history supports this view.[59] This is the case with the Patent and Copyright

Clause, where it announces that its purpose is to "promote the progress of science and useful arts."[60] Yet no book has been denied copyright protection because it was poorly written. The public good preamble does not confine the right.[61] The challenge with this second position is it requires not giving legal effect to a constitutional clause.

These theories have come into play in three fairly recent appellate decisions. First in the Fifth Circuit decision handed down in 2001, *United States v. Emerson*,[62] where Charles Cooper (former head of DOJ's Office of Legal Counsel) and Nelson Lund (who served under Cooper) submitted a thorough analysis of the Second Amendment, resulting in a long, scholarly opinion by Judge Garwood embracing the individual right view. Then, largely as a rebuttal to *Emerson*, in *Silveira v. Lockyer*,[63] the Ninth Circuit embraced the collective right view. Now, in *Parker v. District of Columbia,* the D.C. Circuit has adopted the individual right view in a well-written opinion by Judge Silberman.[64] Now, the Justices of the Court will resolve the circuit split.

IV. *District of Columbia v. Heller* is an Ideal Test Case

This case could very well result in a clear ruling on the nature and meaning of the Second Amendment. Although the fact pattern of the case is conducive to a relatively narrow holding, the inescapable question of constitutional meaning in *Heller* will likely make it a landmark decision. Arguments will be heard March 18, 2008.

The facts of *District of Columbia v. Heller* make it a perfect test case. Indeed, *Heller* was carefully constructed as a test case. In the District of Columbia, it is a crime to have any sort of usable firearm.[65] Regarding handguns, it is illegal to have any sort of handgun in your home, even if that handgun is non-functional.[66] Long guns (rifles and shotguns) in the home are also illegal, unless the gun is unloaded and either disassembled or disabled by a trigger lock[67] ammunition required to be stored in a separate container. Such firearms are of course impractical for emergencies which call for them, such as defending against a home invasion. The D.C. law forbids making the gun functional under any circumstances, except for use at a licensed target range. (There are none in D.C.) The thirty-two-year-old ban is the most severe firearm regulation in America.

Several lawyers decided to challenge the law in court, finding six D.C. residents who wanted to own and possess firearms within the city. The lawsuit, originally named *Parker v. District of Columbia*, was filed in U.S. District Court for the District of Columbia.[68] Each plaintiff had different life circumstances and reasons for wanting to own a gun,[69] but were carefully chosen to obviate all other legal issues. Even the question of whether any Second Amendment right is incorporated via the Fourteenth Amendment is not at issue, because D.C. is exclusively under direct federal control, and so the Bill of Rights applies directly.[70] With these obstacles to adjudication on the merits overcome, a proper test case was born.

The trial court dismissed the case, stating that there is no right to own a gun.[71] The U.S. Court of Appeals for the D.C. Circuit reversed,[72] holding that the Second Amendment guarantees an individual right to keep and bear arms,[73] and therefore that the D.C. ban was unconstitutional.[74] The District petitioned for Supreme Court review, and the Court granted certiorari to hear the case under the name *District of Columbia v. Heller*.[75] (The suit was renamed *District of Columbia v. Heller* because Dick Heller was the only plaintiff that the D.C. Circuit found to have standing.[76] A cross-petition was filed by the *Parker*/*Heller* team, seeking review of the D.C. Circuit's decision that the other plaintiffs lacked standing.[77] The Court has not acted on the cross-petition.)

V. Issues in *Heller*

The question presented in *Heller*, as framed by the Justices themselves, is whether the D.C. Code provisions which prohibit having a handgun or functional firearm in the home violate a right to keep and bear arms apart from any militia service.[78] The reference to militia service is significant. This framing effectively conjoins the collective right and sophisticated collective right models into one option, suggesting that the Justices expect to either adopt or reject the individual right view.

The narrowness of the question deserves discussion. The firearms in question are ordinary rifles, shotguns, and handguns. The setting is the home, not on the street, in a car or in public places. There are no challenges to licensing, waiting periods or registration requirements. The plaintiffs are mentally sound, productive, law-abiding citizens, seeking a declaratory judgment, rather than having broken the law in defiance.

This also makes *Heller* a good "starter" case for Second Amendment jurisprudence. It does not explore the boundaries of the Amendment. It even takes place in the District of Columbia, which avoids the incorporation question. This case simply explores whether there is any actionable right in the Second Amendment.

VI. The Dangers of the Justice Department's Position

The foregoing discussion of facts and issues in *Heller* make the amicus brief filed for the United States both disturbing and harmful. The Justice Department took a position in this case that has shocked many in the legal community, and left everyone scrambling for a response.

The Office of the Solicitor General (OSG), which represents the United States in the Supreme Court, is an extremely influential advocate, even if the United States is not a party to a case. And OSG has filed a brief.[79] It is asking the Supreme Court to deny strict scrutiny or any per se rules to the Second Amendment, and instead to apply intermediate scrutiny.[80] It also asks for the Court, applying this lower level of constitutional protection, to then vacate the D.C. Circuit opinion and remand the case.[81]

Because there are a great many federal gun laws, and the Department of Justice has to defend them all, it is understandable that DOJ would try to urge the Court not to adopt strict scrutiny. Indeed, one would hardly expect the DOJ ever to urge the Court to adopt a test which might put even a single federal statute at serious risk of being declared unconstitutional.

One co-author of this article has published a law review

article taking the position that intermediate scrutiny is a vague standard,[82] that there are relatively few intermediate scrutiny cases, and that intermediate scrutiny under the Free Speech Clause is different than intermediate scrutiny under the Equal Protection Clause.[83] This article further suggests that the current rule for abortion from *Planned Parenthood v. Casey* appears to be some sort of intermediate scrutiny.[84] Hence, requesting intermediate scrutiny may hand the Court an opportunity to open vast, uncharted waters with no idea where it might lead.

There is another possibility that firearm regulations in other contexts could end up subject to something less than intermediate scrutiny.[85] In matters of free speech, some speech is subject to per se rules or strict scrutiny.[86] But content-neutral restrictions on the time, place or manner of speech are subject to a less demanding intermediate scrutiny.[87] Even more restrictions are constitutional in some settings.[88] Here we are dealing with an absolute ban on common handguns in the home. If such an extreme measure is subject to intermediate scrutiny, then could it be possible that less common firearms could be subject to less protection, or that lower scrutiny might be applied to restrictions which are not absolute bans, or restrictions outside the home? If so, then intermediate scrutiny could end up being the ceiling on firearm protections, not the uniform rule.

A third issue implicated by the OSG argument raises questions about the Second Amendment being incorporated against the states.[89] Thus far, the Supreme Court has only incorporated rights that are fundamental in nature.[90] Burdens on fundamental rights are generally subject to strict scrutiny,[91] although that is not always the case. By applying intermediate scrutiny, however, the Court might possibly lay a predicate that would allow gun-control advocates to present a plausible argument that the Court has already deemed Second Amendment rights to not be fundamental, and, therefore, that it cannot be asserted as a right against any state or local gun control law, even a complete ban or door-to-door confiscation.

The DOJ brief thus implicates issues that are not at bar, and fails to confine itself to the narrow and extreme facts in the case. Some might argue that this brief is not very dangerous because we can rely upon the justices to always limit themselves to the narrow facts of the case at bar. But such an assumption is quite a gamble. As the same co-author of this article has recently published, a multi-level system of review, such as that employed in Free Speech Clause jurisprudence, could perhaps more effectively deal with the varying circumstances and specifics of Second Amendment issues than a nebulous and malleable "standard" like intermediate scrutiny.[92] This framework was put together in a patchwork fashion, one case at a time, as new types of speech restrictions were at issue and the Court had to establish the appropriate standard of review for specific types of restrictions. Using First Amendment tools does not necessarily mean that gun controls would be found unconstitutional as often as speech controls are. But it does mean that courts would have doctrinal tools they already know how to use to accomplish those ends, rather than having to invent new tests to give shape to the nebulous "heightened scrutiny" proposed by the OSG.

Generally speaking, strict scrutiny is the appropriate test for burdens on the core exercise of fundamental personal rights explicitly enumerated in the Bill of Rights. There is no real risk that a strict scrutiny standard would lead to the wholesale invalidation of federal gun laws. Strict scrutiny is context-specific, and can account for the government's vital interest in saving lives and preventing crime. Laws banning convicted felons from possessing guns should easily pass strict scrutiny, despite the Solicitor General's stated worries on this point.[93]

Other gun laws, too, would pass strict scrutiny, if they truly are effective at protecting the public and are narrowly tailored so as not to infringe on legitimate firearms use by ordinary people. Moreover, if a particular gun control law burdening the core exercise of a constitutional right cannot meet that two-part test, then having it declared unconstitutional would not be objectionable. But the Court need not establish a uniform rule here; it should confine itself to declaring the rule for an absolute ban of an ordinary firearm in a home context. Such draconian measures should be unconstitutional, just as a ban on attending Baptist churches could not survive an establishment or free exercise challenge on the grounds that it does not ban attending all churches.[94] So long as the homeowner is a law-abiding and mentally-competent adult citizen, an absolute ban on handguns in the home should be invalid. Everything else can wait for another day.

CONCLUSION

If *Heller* holds that the Second Amendment secures an individual right, there will be more federal court cases. Even if the Supreme Court does not grant certiorari on another Second Amendment case anytime soon, we can reasonably expect a whole host of circuit court opinions in the federal system.

The next case the Court may take is whether the Second Amendment is incorporated to the states through the Fourteenth Amendment. The case *NRA v. Nagin*, scheduled for trial early this year, may well present that question in the context of a citywide gun confiscation during an emergency like Hurricane Katrina.[95] But all of that is contingent on the Court finding an individual right in *Heller*. Like the Shot Heard Round the World in 1775, the shot fired in *Heller* may echo for generations to come.

Endnotes

1 Parker v. District of Columbia, 478 F.3d 370, 381 (D.C. Cir. 2007), *cert. granted sub nom.*, District of Columbia v. Heller, 128 S. Ct. 645 (2007).

2 *See generally* David B. Kopel, Stephen P. Halbrook & Alan Kurwin Supreme Court Gun Cases (2004).

3 *See infra* Part IV & V.

4 *See infra* Part III.

5 *See infra* Part VI.

6 Parker v. District of Columbia, 478 F.3d 370, 381 (D.C. Cir. 2007); Silveira v. Lockyer, 312 F.3d 1052, 1060 (9th Cir. 2002); United States v. Emerson, 270 F.3d 203, 211 (5th Cir. 2001).

7 William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236, 1239 (1994).

8 Schenck v. United States, 249 U.S. 47 (1919).

9 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

10 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

11 *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (holding the right to counsel is a fundamental right in the Sixth Amendment).

12 *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the exclusionary rule).

13 Pub. L. No. 73-474, 48 Stat. 1236-40.

14 *Id.*

15 Pub. L. No. 75-785, 52 Stat. 1250.

16 Pub. L. No. 90-618, 82 Stat. 1213.

17 The gun control movement of the 1960s was also fueled in large part by the assassinations of John F. Kennedy in 1963, Robert F. Kennedy in 1968, and Martin Luther King Jr. in 1968.

18 Nat'l Rifle Ass'n Inst. for Legislative Action, "Who We Are, And What We Do," *available at* http://www.nraila.org/About/ (last visited Jan. 25, 2008).

19 *See*, *e.g.*, David I. Caplan, *Handgun Control: Constitutional or Unconstitutional?—A Reply to Mayor Jackson*, 10 N.C. Cent. L.J. 53 (1978); David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 Fordham Urb. L.J. 31 (1976).

20 Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204 (1983).

21 Stephen P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (1984).

22 David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559 (1986).

23 Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987).

24 Kenneth A. Klukowski, *Armed By Right: The Emerging Jurisprudence of the Second Amendment*, 18 Geo. Mason. U. Civ. Rts. L.J. 167, 171-73 (2008).

25 Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989).

26 *See id.* at 642.

27 United States v. Miller, 307 U.S. 174 (1939).

28 Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542 (1876).

29 *Presser*, 116 U.S. at 264-66; *Cruikshank*, 92 U.S. at 551.

30 *Miller* is only ten pages in the U.S. Reports. 307 U.S. at 174-83.

31 *Id.* at 175.

32 *Id.* at 177.

33 *Id*. at 178.

34 *Id*. at 183.

35 Brief of Appellant at 15, United States v. Miller, 307 U.S. 174 (1939) (No. 696).

36 *Id.* at 18.

37 Some will say that this is simply what an individual-right advocate would say to steer clear of the possibility that the Court did indeed tie gun ownership to militia service. But this is not correct. The Court was presented with a government argument that firearm rights should be related to militia service. The Court noted that the record might support that argument, and so rather than accept or reject the argument it remanded. By all appearances *Miller* was never intended to be a final result, but the case never returned to the Court and so the matter was left unresolved.

38 Stephan B. Tahmassebi, *The Second Amendment & the U.S. Supreme Court*, American Rifleman, May 2000, *available at* http://www.nraila.org/Issues/Articles/Read.aspx?ID=7.

39 Silveira v. Lockyer, 312 F.3d 1052, 1064 (9th Cir. 2002).

40 *See infra* Part III.

41 *Cf.* United States v. Emerson, 270 F.3d 203, 220 (5th Cir. 2001).

42 *See* Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007). Brief of Second Amendment Foundation as Amicas Cuciae Supporting Respondent at 31-40, District of Columbia v. Heller, No. 07-290 (U.S. Feb. 8, 2008).

43 Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 Geo. Mason U. Civ. Rts. L.J. 229, 247-48 & n.63 (2008) (citing 1 William Blackstone, Commentaries on the Laws of England *125-*139 (1765)); *see generally* Joyce Lee Malcolm, To Keep and Bear Arms (1994); James Warner, *Disarming the Disabled*, 18 Geo. Mason U. Civ. Rts. L.J. 267 (2008).

44 *Silveira*, 328 F.3d at 570 (Kozinski, J., dissenting from denial of reh'g en banc).

45 *See* The Declaration of Independence para. 2 (1776); The Federalist No. 46 (James Madison).

46 *Silveira*, 328 F.3d at 569-70 (Kozinski, J., dissenting from denial of reh'g en banc).

47 *See Emerson*, 270 F.3d at 231, 235 & n.35.

48 *Silveira*, 312 F.3d at 1092. Ada

49 Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. Rev. 57, 57 & n.1 (1995) (quoting Adams v. Williams, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting)).

50 *See* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995, 1003-04 (1995).

51 *Parker*, 478 F.3d at 379 & n.3; *Emerson*, 270 F.3d at 219.

52 Warren E. Burger, *The Right to Bear Arms*, Parade Magazine, Jan. 14, 1990, at 4. The article gave no indication that he was aware of the scholarly research in the last decade, confusingly, the Burger article also said that the Americans had a right to own guns, although it did specify where that right came from, if not from the Second Amendment. *Id.*

53 Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring).

54 *See* Silveira v. Lockyer, 328 F.3d 567, 568 (9th Cir. 2002) (Kleinfeld, J., joined by Kozinski, O'Scannlain, and T.G. Nelson, JJ., dissenting from denial of reh'g en banc).

55 U.S. Const. amend. II.

56 *Silveira*, 312 F.3d at 1069.

57 Parker v. District of Columbia, 478 F.3d 370, 398 (D.C. Cir. 2007).

58 Lund, *supra* note 43, at 233-36, 240-41. Brief for the Second Amendment Foundation as Amicas Cuciae, *supra* note 42, at 18-31.

59 Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 Tex. Rev. Law & Pol. 157, 180-83 (1999); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 34-35 & nn. 77 & 80 (1996).

60 U.S. Const. art. I, § 8, cl. 8.

61 Lund, *supra* note 43, at 236-40.

62 270 F.3d 203 (5th Cir. 2001).

63 312 F.3d 1052 (9th Cir. 2003).

64 478 F.3d 370 (D.C. Cir. 2007).

65 Lund, *supra* note 43, at 229 & n.1 (2008).

66 D.C. Code § 7-2502.02(a)(4).

67 *Id.* § 7-2507.02.

68 Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004).

69 *Id.* at 103-04

70 *Parker*, 478 F.3d at 391 (citing Pernell v. Southall Realty, 416 U.S. 363, 369-80 (1974)).

71 *Parker*, 311 F. Supp. 2d at 109.

72 *Parker*, 478 F.3d at 401.

73 *Id.* at 395.

74 *Id.* at 401.

75 128 S. Ct. 645 (2007).

76 *Parker*, 478 F.3d at 378.

77 76 U.S.L.W. 3095 (U.S. Sept. 10, 2007) (No. 07-335).

78 128 S. Ct. 645 (2007).

79 The brief can be found at http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/2007-0290.mer.ami.pdf.

80 Brief for the United States as Amicus Curiae at 28, District of Columbia v. Heller, No. 07-290, (U.S. Jan. 11, 2008).

81 *Id.* at 33.

82 *Cf.* Klukowski, *supra* note 24, at 185.

83 *Compare* Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying equal protection intermediate scrutiny whereby a law "must be substantially related to an important government interest) *with* United States v. O'Brien, 391 U.S. 367, 377 (1968) *and* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (applying free speech intermediate scrutiny under which the government action must be narrowly-tailored). So the tailoring in free speech intermediate scrutiny is characterized in the same terms as required by strict scrutiny, establishing a more demanding test under the Free Speech Clause than the Equal Protection Clause.

84 *See* Klukowski, *supra* note 24, at 185 & n.146 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (ruling that laws restricting abortion are unconstitutional if they impose an "undue burden" on seeking an abortion)).

85 *See* Klukowski, *supra* note 24, at 186-88.

86 *E.g.*, City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (applying a categorical rule against viewpoint discrimination); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (applying strict scrutiny to a content-based speech regulation).

87 *See O'Brien*, 391 U.S. at 377.

88 *E.g.*, Cornelius v. NAACP, 473 U.S. 788, 806 (1985) (concerning less protection of speech in a limited public forum).

89 *See* Klukowski, *supra* note 24, at 185-86, 189-90.

90 *Cf.* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

91 Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Not all restrictions on fundamental rights are subject to strict scrutiny. Free speech burdens are sometimes not subject to strict scrutiny. *See supra* notes 83-88 and accompanying text. *See also* Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Geo. J.C. B Pub. POC'Y 229, 277 B nn. 417-18 (2008) (describing the tests applied to the fundamental right of free religious exercise besides strict scrutiny).

92 Klukowski, *supra* note 24, at 186-88.

93 Brief for the United States as Amicus Curiae, *supra* note 81, at 8, 20, 25-26.

94 *Id.* at 183.

95 NRA v. Nagin, Civil No. 05-4234 (E.D. La. filed Sept. 22, 2005). *See generally* Stephen P. Halbrook, *Only Law Enforcement will be allowed to have Guns: Hurricane Katrina and the New Orleans Gun Confiscations.*[18] Geo. Mason v. Civ Rts. c.j. *339 (2008).*

Is there Anything "Fundamental" in the Right to Keep and Bear Arms? A Call for Parity in the Incorporation Doctrine

*By Thomas H. Burrell**

With the *District of Columbia v. Heller* decision set to arrive sometime in the summer of 2008,[1] the U.S. Supreme Court will determine whether the District's ban on handguns, in operation since 1976, is a violation of the Second Amendment.[2] Its opinion will likely cut a new facet on the interpretation of Second Amendment—including, inevitably, incorporation.

The District of Columbia is under the supervision of Congress, which has plenary power to enact or repeal provisions of the D.C. Code.[3] In its majority opinion, the D.C. Circuit noted that incorporation of the Second Amendment through the Fourteenth Amendment as a prohibition against the states was not directly at issue in the case.[4] But Judge Henderson's dissenting opinion argued that the Second Amendment only protects citizens of states against national legislation, and that the District is not a "state" within the purview of the Amendment. Judge Henderson also noted that even if the District were a "State," the Second Amendment has not been incorporated.[5] D.C.'s petition for certiorari likewise relies on the fact that the Second Amendment has not been incorporated.[6] Given the arguments touching upon incorporation, the Court's opinion, to a greater or lesser extent, will discuss the issue. Moreover, in light of the stringent gun laws in other major cities, courts post-*Heller* will likely revisit the issue of incorporation of the Second Amendment, perhaps even incorporation of the Bill of Rights generally.

The doctrine of incorporation received its first breath in the nineteenth century, but its full impact did not come about until the mid-twentieth century.[7] In basic terms the doctrine holds that the rights secured by the Federal Bill of Rights are "fundamental" and thus protected by the words "due process" with substance.[8] In other words, courts read the word "liberty" in the Due Process Clause to include anything deemed "fundamental" and thus, incorporate the Bill of Rights.[9] Nowhere in the text will you find that the Amendment includes the ability to enforce the Bill of Rights against the States. The language of Section One reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[10]

Those terms had a specific historical meaning when adopted. Extending the meaning of the language to include the Bill of Rights for national protection was only advocated by a few members of the 39th Congress.[11] In contrast to modern incorporation, the Supreme Court initially rejected reading the Fourteenth Amendment as a vehicle to incorporate the Bill of Rights.[12] In *Walker v. Sauvinet* the Court recognized the omission of language from the Fifth Amendment in the Fourteenth Amendment and refused to incorporate trial by jury.[13] In *Walker*, the Louisiana statute provided that if a jury could not reach a decision, the issue shall go before the judge to decide on the evidence and pleadings.[14] A defendant ultimately deprived of a jury trial under the act appealed, arguing that the statute violated the common law right to trial by jury covered by the Fourteenth Amendment. The Supreme Court refused to incorporate trial by jury under either the Due Process Clause or the Privileges or Immunities Clause of the Amendment.[15]

In the same term, the Court in *United States v. Cruikshank* addressed the conviction of three defendants accused of interfering with the rights of two African American voters.[16] Of importance to this discussion, the second and tenth counts of the indictment alleged that the defendants banded together and conspired with the intent to prevent the exercise of the right to keep and bear arms for a lawful purpose.[17] The Court appeared sympathetic to the case against the defendants but noted with emphasis that the indictment generally suffered from two types of flaws: (1) the jurisdiction of the United States courts did not provide a remedy for the injuries suffered, and (2) where the injuries were protected by the laws of the United States, the allegations in the indictment were too broad to put a defendant on notice of the crime charged.[18] The *Cruikshank* Court discussed the role of federal and state governments and noted that citizens are citizens of both governments, but the "Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people."[19] In reference to the Second Amendment claim, the Court found:

> This [right to bear arms for a lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called . . . internal police [powers].[20]

A decade later, in *Presser v. Illinois*, the Court reaffirmed the *Cruikshank* Second Amendment holding in a case dealing with an appeal from a defendant convicted of a state statute preventing parading or drilling with arms unless one is a member of the militia or has a license from the governor.[21] Herman Presser was indicted on September 24, 1879 in Cook County for unlawfully drilling and parading with arms in violation of the statute.[22] He moved that the law was unconstitutional as a violation of the Second Amendment. Presser also alleged that the act violated the Privileges or Immunities Clause and Due Process Clause of the Fourteenth Amendment.[23] The Court

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noted that it was not sure that the military code of Illinois was infringing the right to bear arms, but stated that, even if it were, the "conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the national government, and not upon that of the state."[24] The Court also suggested that states cannot prohibit the right to bear arms under an express right of Congress to raise a militia under Article I, § 8.

As these cases show, during the generation of its adoption and ratification, the principle that the Fourteenth Amendment did not incorporate the Bill of Rights was considered a given. On several occasions, contemporaries to the 39th Congress's understanding of the Amendment refused to incorporate the Bill of Rights under Section One.[25] As the Court began to erode the limitations of the Amendment through substantive due process and substantive equal protection interpretations in the latter part of the nineteenth century, the concept of judicially incorporating the Bill of Rights found refuge in the new understanding of the Amendment.[26]

Modern incorporation theory usually refers to a few passages from Representative John Bingham or Senator Jacob Howard of the 39th Congress to argue that the Fourteenth Amendment incorporates the Bill of Rights as a tool for the judiciary.[27] Both Howard and Bingham referred to the Amendment as arming Congress with the power to protect the privileges or immunities of citizens, which they generally described by referring to the first eight amendments including the right to bear arms.[28] Bingham was the primary author of Section One and for this reason his commentary on the Amendment is entitled to deference. Howard attracts attention because he opened the initial Senate debate of the Amendment in place of an ill, and more moderate, Senator William Fessenden.[29] In the context of analyzing sentiments of Bingham and Howard, one must consider that Bingham and Howard were among what contemporaries called "radical Republicans." Both Bingham and Howard wanted more under the Amendment than would pass under an amending majority.[30] In terms of defining the understanding of the 39th Congress, the predispositions of Bingham and Howard are worth noting. One does not need to fight with Bingham's shorthand, echoed by Howard, however, to determine that the judiciary's incorporation is not warranted under Section One. There are two major problems with modern incorporation. First, Bingham's desires of the level of federal protection were not shared by the amending majority.[31] Second, even adopting Bingham's view *in toto*, Section One was designed as a tool to expand Congress's power with little interpretive role for the judiciary.

The original design and intent of Bingham's draft was for Congress to have plenary powers to pass laws protecting, for example, the Bill of Rights.[32] Congress was distrustful of the Court following the *Dred Scott* decision.[33] Bingham introduced the Amendment in its early draft by quoting the Supremacy Clause and Congress's role to protect the rights embodied in the Bill of Rights.

> This Constitution, and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.[34]

After noting the Amendment was taking its language from the Due Process Clause of the Fifth Amendment and from the Privileges and Immunities Clause of Article IV, § 2, Bingham stated: "[I]t has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every state, by congressional enactment, to enforce obedience to these requirements of the Constitution."[35] Bingham continued:

> The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It 'hath that extent-no more.'[36]

Under the Amendment, Congress was to interpret "privileges or immunities" through enforcement legislation. Bingham himself declared in a post-ratification debate that the "Constitution is not self-executing."[37] Bingham clarified:

> [B]y virtue of these amendments, it is competent for Congress today to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances, for these are of the rights of citizens of the United States defined in the Constitution and guarantied by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered.[38]

Reconstruction pitted Congress against the rebelling states. The main purpose of Section One was to constitutionalize the Civil Rights Act of 1866 (CRA of 1866).[39] The CRA of 1866 was originally proposed as legislation under the congressional enforcement section of the Thirteenth Amendment barring slavery. Many felt the Bill was beyond the authority of the Thirteenth Amendment and thus unconstitutional. President Johnson vetoed the Bill. Congress overrode the veto and sought to amend the Constitution to give Congress authority to pass laws such as the CRA of 1866.

In his initial draft of Section One, Bingham urged for a broad array of congressional powers.[40] Bingham even stated that he wanted to alter the design of federal-state relations to change the principle enunciated in Madison's Federalist No. 45.[41] The Amendment's early draft read:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[42]

Although Bingham intended for Congress to have a plenary grant in securing privileges and immunities, the rest

of Congress did not share Bingham's desire in arming Congress with general regulation of life, liberty and property at the expense of state sovereignty.[43] In the Reconstruction Committee and before Congress, Bingham's initial proposals and his vision of plenary powers for Congress were rejected. Congress discarded those proposals which included latitudinarian language securing "equal protection in their rights of life, liberty and property," "same political rights and privileges," "equal protection in the enjoyment of life, liberty and property," and "equal political rights and privileges."[44] Members of Congress did not want Congress to have the power to establish uniform laws in the states' jurisdiction.[45] The final draft states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[46]

In its final form, Congress was to provide remedial protection and the scope of Congress's enforcement power was limited to equal protection of the laws and protection of national privileges and immunities. The language was revised to remove the suggestion that Congress was to attempt to secure "equal protection in the rights of life, liberty and property" or "equal privileges and political rights."[47] Implications in this language would allow some to construe the Amendment to reach political and social rights. But the Amendment and CRA of 1866 covered only citizenship rights. Laws concerning, for example, voting, interracial marriage, segregation and jury service were left for the states to regulate.[48] The 39th Congress wanted only a narrow Amendment just as they wanted a narrow CRA of 1866 to remove open-ended interpretations. In fact, many members of congress understood Section One to be "a copy of the [CRA of 1866]" in more general terms.[49] Section One was merely to provide a constitutional basis for the CRA of 1866 and to prevent the protection of civil rights from being removed by a simple majority.[50]

Congress rejected Bingham's language, and along with that, Bingham's initial desire to have the scope of congressional protection equivalent to the first eight amendments of the Bill of Rights. One must discount Bingham's later discussions about the plenary scope of Section One as rehashing the proposals and desires rejected by the Committee and by the amending majority of the 39th Congress. Bingham loses credibility in his post-ratification suggestion that the final revised language of the Amendment was actually intended to make it "more comprehensive" in the role of Congress against the states.[51] After the language was adopted, Bingham even attempted to argue that the Privileges or Immunities Clause allows Congress to pass laws covering universal suffrage.[52] As a definition of congressional coverage under the Amendment, his post-ratification discussion must be written off as self-serving and unrepresentative of the amending majority.

As noted above, early courts shared the 39th's understanding and did not incorporate the Bill of Rights. A generation after the Amendment was adopted, courts began to undermine the limited Amendment with substantive language. These substantive opinions were initially contained in non-majority opinions such as the dissenting opinions of Justices Field, Bradley, Swayne and Chief Justice Chase in the *Slaughter-Houses Cases*.[53] Justice Stephen Field had a penchant for expanding the original intent of the Fourteenth Amendment with open-ended interpretations.[54] These non-majority opinions captured the majority toward the end of the nineteenth century and reshaped the Amendment, leaving an extraordinary role for the judiciary in judicial reasonableness review of state legislation.[55]

In one of these non-majority opinions, *O'Neil v. Vermont*, [56] Justice Field squarely broke away from previous Court law and suggested that the Privileges or Immunities Clause incorporated the amendments of the Bill of Rights dealing with the rights of citizens. Field went along with the majority in *Cruikshank* and *Presser*, but parted from the majority in *O'Neil*.[57] John O'Neil was convicted of 307 offenses of selling intoxicating liquor in violation of a Vermont statute.[58] O'Neil was sentenced to pay a fine and to serve over fifty-four years if he did not meet the terms of the sentence.[59] O'Neil appealed to the Vermont Supreme Court and then to the U.S. Supreme Court. The majority of the Court, noting that the Eighth Amendment had not been pled as error, reaffirmed in dicta that the Eighth Amendment did not apply to the states and thus would have no bearing on the case.[60] Finding no federal question, the Court dismissed the appeal.[61]

Justice Field, however, dissented and noted, before discussing the Court's jurisdiction, that the sentence was cruel and unusual. Field commented that Neil's sentence was six times as great as a court could have given for manslaughter, forgery or perjury.[62] He reasoned that the Privileges or Immunities Clause should be read broadly to include the Bill of Rights. Field characterized the Bill of Rights as part a guarantee of restrictions against congressional action, part against congressional violation of procedure, and part as guarantees of individual rights. Field used the omission of express language forbidding Congress from acting or making law in the amendments other than the First Amendment as a cleavage point for arguing that Section One meant to incorporate the individual rights contained in the other amendments.[63] Field would have found the Eighth Amendment applicable to the states and the sentence in violation of it.[64]

This germ of incorporation, championed by Justice Harlan, reached a majority in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*.[65] In this case, the Court incorporated the "just compensation" provision of the Fifth Amendment's Takings Clause. In 1880, Chicago passed an ordinance resolving to widen a street. The expansion of the street would condemn a portion of a railroad right away and deprive the land of its value. Illinois had a provision similar to the Fifth Amendment and a jury awarded the railroad $1 as compensation for the condemnation. After an unsuccessful appeal to the Illinois Supreme Court, the railroad petitioned the U.S. Supreme Court to review the jury award in terms of Fourteenth Amendment as a denial of "due process." The Court opined:

> Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against

> the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.[66]

The Court concluded that the Due Process Clause of the Fourteenth Amendment requires just compensation for takings.[67] There is little legitimacy in the Court's doing so. Bingham attempted specifically to add the "just compensation" language to the draft of Section One, proposing "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[68] The Reconstruction Committee, keen on pulse of the rest of the 39th Congress, rejected his proposal as they did with his other attempts to increase national power at the expense of the states. The Committee kept "due process" to its basic structure and did not include the rest of the language from the Fifth Amendment. After ratifying the Amendment, several states held constitutional conventions and passed legislation modifying or abolishing provisions such as trial by jury and grand jury indictment without the slightest belief they were violating the Fourteenth Amendment.[69] The Court was without basis to read the rejected language back into its interpretation of the Amendment.

After gaining a foothold in *Chicago, Burlington & Quincy Railroad*, the Court piecemeal incorporated various rights it deemed fundamental to liberty and justice. In *Gitlow v. New York*,[70] the Court found that the freedom of speech and press were fundamental and thus incorporated by the Fourteenth Amendment. The defendant was an Anarchist who published the *Left Wing Manifesto,* which called for the overthrow of the government. The defendant claimed that the statute violated the Constitution's protection of freedom of speech. The question before the Court was whether "liberty" in the Fourteenth Amendment includes freedom of speech and press and whether the statute which does not take into consideration circumstances, "unduly restrains this liberty and is therefore unconstitutional."[71] The Court held:

> For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[72]

Over the next few decades, the Court expanded upon this rationale. With *Gitlow* and progeny, the test of incorporation is whether the judiciary determines a right or procedure "fundamental." With such an amorphous test, the Court's modern incorporation doctrine gives little or no deference to federalism considerations.[73] The framers of both the Constitution and the Fourteenth Amendment were concerned about centralizing national power. Drafts of reconstruction legislation allowing for expansive national government at the expense of the states were rejected. The Court's interpretation of Section One toward the end of the nineteenth century and thereafter undermined these intended limitations.

In all its judicial footwork under the rubric of the Fourteenth Amendment, the Court has not, however, incorporated the Second Amendment. Given the ease with which the Court incorporated other rights in the Bill of Rights and other rights entirely made up, it is baffling that the Court has yet to incorporate the Second Amendment as being one of the "deeply rooted"[74] "rights of persons,"[75] one of the "fundamental personal rights and liberties,"[76] one of the rights in the Court's "penumbra" or "zone"[77] of individual rights or even a "liberty of the person both in... spatial and... more transcendent dimensions."[78]

Unlike, for example, issues such as the distribution of condoms, abortion, or sodomy, the 39th Congress did in fact discuss the issue of disarmament as part of the efforts addressed by Reconstruction legislation. Many felt that black codes disarming African Americans were equivalent to legislation depriving citizens of citizenship rights. The 39th Congress condemned black codes such as those enacted by Opelousas, Louisiana which did not allow Negroes to carry firearms unless they had special permission from their employer and approval in writing by the mayor or president of the board of police.[79] In Kentucky, a white person could own a gun, but a black person would pay a fine if caught with a firearm.[80] Senator Lyman Trumbull, former Illinois Supreme Court Justice and author of the CRA of 1866, spoke of the prohibition of the civil right to own a firearm in the same sense as he did other slave laws and black codes.[81] For Trumbull, disarming citizens was similar to laws forbidding preaching the Gospel, forbidding travel and allowing African Americans to be sold into slavery if traveling into a state with the purpose of residing there.[82] Trumbull was not alone. Representative Henry J. Raymond indicated that the Bill establishes citizenship for newly freed slaves and provides protection for those citizenship rights. The colored citizen "has the right of free passage from one State to another, any law in any State to the contrary notwithstanding. He has a defined *status*; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms; a right to testify in Federal courts; he has all those rights that tend to elevate him and educate him for still higher reaches in the process of elevation."[83] Protection against disarmament was also included in the Freedmen's Bureau Bill, a companion bill to the CRA of 1866, which contained language protecting "the constitutional right to bear arms."[84] If any right were going to be read into the Fourteenth Amendment beyond the civil rights enumerated in the CRA of 1866, the right to bear arms would be among the first.

With Section One, courts pick fragments from debates and expound volumes, but when it comes to interpreting the Second Amendment, despite the better footing, courts perform a *volte face* and refuse to give it the same consideration. Judge Kozinski aptly described the double standard:

> Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech, or... the press" also means the Internet... and that "persons, houses, papers, and effects" also means public telephone booths. When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases-or even the white spaces between lines of constitutional text. But, as the panel amply demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there....
>
> The able judges of the panel majority are usually very

> sympathetic to individual rights, but they have succumbed to the temptation to pick and choose. Had they brought the same generous approach to the Second Amendment that they routinely bring to the First, Fourth and selected portions of the Fifth, they would have had no trouble finding an individual right to bear arms.[85]

If the framers of the Amendment wanted to incorporate any of the first eight amendments, they would have chosen language better suited for that purpose. Bingham stated that he was taking the language of Section One directly from the Constitution. The Fifth Amendment as a ban against the national government had more guarantees than the words "due process." These other guarantees did not make the language of the Amendment. To appease moderates and conservatives, the Committee revised Bingham's initial language to reduce the scope of the Amendment. Congress rejected open-ended language for its implications of broad national coverage. He attempted to add an additional right protected in the Bill of Rights to the Due Process Clause of Section One, and the Committee rejected his proposal. The Committee opted to keep "due process" to its basic structure, *e.g.,* preventing an unlawful *posse comitatus* from seizing and hanging a suspect.[86] Under the original Fourteenth Amendment, the wisdom of states having jury trials, having protections for free speech in the same fashion as the First Amendment, or having a national concept of "cruel and unusual" punishment had no place in the debate.[87] Just as prior to the Civil War, the states had the liberty to add—and more importantly to modify—these protections as they saw fit, free from a national straightjacket.[88] The Bill of Rights not only protected the spirit of individual rights, but also protected the people and the states from centralization.

From a litigation position, the argument that the Fourteenth Amendment does not incorporate the Bill of Rights has been dormant (if not dead) for quite some time. The question at hand in *Heller* is one of parity. If the "right" in question strikes its fancy, the Court would find little difficulty incorporating that right as "fundamental" and thus protected by its understanding of "due process" under the Fourteenth Amendment. The Court's refusal thus far to see the right to keep and bear arms in the Second Amendment as a "deeply rooted" or "fundamental" right is at odds with its own jurisprudence.

Endnotes

1 *See* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), *sub nom*. District of Columbia v. Heller, *cert. granted*, 76 U.S.L.W. 3273 (U.S. Nov. 20, 2007) (07-290).

2 U.S. Const amend. II; *see Parker*, 478 F.3d at 373.

3 U.S. Const. art 1, § 8, cl. 17; *Parker*, 478 F.3d at 408.

4 *See Parker*, 478 F.3d at 391 n.13.

5 *See Parker*, 478 F.3d at 405-07, 408 n.13 (Henderson, Circuit Judge, dissenting).

6 *Heller* Pet. for Cert. at 18-19 (arguing that the Second Amendment was designed to prevent federal encroachment of local legislation and that the District's ban is local legislation).

7 *See, e.g.*, Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 236-37 (1897); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating First Amendment freedom of speech and press); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (making First Amendment applicable to the states through Fourteenth Amendment); Wolf v. Colorado, 338 U. S. 25, 27-28 (1949) (Fourth Amendment applicable to the states); Mapp v. Ohio, 367 U.S. 643, 650, 655 (1961) (Fourth Amendment reasonable searches and seizures and the exclusionary rule); Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963) (Sixth Amendment right to counsel); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (Fifth Amendment right to be free from compelled self-incrimination); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (Sixth Amendment right to trial by jury).

8 Earlier attempts were made to incorporate the Bill of Rights through the Privileges or Immunities Clause. *See, e.g.*, Walker v. Sauvinet, 92 U.S. 90 (1875); O'Neil v. Vermont, 144 U.S. 323 (1892); Maxwell v. Dow, 176 U.S. 581 (1900). For criticisms of "due process" incorporation, see Charles Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 Harv. L. Rev. 431 (1926).

9 *Duncan*, 391 U.S. at 148 (describing the test of incorporation as whether the right affects "fundamental principles of liberty and justice"); *Gitlow*, 268 U.S. at 666; *Mapp*, 367 U.S. at 649; Griswold v. Connecticut, 381 U. S. 479, 485 (1965).

10 U.S. const. amend. XIV.

11 *See generally* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

12 *See, e.g.*, Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321, 325-26 (1868) (Bill of Rights does not apply to the states); The Justices v. Murray, 76 U.S. (9 Wall.) 274, 278 (1870) (Seventh Amendment does not apply to the states); *Walker*, 92 U.S. at 92 (right to trial by jury not incorporated); United States v. Cruikshank, 92 U.S. 542, 552 (1876) (Bill of Rights not incorporated); Hurtado v. California, 110 U.S. 516, 538 (1884) (refusing to incorporate Fifth Amendment grand jury terms into "due process" of Fourteenth Amendment); Presser v. Illinois, 116 U.S. 252, 265 (1886) (refusing incorporation of Second Amendment); Spies v. Illinois, 123 U.S. 131, 166 (1887) (Bill of Rights not incorporated); In re Kemmler, 136 U.S. 436, 449 (1890) (Eighth Amendment not incorporated); *Maxwell*, 176 U.S. at 601 (affirming *Hurtado* and holding further that the Privileges or Immunities Clause does not incorporate the Bill of Rights); Twining v. New Jersey, 211 U.S. 78, 114 (1908) (refusing to incorporate the right to be free from compulsory incrimination: "[i]f the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands"); Weeks v. United States, 232 U.S. 383, 398 (1914) (Fourth Amendment does not apply to state officers); Palko v. Connecticut, 302 U.S. 319, 323 (1937) (Cardozo, J.) (refusing to find the Fifth Amendment's double jeopardy barring second trials applicable to a state seeking a new trial on error but commenting that the Fourteenth Amendment might incorporate principles of the First Amendment); Adamson v. California, 332 U.S. 46, 54 (1947) (Reed, J.) (refusing to incorporate Fifth Amendment ban against self-incrimination).

13 92 U.S. 90 (1875) (Waite, C.J.).

14 *Walker*, 92 U.S. at 92.

15 *See id.* at 92-93 (citations omitted).

16 92 U.S. 542 (1876).

17 *See Cruikshank*, 92 U.S. at 545.

18 *See id.* at 557-58.

19 *Cruikshank*, 92 U.S. at 549-51.

20 *Cruikshank*, 92 U.S. at 553.

21 116 U.S. 252 (1886).

22 *See Presser*, 116 U.S. at 254.

23 *See id.* at 260, 261.

24 *Id.* at 264-65 (quoting from *Cruikshank*).

25 *See* Adamson v. California, 332 U.S. 46, 53 (1947) (Reed, J.) (noting the contemporary view of several justices on the bench at the adoption of the Amendment refusing to incorporate the Bill of Rights).

26 *See* Thomas H. Burrell, *Justice Stephen Field's Expansion of the Fourteenth*

Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony, 43 Gonz. L. Rev. 77, 161 (2007).

27 Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 5 n.13, 51 n.98 (1955); Adamson v. California, 332 U.S. 46, 92, *et seq*. (1947); *see generally* Fairman, *supra* note 18. For a reprinting of the debates, see Alfred Avins, The Reconstruction Amendments' Debates: The Legislative History and Contemporary Debates in Congress on the 13th, 14th, and 15th Amendments (1967).

28 *See* Sen. Howard Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (mass of privileges under Section One); Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1089-92 (1866); Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 2542 (1866); Rep. Bingham Cong. Globe, 42d Cong., 1st Sess. app 81-85 (1871).

29 *See* Earl A. Maltz, *The Concept of Equal Protection of the Laws–A Historical Inquiry*, 22 San Diego L. Rev. 499, 524 (1985) (commenting on the presentations of the Amendment to the House and Senate).

30 Bingham persistently attempted to push the language of the Amendment to secure broader federal protection, *infra* notes 49-51. *See* Sen. Howard Cong. Globe, 39th Cong., 1st Sess. 2765-67 (1866) (Howard pushed for broader coverage but conceded that the Amendment secured less than he had hoped).

31 *See* Burrell, *supra* note 26, at 100-04, 116-19; *infra* note 50 (limitations of the Amendment).

32 *See* Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1034 (1866); Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1089-94 (1866); Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 2542 (arms congress "to protect by national law the privileges and immunities of all the citizens").

33 *See* Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *see* Raoul Berger, Government By Judiciary: The Transformation of the Fourteenth Amendment 245-52 (2d ed. 1997).

34 Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1034 (1866).

35 *Id.*

36 Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1088 (1866); *see also id*. at 1090.

37 Rep. Bingham Cong. Globe, 42d Cong., 1st Sess. app. at 81 (1871).

38 *Id.* at 85. Quotation to this passage is for the limited purpose of demonstrating Bingham's intent for Congress to enforce the provisions of Section One. As discussed above, the 39th Congress did not share Bingham's view in the scope of congressional coverage. *See, e.g.*, Rep. Farnsworth Cong. Globe, 42d Cong., 1st Sess. app. at 115 (taking issue with Bingham's post-ratification attempt to bolster the power of Congress under Section Five); Rep. Garfield *id.* app. at 151 (Bingham can "make but he cannot unmake history"); Burrell, *supra* note 26, at 102-03.

39 *See* Rep. Broomall Cong. Globe, 39th Cong., 1st Sess., 2498 (1866); Rep. Latham Cong. Globe, 39th Cong., 1st Sess. 2883 (1866) (Civil Rights Bill "covers exactly the same ground as this amendment"); *infra* note 56 (Sen. Trumbull stating Section One is copy of the Act).

40 Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1034 (1866); Bingham Cong. Globe, 39th Cong., 1st Sess. 1089-94 (1866).

41 *See* Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1093 (1866). It's amazing that Bingham could think that he could get an Amendment passed which altered the entire concept of federalism and yet think the Amendment was not a point of controversy. *See* Rep. Hale Cong. Globe, 39th Cong., 1st Sess. 1063 (noting Bingham's characterization of the Amendment as trivial).

42 Rep. Bingham Cong. Globe, 39th Cong., 1st Sess. 1034 (1866); *see also* Bickel, *supra* note 34, at 30-31, 40-45.

43 *See* Rep. Hotchkiss Cong. Globe, 39th Cong., 1st Sess. 1095 (1866); Hale Cong. Globe, 39th Cong., 1st Sess. 1063, 1094 (1866); Bickel, *supra* note 34, at 58.

44 *See* Bickel, *supra* note 34, at 30, 31, 32.

45 *See supra* note 50.

46 U.S. const. amend. XIV.

47 Bickel, *supra* note 34, at 45; Burrell, *supra* note 26, at 116-19.

48 *See* Burrell, *supra* note 26, at 91-100. Representative James Wilson, manager of the CRA of 1866 in the House, noted the distinction between civil rights and political rights: "What do these terms [civil rights and immunities] mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they so be construed." Rep. Wilson Cong. Globe, 39th Cong., 1st Sess. at 1117 (1866).

49 *See* Sen. Trumbull Cong. Globe, 42d Cong., 1st Sess. 575 (1871) (finding the Amendment's first section is a "copy of the civil rights act"); *supra* note 46.

50 *See* Rep. Stevens Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (places CRA of 1866 in the Constitution beyond a simple majority); Rep. Garfield Cong. Globe, 39th Cong., 1st Sess. 2462 (1866) (same).

51 *See* Rep. Bingham Cong.Globe, 42d Cong., 1st Sess. app. 82, 150-53 (1871).

52 *See* Rep. Bingham Cong.Globe, 40th Cong., 2d Sess. 2462-63 (1868) (arguing that political rights are protected under the Fourteenth Amendment despite the clear understanding of the 39th Congress to the contrary). Universal suffrage failed to obtain support in the Fourteenth Amendment. Both Howard and Stevens when introducing the final draft expressed their regret that the Amendment did not cover suffrage rights. *See* Rep. Stevens Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (expressing regret that universal suffrage was not secured with the Amendment); Sen. Howard Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (same). If the Fourteenth Amendment allowed Congress to establish universal suffrage, why would we need the Fifteenth Amendment? *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175-76 (1875).

53 83 U.S. (16 Wall.) 36, 83, 111, 124 (1873).

54 Burrell, *supra* note 26, at Part IV.

55 *Id*.

56 144 U.S. 323, 337 (1892) (Field, J., dissenting). Justice Harlan filed a separate dissent. *Id.* at 366.

57 Field was also among the majority in a case refusing to incorporate the Eighth Amendment nearly two years earlier. *See* In re Kemmler, 136 U.S. 436, 449 (1890).

58 *O'Neil*, 144 U.S. at 327.

59 The justice of the peace convicted Neil of 457 offenses of mailing liquor into Vermont for which he was to serve a month in jail and pay $140 and the costs of prosecution. If he failed to pay within a month, his sentence was to increase to 79 years in prison. He appealed the judgment to the county court. On appeal, he was convicted of 307 offenses and fined $140 along with the costs of prosecution and ordered to stand committed until the sentence was complied with. If he failed to pay by a specified deadline, he was to serve over 54 years in prison. *O'Neil*, 144 U.S. at 326-30.

60 *See id.* at 331-32.

61 *See id.* at 334-35, 337.

62 *See id.* at 339 (Field J., dissenting).

63 *See id.* at 363-64 (Field J., dissenting).

64 *See id.* at 339, 360-65 (Field J., dissenting).

65 166 U.S. 226, 235-36 (1897) (Harlan, J.) (modifying Field's dissent in *O'Neil*, to which he joined, to hold that "due process" with substance incorporated "just compensation").

66 Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 236-37 (1897).

67 *Chicago, Burlington & Quincy Railroad Co.*, 166 U.S. at 241.

68 Bickel, *supra* note 34, at 42.

69 *See* Fairman, *supra* note 18, at 82 *et seq*.

70 268 U.S. 652 (1925).

71 Gitlow v. New York, 268 U.S. 652, 664 (1925).

72 *Gitlow*, 268 U.S. at 666.

73 Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (describing the test of incorporation as whether the right affects "fundamental principles of liberty

and justice"); Burrell, *supra* note 26, at Part III.E.

74 Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

75 O'Neil v. Vermont, 144 U.S. 323, 363-64 (1892) (Field J., dissenting).

76 *Gitlow*, 268 U.S. at 666; *Duncan*, 391 U.S. at 148.

77 Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (Douglas, J.) .

78 Lawrence v. Texas, 539 U.S. 558, 562 (2003).

79 *See* Rep. Eliot Cong. Globe, 39th Cong., 1st Sess. 517 (1866).

80 *See* Rep. Grinnell Cong. Globe, 39th Cong., 1st Sess. 651 (1866).

81 *See* Sen. Trumbull Cong. Globe, 39th Cong., 1st Sess. 474 (1866); *see* Bickel, *supra* note 34, at 56.

82 *Id. See also* Rep. Chandler Cong. Globe, 39th Cong., 1st Sess. 217 (1866) (urging for congressional protection against disarming blacks); Brief for Members of Congress et al. as Amici Curiae Supporting Respondents, District of Columbia v. Heller (07-290) at 14 [hereinafter "Members of Congress Amicus Brief for Resp."] (Stephen P. Halbrook, counsel for amici).

83 Rep. Raymond Cong. Globe, 39th Cong., 1st Sess. 1266 (1866).

84 The Freedmen's Bureau Act of 1866, 14 Stat. 173, 176-77 (1866); Members of Congress Amicus Brief for Resp. at 15, 17-18.

85 Silveira v. Lockyer, 328 F.3d 567, 568-69 (9th Cir. 2003) (Judge Kozinski, dissenting from denial of rehearing en banc) (citations omitted).

86 *See* The Civil Rights Cases, 109 U.S. 3, 23-24 (1883).

87 *Cf.* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 176, 178 (1875) (wisdom of suffrage for women has no bearing on interpretation of Constitution and Reconstruction amendments).

88 Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (Harlan, J. dissenting) (Justice John M. Harlan was the grandson of Justice John M. Harlan who initially held for judicial incorporation in Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 236-37 (1897)); Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring); Maxwell v. Dow, 176 U.S. 581, 600-01 (1900) (Peckham, J.) (noting that the Amendment did not, among other things, require each ratifying state grant trial by jury irrespective of their own constitution stating otherwise); *see* Fairman, *supra* note 18, at 82 *et seq*.

The Equal Rights Amendment: Back for an Encore Performance?

By Gail Heriot

The ERA is back—or, at least, so we are told. On March 27, 2007, a group of Congressional Democrats—including Senators Edward Kennedy and Barbara Boxer and Representatives Carolyn Maloney and James Leach—announced with great fanfare a renewed effort to pass the formerly-defunct proposal.[1] "Elections have consequences, and isn't it true those consequences are good right now?" Senator Boxer asked a cheering audience of ERA supporters at the Capitol Hill press conference.[2]

Nothing has changed about the proposal except its name, which, for reasons I can only speculate upon, the revivalists have re-dubbed the "Women's Equality Amendment." Its core clause would still amend the Constitution to read, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[3] All the original proposal's merits and demerits have been lovingly preserved.

It had been a long time since I had given any serious thought to the ERA. When the twice-extended deadline for ratification finally expired on June 30, 1982, I had wrongly assumed the country was closing the book on the proposal. Hearing of its revival made me feel a bit nostalgic (much the way my old eight-track tapes of Cat Stevens make me feel), but it has not caused me to change my mind about the measure.[4]

There was a time, shortly after its initial passage by Congress in 1972 when the ERA's ratification seemed inevitable. President Nixon supported it, and so did his successors, Gerald Ford and Jimmy Carter. The vote in the House of Representatives was 354 to 24; in the Senate it was 84 to 8. By the end of 1973, 30 of the 38 states necessary for ratification had approved the measure. Even your humble author was an enthusiastic supporter. (This was long before anyone ever thought to call me a "conservative," much less a "conservative law professor." I was just a school girl, and my politics were somewhat left-of-center.)

But by the time the extended deadline had expired, I and many other Americans had cooled to the idea. Five states that had initially approved the measure voted to rescind their approval.[5] Something had changed our way of thinking. And, for me at least, it had little to do with becoming a conservative—since, in 1982, I still regarded myself as liberal, if not always happily so. For me the real change was that I had become a lawyer and learned something about the lawyer's craft, especially the art of drafting legal language that will best accomplish the goals one has in mind and not those one does not.

Phyllis Schlafly, leader of the anti-ERA movement, warned that those words, "[e]quality of rights under the law shall not be denied or abridged ... on account of sex," might have consequences not intended by its rank-and-file supporters. And she was not shy about coming up with examples. Among the questions she asked: What effect will it have on the military draft and on the military's authority to assign men, but not women, to combat duty? How will it affect the authority of federal and state governments to maintain separate bathrooms for men and woman in public buildings and similar, separate and otherwise-uncontroversial facilities? Will states have the authority to provide for marriage between a man and a woman without also providing for marriage between two men or two women? When leaders of the ratification movement failed to provide satisfactory answers, Mrs. Schlafly's questions cut seriously into support of the ERA. Whatever political support ideas like gay marriage and women in combat might have today, they had practically none a generation ago. No state legislature would have voted to ratify the ERA if voters had thought that her warnings had substance. It would have been difficult to find more than a handful of legislators willing to endorse the measure.

Mrs. Schlafly was accused of fomenting hysteria.[6] Leaders of the ratification movement argued that the amendment would be interpreted by the courts to impose a strict scrutiny standard on all laws that discriminate on the basis of sex like that already imposed on racially discriminatory laws. Mrs. Schlafly's parade of horribles, they said, would never come to pass. But the actual text of the ERA imposed an unqualified call for "equality of rights," not a strict scrutiny standard. Their argument therefore seemed largely grounded in faith.

Meanwhile, the Supreme Court had been busy fashioning tough protections against sex discrimination as part of its equal protection jurisprudence, in cases like *Reed v. Reed* (1971),[7] *Frontiero v. Richardson* (1973),[8] and *Craig v. Boren* (1976).[9] Even those who heavily discounted Mrs. Schlafly's warnings had to wonder if ERA would add any value. After *Craig*, the Court was already committed to an intermediate scrutiny standard in matters of sex discrimination. Many state legislators concluded that little could be gained by rocking the boat, and allowed the measure to die.

Fast forward to the 21st Century. Is there anything we have learned that might help us evaluate the ERA revival? You bet. With the clarity of hindsight, we now know that Mrs. Schlafly's most explosive warnings were entirely on-target. State constitutions with ERA-like clauses have indeed formed the basis for arguments that a state that recognizes marriage between a man and a woman must also recognize same-sex marriage. More significantly, several courts have agreed.[10] It is hard to argue with Mrs. Schlafly's legal analysis now. Her prediction on this point did indeed come to pass.[11]

I cannot help but wonder, however, if revivalists could not re-draft their proposal in a way that would be perfectly consistent with the way the ERA was understood by its original rank-and-file supporters, while avoiding the pitfalls about which Mrs. Schlafly warned. And I cannot help but wonder if such a newly drafted ERA would not easily win ratification. Allow me to lay out a few possibilities for the sake of intellectual stimulation:

(1) The ERA could be amended to make clear the authority of federal and state governments to maintain separate public

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bathrooms and make similarly uncontroversial distinctions based on sex. Given that ratification leaders agreed that the measure was not intended to interfere with that authority, presumably no one will object to this.

Part of the problem with the ERA was that it had been drafted into its present form in the 1940s—decades before it was actually adopted by Congress in 1972. A lot happened after the final language was hammered out. Before *Brown v. Board of Education*, one could imagine that "separate but equal" facilities would not violate the proposed amendment; after that decision, however, such an assumption was unwarranted.[12] When Title VII of the Civil Rights Act of 1964 was being considered, its supporters recognized that sex discrimination really is different from race discrimination, and that some of the everyday distinctions based on sex, like separate bathrooms and separate prisons, are in fact sound public policy. Consequently, Congress added a little flexibility to the ban on sex discrimination in employment, providing an exception for "bona fide occupational qualifications based on sex."[13] It was meant to be, and is, an exception of limited scope that applies mainly to issues of sexual privacy and theatrical authenticity. It has caused little serious controversy over the years. Evidently, no one thought to re-draft the proposed language of the ERA to include such an exception. They could now.

(2) The ERA could be amended to recognize that certain issues are too controversial even today to be governed by a constitutional amendment upsetting the status quo. Maybe gay marriage is a good idea, maybe it is not. Maybe placing women in combat on the same basis as men makes sense, maybe it does not. But no proposal that would constitutionally mandate either has a chance of passing Congress by a two-thirds majority or being ratified by three quarters of the states. Leave these issues to the political process. Those who favor women in combat or gay marriage will have an opportunity to persuade legislators (or to argue in the courts based on already-existing law). The ERA should be limited to issues where there is the kind of public consensus necessary for ratification. Presumably this would cause no problem for the ERA revivalists who scoffed when Mrs. Schlafly raised these issues a generation ago. If they really thought her warnings were hysterical, they should be willing to agree to such a limitation. I would suggest limiting the ERA's application to public employment, public education, and public contracting, areas that together account for nearly all of the cases ERA's original rank-and-file supporters had in mind. That is enough for any constitutional amendment to bite off.

(3) In keeping with the original spirit and understanding of the ERA, supporters could make clear that the measure is about equality of treatment and not equality of results. It is a two-way street, permitting neither "negative discrimination" nor preferential treatment. One way to do this is to drop the "[e]quality of rights" language and replace it with more active language, such as: "Neither the United States nor any State shall discriminate against, or grant preferential treatment to, any individual or group on the basis of sex." Such language makes it clear, for example, that a state need not set aside half of its jobs for women just because half of its citizens are women, and need not fund abortions for women just because men do not get pregnant. As with my other proposals, this one should be accepted readily by those who argued that Mrs. Schlafly's warnings were off-base.

Would conservatives like me support an ERA with these changes? The answer to that question is very clear: *I already have*. Indeed, I have spent much of the last twelve years helping to pass popular initiatives that would amend state constitutions to include exactly such language.

Proposition 209, adopted by California voters in 1996, states that "the State shall not discriminate against, or grant preferential treatment to, any individual or group on the ground of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting."[14] It contains an exception modeled after Title VII that states, "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education or public contracting."[15] More recently, in 2006, Michigan voters adopted Proposal 2, which contains essentially identical language.[16]

Perhaps a more revealing question is whether ERA revivalists would support these friendly amendments. Unfortunately, the answer seems too clear: *There isn't a chance.* Many of the same organizations that are pressing for the ERA revival led the opposition to Proposition 209 and Proposal 2. In the final days of the Proposition 209 campaign, California's television airwaves were blanketed with a spot featuring a woman being stripped by male hands of her stethoscope, medical lab coat, hard hat, police cap and finally her business suit until she was left in torn clothes and underwear, while men chanted "take it off, take it all off." The voice over asked, "Want to be a doctor? Police Officer? Hard Hat? Forget it!" At the end, a final male hand reaches in to stroke her face suggestively. Katherine Spillar, Executive Vice President of Feminist Majority—who headed the coalition that produced the spot—was only too happy to confirm what that final flourish was intended to convey. "The suggestion is that a woman can always sell her body," she told the press.[17]

ERA revivalists are in a bind. They opposed Proposition 209 and Proposal 2 because those measures required equal treatment, and they believed women needed preferential treatment. Without it, some could be forced into prostitution—or so their television spot implied. Yet they claimed to support a revival of the ERA, which calls for "[e]quality of rights" and not for special rights. Surely, they are playing a dangerous game here. Even without clarifying changes, the ERA would very likely be interpreted to invalidate the many state-sponsored "affirmative action" programs that currently give preferential treatment to women and women-owned businesses. Equal rights means equal rights.[18] Given these circumstances, it is difficult to take the plan to revive the ERA seriously.

My views on the ERA changed between 1972 an 1982, but my views on sex discrimination have changed remarkably little over the years. As a school girl, I opposed sex discrimination in medical school admissions, in the employment of park rangers, and in the awarding of highway contracts. But I still preferred

to apply my mother's lipstick in a women's bathroom, and I was not keen on co-ed prisons. (The possibility of same-sex marriage never crossed my mind.) Decades later, I buy my own lip gloss but have not changed my mind about sex discrimination. And I still do not have my mind wrapped around the same-sex marriage issue. In 1972, my views made me a liberal; now they make me a conservative. But they are consistent.

It may be hard to persuade ERA revivalists to abandon preferences and approach the issue as I do. But there is one angle they (indeed all of us) might want to consider. Back in 1996, when Proposition 209 passed, there were not a lot of affirmative action programs that overtly discriminated against women. But I do remember one—a California state university nursing program that, in the name of diversity, gave preference to men interested in nursing. Proposition 209 outlawed it. Today, more than a decade later, 56% of all undergraduates are women.[19] That makes them not just a majority, but a significant majority, particularly at the community college level. Consequently, some admissions offices at moderately selective schools are starting to give preferential treatment to men.[20] Yes, we have come a long way.

Harmless? I, at least, am not inclined to think so. This preferential treatment presents a serious problem that could become even more serious as time goes by. Once a few schools indulge in it, others may feel pressure to follow the suit as they vie to achieve what they regard as a desirable gender balance. The competition for scarce men may become fierce in a way that is analogous to the competition for minority students on selective college campuses. Schools that resist engaging in such preferential treatment may find it extremely hard to recruit men and eventually relent. The tiny thumb on the scale could become not-so-tiny.

In the end, the competition will be all for naught, since it only rearranges the men at undergraduate institutions, pairing them with better qualified women. It is not likely to increase their overall numbers in higher education, and hence would have little or no effect on the problem of overall gender imbalance. But after *Grutter v. Bollinger*[21]—which upheld the right of the University of Michigan to give racial preferences for diversity's sake—it is not clear that sex discrimination of this kind is illegal outside California and Michigan.

This raises some interesting questions: Is it possible that feminist organizations will one day regret their support for the University of Michigan in *Grutter*? Is it possible that they will decide to support initiatives like Proposition 209 and Proposal 2? If so, maybe we will see a real ERA.

Endnotes

1 *See* S.J. Res. 10 (introduced Mar. 27, 2007); H.J. Res. 40 (introduced March 27, 2007).

Not everyone agrees that the ERA was "formerly defunct." Those who subscribe to the "Three-State Strategy" take the position that the measure was not dead, but only sleeping. Developed by three University of Richmond law students, this approach requires neither that Congress re-pass the ERA nor that the 35 states that have already ratified the measure re-ratify it. Instead, it holds that Congress may declare the ERA ratified if only three additional states vote to approve it. *See* Allison L. Held, Sharyn L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 Wm. & Mary J. Women & Law 113 (1997).

The logic of the Three-State Strategy depends upon the following propositions being accepted:

(a) Congress's original deadline of March 22, 1979 and its subsequent extensions are all null and void, because, for reasons that are never entirely explained in the article, Congress can only impose a ratification deadline if it inserts it into the actual text of the Constitutional language to be ratified. Putting the deadline into the proposing language has no effect and should be ignored.

(b) Any state that ratified the proposal in part in reliance on the deadline (i.e. the belief the provision would not go into effect without the substantially contemporaneous consensus of 38 states) can nevertheless be held to its ratification.

(c) States may not rescind their ratification, as five states at least purported to do while the ratification process was still underway.

But see Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot*, 459 U.S. 809 (1982) (holding that Congress's original deadline was binding, that subsequent efforts to extend the deadline were unconstitutional, and that a state may rescind its ratification prior to the measure's final approval).

The current effort to pass the ERA by beginning the process from scratch is not entirely a repudiation of the Three-State Strategy. Currently pending in Congress is H.R. 757 (introduced October 18, 2007), which would require the House Representatives to take any action necessary to verify that the ERA is part of the Constitution if three more states ratify it. Representative Carolyn Maloney, the lead House sponsor of the move to re-pass the ERA, is also a co-sponsor of H.R. 757.

2 *New Drive Afoot to Pass Equal Rights Amendment*, Washington Post at A01, March 28, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702357.html.

3 The full text of the amendment would read:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This article shall take effect 2 years after the date of ratification.

4 This is, in fact, the second significant effort to re-pass the ERA in Congress. The first, in 1983, failed to muster the necessary two-thirds vote in the House of Representatives. Interestingly, on this occasion, proposals to amend the measure to exempt women both from the draft and from combat were defeated in the House Committee on the Judiciary based at least in part on arguments that women should be not so exempt.

5 Nebraska, Tennessee, Idaho, Kentucky and South Dakota. The states that never ratified the ERA were Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah and Virginia.

6 *See* Judy Mann, *Obstruction*, Washington Post at B1 (Feb. 19, 1982)("The vote in Virginia [against ratification of the ERA] came after proponents argued on behalf of civil rights for women and opponents trotted out the old canards about homosexual marriages and unisex restrooms ...."); Betty Friedan, *Feminism's Next Step*, New York Times, sec. 6 at 14 (July 5, 1981)("Discussion of [the ERA] bogged down in hysterical claims that the amendment would eliminate privacy in bathrooms, encourage homosexual marriage, put women in the trenches and deprive housewives of their husbands' support."); Patricia Avery & Patrick Oster, *Equal Rights for Women–Doomed?*, U.S. News & World Report at 45 (Apr. 28, 1975) ("What foes of ERA contend were valid arguments and what advocates claim were emotional scare tactics also seemed to sway sentiment among the women against the amendment [in North Carolina]. Opponents, for example, suggested passage of ERA would mean abortion on demand, legalization of homosexual marriages, sex-integrated prisons and reform schools–all claims that were hotly denied by ERA supporters."). *See* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155, 1162 n.23 (2005)(citing above articles); *see also* Betty Friedan, The Second Stage (1981).

7 404 U.S. 71 (1971).

8 411 U.S. 677 (1973).

9 429 U.S. 190 (1976).

10 *See* Goodridge v. Department of Public Health, 798 N.E.2d 941, 970 (Mass. 2003)(Greaney, J., concurring in a 4-3 decision in which Greaney's concurrence was necesssary to achieve a majority). *Also see* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, 1998 WL 88743, at *6 (Alaska Super. Feb. 27, 1998) (superseded by constitutional amendment Alaska Const. art. I, § 25); *In re Marriage Cases*, No. 4365-JCCP (Cal. Super. March 14, 2005), *rev'd* 49 Cal. Rptr. 3d 675 (Cal. App. 2006), review granted 53 Cal. Rptr. 3d 317 (Cal. 2006); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (superseded by constitutional amendment Haw. Const. art. I, § 23).

11 'Mrs. Schlafly's warnings about the military draft and combat have had no opportunity to be tested, but it is worth pointing out that in the absence of an ERA, the power of Congress to require men, but not women, to register for the draft has been challenged. The Supreme Court upheld that power in *Rosker v. Goldberg*, 453 U.S. 57 (1981). Whether the Court would have done so had the ERA been part of the Constitution is, of course, unknown.

12 Brown v. Board of Education, 347 U.S. 483 (1954).

13 42 U.S.C. sec. 2000e-(2)(e)(I) (1981).

14 Cal. Const., art. I, § 31. Washington State's Initiative 200 amended the Revised Code of Washington State in a similar manner in 1998. Rev. Code Wash. Sec. 49.60.400.

15 *Id*. at sec. 31(c).

16 Mich. Const., art. I, § 26.

17 Burt Herman, *Ads Target Women*, AP (Nov. 1, 1996).

18 Perhaps changing the name of the proposal from the "Equal Rights Amendment" to the "Women's Rights Amendment" is intended to convey an intent to invalidate only laws that disadvantage women and not laws that disadvantage men. But such a result will require the courts to ignore both the proposal's text and the way in which it was represented to the public in the 1970s.

19 U.S. Census Bureau Press Release (Dec. 19, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/education/007909.html

20 *See* Richard Whitmire, *The Latest Way to Discriminate Against Women*, Chron. Higher Ed. (July 20, 2007), *available at* http://chronicle.com/cgi-bin/printable.cgi?article=http://chronicle.com/weekly/v53/i46/46b01601.htm. *See also* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001).

21 539 U.S. 306 (2003).

Corporations, Securities & Antitrust

The Rise and (Coming) Fall of "F-Cubed" Securities Litigation

*By George T. Conway, III**

With increasing frequency, the plaintiffs' bar has been filing what are being called "f-cubed" securities fraud cases in U.S. courts: cases on behalf of *f*oreign plaintiffs against *f*oreign companies for trading on *f*oreign exchanges.[1] Dozens of such cases have been filed in the past few years,[2] and they have met with some success. Two of the biggest securities class-action settlements in recent years, in fact, have involved foreign companies and classes that included foreign investors in those companies: Nortel Networks, which paid some $2.2 billion, and Royal Ahold, which settled for $1.1 billion.[3] To be sure, many of the recent f-cubed cases have been dismissed.[4] But enough have survived to make plaintiffs' lawyers' efforts to recruit foreign clients worthwhile.

The f-cubed cases raise many interesting legal questions, but none more interesting, or more important, than the most basic: *Do these cases even belong in American courts?* That is a question of interpretation—of the Securities Exchange Act of 1934, and, in particular, of Section 10(b) of the Securities Exchange Act of 1934,[5] the provision upon which securities class-action plaintiffs typically rely. In interpreting that statute, there is one point on which almost everyone agrees: Congress was silent on whether Section 10(b) may apply abroad.[6] The Supreme Court has never taken an f-cubed securities case, and the federal courts of appeals, in divining meaning from Congress's silence, have produced varying verbal formulas to tell us just when Section 10(b) applies abroad. District judges, for their part, have arrived at different answers in different cases—sometimes different answers in the *same* case—and have made the case law something of a mess. But the right answer, it turns out, is rather simple. Congress, by its very silence, has given it to us—and the Supreme Court has recently told us how.

The Conduct Test and its Inconsistent Application by the Lower Courts

The leading authority on the extraterritorial application of Section 10(b) came from the Second Circuit three decades ago, in an opinion authored by Judge Henry Friendly. The case was *Bersch v. Drexel Firestone, Inc.*,[7] and it involved perhaps the most notorious financial fraud of the 1960s and early 1970s: the IOS scandal. IOS was an overseas mutual-fund company, incorporated in Canada and headquartered in Europe. Its shares were marketed outside the United States throughout the "go-go" bull market of the 1960s. IOS ultimately collapsed, resulting in a slew of civil and criminal proceedings around the globe. The *Bersch* case was a class action brought on behalf of investors who purchased IOS shares in three public offerings. The offerings took place abroad, and the class was virtually entirely foreign. The plaintiffs asserted claims under Section 10(b) and other antifraud provisions of the Securities Exchange Act of 1934 and the Securities Act of 1933, and argued that these provisions of American law applied to the IOS offerings because the IOS offerings were essentially run by investment banks, law firms, and accounting firms in New York.[8]

The plaintiffs had a point. The underwriters, their attorneys, and their accountants met many times in New York to plan one of the offerings; the prospectus for that offering was partly drafted and reviewed in New York; and bank accounts were opened in New York to receive proceeds from the offering.[9] The district court found that "discussions, investigations, decision-making and planning" for the offering "were carried on to a significant extent in the United States by Americans and others, and the acts abroad were substantially supervised from New York."[10] The district court concluded that the federal securities laws applied to the foreign investors' claims because "the[] circumstances viewed *in toto* disclose conduct constituting an essential link in the offering in the United States."[11] In the district court's view, it was enough that the alleged fraud would not have occurred but for the domestic conduct, and it did not matter that "the ultimate representations or inducements" constituting the fraud "do not appear to have occurred in the United States."[12]

The Second Circuit reversed, and held that the foreign plaintiffs could not sue. The court of appeals applied two tests to determine whether the federal securities laws could be applied to foreign securities transactions, tests that today have become known as the "effects" test and the "conduct" test.[13] The "effects" test was derived from an antitrust-law formulation in *United States v. Aluminum Company of America*,[14] and holds that the federal securities laws apply to fraudulent acts committed abroad "when these result in injury to purchasers or sellers ... in whom the United States has an interest, not where acts simply have an adverse affect on the American economy or American investors generally."[15] Injury to investors abroad does not meet the effects test.[16] Even where some Americans suffered losses domestically, as in *Bersch*, foreign investors cannot piggyback on those losses and bring claims for losses suffered abroad.[17]

The Second Circuit nonetheless held that foreign investors could sue under the federal securities laws if there were sufficient domestic conduct involved in a fraud. But instead of the "but for" causational link that the district court had found to be sufficient, the court of appeals held there had to be *direct* causation between the domestic conduct and the alleged fraud for the federal securities laws to apply. "[T]he anti-fraud provisions of the federal securities laws," the Second Circuit held in *Bersch*, "[d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States *directly caused* such losses."[18]

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And by "direct" causation, *Bersch* meant that relevant misrepresentations had to have been made in the United States. "The fraud, if there was one, was committed by placing the allegedly false and misleading prospectus in the purchasers' hands," Judge Friendly wrote.[19] That had occurred abroad, the court concluded, because "[h]ere the final prospectus emanated from a foreign source—London or Brussels … Toronto … and apparently the Bahamas and Geneva." The conduct directly causing a securities fraud, Judge Friendly emphasized, took place "where... the misrepresentations were communicated":

> Not only do we not have the case where all the misrepresentations were communicated in the nation whose law is sought to be applied ... or the case where a substantial part of them were ... but we do not even have the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law. At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad.[20]

As Judge Friendly formulated it, the *Bersch* "conduct" test is easy enough to understand and to apply: if the misrepresentations took place abroad and the purchases took place abroad, a foreign purchaser's claim does not lie under the federal securities laws. It is a clear, bright-line rule. And Judge Robert Bork later wrote for the District of Columbia Circuit in *Zoelsch v. Arthur Andersen & Co.*,[21] the *Bersch* rule was "most restrictive"; Section 10(b) could only be applied to a foreign plaintiff's claim

> where the domestic conduct comprises all of the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5: the fraudulent statements or misrepresentations must originate in the United States, must be made with scienter and in connection with the sale or purchase of securities, and must cause the harm to those who claim to be defrauded, even though the actual damages and reliance may occur elsewhere.[22]

Faithful application of *Bersch*'s conduct test has led to the dismissal of many of the recent f-cubed cases. The typical factual scenario in these cases goes roughly like this: a foreign company, headquartered abroad, with most of its operations abroad and most of its equity trading abroad, nevertheless has some operations in the United States. The company suffers a setback in those American operations and, as a result, its share prices on foreign stock exchanges fall. Foreign plaintiffs, represented by American class-action lawyers, bring suit under Section 10(b) in federal district court, alleging that the foreign company had inflated its share prices on foreign exchanges by making false statements about its American operations. The foreign plaintiffs seek damages under the fraud-on-the-market theory for the losses they suffered when the truth about the American operations was revealed to the market, and they argue that that these losses were "directly" caused by conduct in the United States—namely, the creation in the United States of false information that was passed on to corporate headquarters abroad, and from there passed on to the market.[23]

The courts that have correctly applied *Bersch* have dismissed these claims, on the ground that the alleged misstatements to the market were made abroad. These courts have recognized that "the conduct relevant" to establishing the applicability of the federal securities laws "is the alleged misrepresentations or omissions made, not the underlying acts,"[24] and that "[s]imply making fraudulent statements about what is happening in the United States does not make those statements 'United States conduct' for purpose of the conduct test."[25] In such cases, the domestic conduct "amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad."[26] Where "the alleged activities in the United States were merely the objects of fraudulent representations made abroad,"[27] or the "inflated financial information emanated from the United States,"[28] but the statements made to investors were published abroad, the courts have held that the federal securities do not apply to foreign plaintiffs' claims.[29] These cases, like *Bersch*, apply a clear line: if, to use Judge Friendly's words, "the bullet was fired from places abroad"—if the allegedly fraudulent statements were transmitted from places outside the United States to the foreign investors—then the federal securities laws do not apply.[30]

Still, not all federal courts have adhered to *Bersch*'s version of the conduct test. The circuits have split, for example, over how the conduct test should be expressed. The Fifth, Seventh, and District of Columbia Circuits have followed the Second Circuit's approach.[31] The Third, Eighth, and Ninth Circuits, however, "generally require some lesser quantum of conduct" than the Second Circuit.[32] To the extent that the Third, Eighth, and Ninth Circuits have adopted "a common position, it appears to be that the domestic conduct need be only significant to the fraud rather than a direct cause of it."[33] Nevertheless, it remains unclear how these differences among the circuits would affect the outcome of the current crop of "f-cubed" securities class-action cases; the courts of appeals have yet to face any of these cases,[34] and their opinions on the conduct test have addressed rather different factual contexts—usually individual plaintiffs bringing claims of fraud in face-to-face transactions, and not fraud-on-the-market claims on behalf of a class.[35]

At the district court level, however, there is even greater disarray—even in courts that are bound by *Bersch*. Relying on interpretations of Second Circuit decisions in differing factual contexts after *Bersch*, some district judges seem to have dispensed with *Bersch*'s focus on where allegedly fraudulent communications to shareholders were issued, and instead applied balancing tests that purport to weigh the degree of foreign conduct involved in the case with the amount of domestic conduct upon which the plaintiffs rely.[36]

One major problem with such an approach was well expressed by Judge Bork in *Zoelsch*: it is "counterproductive to adopt a balancing test, or any test that makes jurisdiction turn on a welter of specific facts," because "[a]s we know from our experience in the extraterritorial application of antitrust law, such tests are difficult to apply and are inherently predictable."[37] As a result, they "thus present powerful incentives for increased litigation, which inevitably tends to defeat efforts to protect limited American judicial resources."[38]

The application of a balancing test also subjects foreign corporations to unpredictable and inconsistent legal standards. A French company, for example, should expect that the disclosures it makes in France to French shareholders who buy its shares on the Paris Bourse should be subject to French law,

and that any fraud claims its French shareholders may think they have should be governed by that law as well. But in one recent case in the Southern District of New York, a judge held that a French conglomerate should be subjected to a class action in the United States brought by European shareholders because its most senior executives spent more than a "*de minimis*" amount of time in New York on business.[39]

In another recent case in the same court, a judge likewise allowed European shareholders to sue another French conglomerate in the United States for statements the company made in Europe.[40] In the second case, the basis for the application of Section 10(b) was the fact that false financial data for an American subsidiary was sent to French headquarters and incorporated into the financial reports the company distributed abroad.[41] Echoing the district judge who was reversed in *Bersch* three decades earlier, the court found that Section 10(b) applied because the domestic conduct "served as an essential link" in the alleged fraud.[42]

Empagran and the End of F-Cubed Securities Litigation

This uncertainty in the district courts, however, comes at a time when the answer to the f-cubed question should be *more* certain than ever. The answer comes from two recent Supreme Court decisions rejecting the extraterritorial application of American law. In those decisions, the Supreme Court has emphasized the strength of both "[t]he presumption that United States law governs domestically but does not rule the world,"[43] as well as the "principle of general application ... that courts should 'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'"[44]

The first and most important decision was *F. Hoffmann-La Roche Ltd v. Empagran S.A.* in 2004.[45] The case involved the perfect antitrust-law analog of an f-cubed securities-law case. It was a class action, and the question presented was "[w]hether plaintiffs"—foreign plaintiffs—"may pursue Sherman Act *claims* seeking recovery for injuries sustained in transactions occurring entirely outside U.S. commerce."[46] The foreign plaintiffs in *Empagran* alleged a global vitamin price-fixing conspiracy that took place both in the United States and abroad, and harmed both domestic and foreign purchasers.[47] There was "significant foreign anticompetitive conduct," although "some of the anticompetitive price-fixing conduct alleged here took place in *America.*"[48] Customers who purchased vitamins in the United States were harmed, but the plaintiffs in *Empagran* bought vitamins abroad, and, as a result, suffered harm that was independent of the harm suffered by Americans.[49]

Unlike the plaintiffs in f-cubed securities cases, the foreign antitrust plaintiffs in *Empagran* relied on a statutory provision that expressly authorizes some extraterritorial application. The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") specifically places within the Sherman Act's reach conduct that "has a direct, substantial, and reasonably foreseeable effect" on United States commerce and "such effect gives rise to a [Sherman Act] claim."[50] The foreign plaintiffs argued, and the District of Columbia Circuit agreed, that because the global price-fixing conspiracy had effects on American commerce, and because those effects gave rise to claims of *others*—namely, the Americans who purchased vitamins in the United States—the foreign plaintiffs could sue for the injury they suffered abroad.[51]

The Supreme Court unanimously reversed—and held that the foreign plaintiffs could not sue. Justice Breyer's opinion for the Court did briefly consider the "language and history" of the statute.[52] But that was secondary: the Court looked *first* to, and discussed far more extensively, the rule that courts must "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[53] "This rule of statutory construction," the Court observed, "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws."[54] The rule "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."[55]

The Court went on to hold that, under this rule of statutory construction, the FTAIA had to be construed to apply only when the plaintiffs themselves alleged that they suffered injury in the United States. The Court noted that when "*domestic* ... injury" is involved, "application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable" even if it "interfere[s] with a foreign nation's ability independently to regulate its own commercial affairs."[56] But that is not true, the Court held, when the injury is foreign. When foreign harm is involved, the Court held, "the justification for that interference seems insubstantial."[57] Justice Breyer's opinion for the Court pointedly asked:

> But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*...
>
> Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?[58]

The Court held that there was "no good answer" to these questions—"no convincing justification for the extension of the Sherman Act's scope" to redress foreign harm.[59]

Justice Breyer emphasized, moreover, that it was the mere "*risk* of interference with a foreign nation's ability independently to regulate its own commercial affairs"—not proof of *actual* interference—that controlled the interpretation of the statute.[60] The idea that courts should weigh "comity considerations case by case" was "too complex to prove workable."[61] In the Court's view, what mattered was that other nations could disagree about what conduct should be illegal, and "even where [they] agree" on that, they could "disagree dramatically about appropriate remedies."[62] All of this created a risk, for example, that "to apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic ... laws embody."[63]

The Court accordingly concluded that Congress could not be presumed to have imposed American economic policies upon other nations "in an act of legal imperialism, through legislative fiat":

> Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. *But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat*.[64]

The Supreme Court dealt with the extraterritoriality of United States law once again last year in *Microsoft Corp. v. AT&T Corp.*, a patent case.[65] There AT&T alleged that Microsoft, through the worldwide licensing of its Windows operating system, had induced the infringement of an AT&T patent for digitally encoding and compressing speech.[66] Microsoft conceded that it was liable domestically—that it had induced the infringement of the AT&T patent to the extent that it had licensed Windows to United States manufacturers of personal computers.[67] The Supreme Court faced the question of whether Microsoft could be held liable for licensing Windows abroad to foreign manufacturers. The controlling provision of the patent law, like the antitrust statute at issue in *Empagran*, expressly provided for extraterritorial liability. It provided that anyone who "supplied in or from the United States all or a substantial portion of the components of a patented invention," and "actively induce[d] the combination of such components outside of the United States," would be "liable as an infringer" if the combination would have "infringe[d] the patent [had it] occurred within the United States."[68]

The Court had to decide whether Windows, in the form in which Microsoft transmitted it abroad, was a "component of a patented invention" within the meaning of this provision.[69] Microsoft argued that the word should be read narrowly, and contended that the "master disks" it shipped abroad could not be a "component" because the disks could not themselves be used in a personal computer. AT&T, in contrast, argued that the master disks were properly treated as a "component" because Windows could be so easily transferred from the master disk format to a medium readable by a personal computer.[70] The Supreme Court ruled in favor of Microsoft, and held that Windows did not become a "component" until it was converted into a form readable by a personal computer, and, accordingly, that no "component of a patented invention" had been "supplied in or from the United States" under the statute.[71]

As in *Empagran*, the Court emphasized the importance of the presumption against extraterritoriality. Justice Ginsburg's opinion for a seven-Justice majority emphasized, among other points, that "United States law ... does not rule the world," that "'[f]oreign conduct is [generally] the domain of foreign law,'" and that foreign law "'may embody different policy judgments'" than those made by Congress.[72] In particular, the Court rejected AT&T's argument that the presumption did not apply because the statute specifically provided for extraterritorial application. The presumption "remains instructive in determining the *extent* of the statutory exception."[73] The Court also rejected AT&T's argument that the presumption did not apply because the statute at issue only applied "to domestic conduct, *i.e.*, to the supply of a patented invention's components 'from the United States.'"[74] The Court observed that AT&T's reading of the law would have had a significant—and impermissible—extraterritorial effect: it would have "'convert[ed] a single act of supply from the United States into a springboard for liability each time a copy of the software is subsequently made [abroad] and combined with computer hardware [abroad] for sale [abroad].'"[75]

Empagran and *Microsoft* sound the death knell for f-cubed securities actions. Indeed, the federal securities laws actually provide a *weaker* basis for extraterritorial application than the antitrust and patent laws at issue in those cases. The Securities Exchange Act contains no relevant provision *at all* that addresses liability for foreign conduct, let alone one that expressly provides, as did the statutes in *Empagran* and *Microsoft*, that such conduct may in some cases be subjected to American law.[76] Indeed, the provision upon which f-cubed and domestic securities plaintiffs most often rely—Section 10(b) of the Securities Exchange Act[77]—does not, by its terms, provide for any right of action at all. There is no textual or historical evidence that Congress even contemplated that *domestic* conduct could trigger a private suit under Section 10(b). As the Supreme Court emphasized once again this Term, "[t]he § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes."[78] Nothing in Section 10(b) in particular, or in the securities laws generally, suggests that Congress sought to provide redress for foreign plaintiffs who suffer foreign harm from foreign conduct, and under *Empagran* and *Microsoft* such congressional silence means that United States law must be construed not to apply.

F-cubed securities litigation poses exactly the sort of impermissible risks to international comity the Supreme Court described at length in *Empagran*. It poses the risk, in particular, of "unjustifiably permit[ting]" foreign plaintiffs "to bypass their [home countries'] own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic ... laws embody."[79] There are very many such competing considerations that go into designing a private securities enforcement system. A nation could even decide not to have such a system at all, and instead rely solely on enforcement by public authorities, or perhaps by exchanges or self-regulatory organizations.

If a nation chooses to allow actions by private investors, it must make a profusion of decisions about how that system will work, substantively and procedurally. It would have to decide, for example, whether to allow American-style opt-out class actions; what level of scienter to require; what standard of materiality to apply; whether to require plaintiffs to prove individual reliance, or to adopt a fraud-on-the-market theory as a substitute for actual reliance; whether to impose liability on corporate issuers for secondary trading in which the issuer was not a party; what standards of causation to apply; how to measure damages; whether, and to what extent, to allow contribution and indemnity; whether to allow discovery, and, if so, how much; what limitations periods to apply, if any; whether to apply the English rule or the American rule on attorneys' fees, or neither rule; and whether to use judges, juries, or specialized arbitrators to decide facts.

American judges and lawmakers have struggled with questions like these for years, and today, foreign nations are

increasingly addressing them as well.[80] *Empagran* and *Microsoft* teach that foreign nations should be allowed to reach their own conclusions, and should be allowed to apply those conclusions to the claims of people who suffer harm on their soil—and should not have their laws supplanted by American law "in an act of legal imperialism."[81] To paraphrase one of Justice Breyer's rhetorical questions in *Empagran*: *Why should American law supplant a foreign country's own determination about how best to protect its investors from fraudulent conduct engaged in significant part by its own companies?*[82]

The answer, as in *Empagran*, is that there is "no good answer to the question."[83]

Endnotes

1 *See*, *e.g.*, Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, Wall St. J., Sept. 2, 2005, at A1, *available at* http://tinyurl.com/2gky39 (subscription required); Andrew Longstreth, *Coming to America*, Am. Law., Nov. 1, 2006, *available at* http://tinyurl.com/2kd3my (subscription required).

2 *See* PriceWaterhouseCoopers, 2006 Securities Litigation Study 58-59 (noting number of cases brought against foreign issuers, without regard to whether the plaintiffs are domestic or foreign), *available at* http://tinyurl.com/397ep3.

3 *Id.* at 63; *see also* Longstreth, *supra* note 1.

4 *E.g.*, *In re* Royal Dutch/Shell Transport Sec. Litig., Civ. No. 04-374 (JAP), 2007 WL 3406599, at *11 (D.N.J. Nov. 13, 2007); *In re* Rhodia S.A. Sec. Litig., No. 05 Civ. 5389 (DAB), 2007 WL 2826651, at *12 (S.D.N.Y. Sept. 26, 2007); *In re* National Australia Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006), *modified on other grounds*, 2006 WL 3844463 (S.D.N.Y. Nov. 8, 2006), *appeal docketed sub nom.* Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. Feb. 16, 2007); *In re* Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243 (WHP), 2006 WL 3026024, at *11-*12 (S.D.N.Y. Oct 25, 2006); Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 374 (D. Del. 2006); *In re* Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 115 (S.D.N.Y. 2005); Froese v. Staff, No. 02 Civ. 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003); Tri-Star Farms Ltd. v. Marconi, PLC, 225 F. Supp. 2d 567, 581 (W.D. Pa. 2002).

5 15 U.S.C. § 78j(b).

6 According to the Second Circuit, for example, "[t]he Securities Exchange Act is silent as to its extraterritorial application," Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991), so courts must use their "best judgment as to what Congress would have wished if these problems had occurred to it," Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), and, in particular, must decide "whether Congress would have wished the precious resources of the United States courts" to be devoted to extraterritorial acts, *id.* at 985.

7 519 F.2d 974 (2d Cir. 1975).

8 *See, e.g.*, *id.* at 978-84.

9 *Id.* at 985 n.24.

10 Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446, 457 (S.D.N.Y. 1974), *rev'd*, 519 F.2d 974 (2d Cir. 1975).

11 *Id.*

12 *Id.*

13 *See*, *e.g.*, United States v. Berger, 322 F.3d 187, 192 (2d Cir. 2003).

14 148 F.2d 416 (1945).

15 *Bersch*, 519 F.2d at 989.

16 *See*, *e.g.*, Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 128 & n.12 (2d Cir. 1998).

17 *E.g.*, *Bersch*, 519 F.2d at 997 ("direct[ing] that the district court eliminate from the class action all purchasers other than persons who were residents or citizens of the United States"). Applying *Bersch*, courts have consistently held that foreign plaintiffs who purchased securities abroad may not "bootstrap their losses... to independent American losses," *Tri-Star Farms*, 225 F. Supp. 2d 567, 573 n.7 (W.D. Pa. 2002)—meaning that the existence of claims of holders of securities of a foreign company traded on American exchanges (such as American Depositary Receipts) does not support the application of the securities laws to claims of those who purchased the company's securities on exchanges abroad, *see*, *e.g.*, *In re* Rhodia S.A. Sec. Litig., No. 05 Civ. 5389 (DAB), 2007 WL 2826651, at *8 (S.D.N.Y. Sept. 26, 2007); *In re* National Australia Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *2 n.6, *4 (S.D.N.Y. Oct. 25, 2006), *modified on other grounds*, 2006 WL 3844463 (S.D.N.Y. Nov. 8, 2006), *appeal docketed sub nom.* Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. filed Feb. 16, 2007); *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 370 (S.D.N.Y. 2005); *In re* Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243 (WHP), 2006 WL 3026024, at *2, *11-*12 (S.D.N.Y. Oct 25, 2006); *In re* Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 110, 114-15 (S.D.N.Y. 2005); *In re* Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 9 & n.11, 11 (D.D.C. 2000); McNamara v. Bre-X Minerals Ltd., 32 F. Supp. 2d 920, 922, 924 (E.D. Tex. 1999); Kaufman v. Campeau Corp., 744 F. Supp. 808, 810 (S.D. Ohio 1990).

18 *Bersch*, 519 F.2d at 993 (emphasis added).

19 *Id.* at 987.

20 *Id.*

21 824 F.2d 27 (D.C. Cir. 1987).

22 *Id.* at 31.

23 *See, e.g.*, *In re* Rhodia S.A. Sec. Litig., No. 05 Civ. 5389 (DAB), 2007 WL 2826651, at *10-*11 (S.D.N.Y. Sept. 26, 2007); *In re* National Australia Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *5, *7 (S.D.N.Y. Oct. 25, 2006), *modified on other grounds*, 2006 WL 3844463 (S.D.N.Y. Nov. 8, 2006), *appeal docketed sub nom.* Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. Feb. 16, 2007); Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 367-68, 371 (D. Del. 2006); *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 364-65 (S.D.N.Y. 2005); *In re* Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 107-09, 111 (S.D.N.Y. 2005); Froese v. Staff, No. 02 Civ. 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003); *Tri-Star Farms*, 225 F. Supp. 2d 567, 578 & n.12 (W.D. Pa. 2002); *In re* Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 10 n.14 (D.D.C. 2000).

24 *Bayer*, 423 F. Supp. 2d at 111.

25 *In re* Bayer AG Sec. Litig., No. 03 Civ. 1546 (WHP), 2004 WL 2190357, at *17 (S.D.N.Y. Sept. 30, 2004) (quoting *Tri-Star*, 225 F. Supp. 2d at 578).

26 *National Australia Bank*, 2006 WL 3844465, at *8; *accord*, *e.g.*, *Rhodia*, 2007 WL 2826651, at *10.

27 *Rhodia*, 2007 WL 2826651, at *10.

28 *Froese*, 2003 WL 21523979, at *2.

29 *See*, *e.g.*, *Rhodia*, 2007 WL 2826651, at *10-*12; *National Australia Bank*, 2006 WL 3844465, at *6-*8; Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 368-74 (D. Del. 2006); *Bayer*, 423 F. Supp. 2d at 110-15; Froese v. Staff, No. 02 Civ. 5744 (RO), 2003 WL 21523979, at *2 (S.D.N.Y. July 7, 2003); *Tri-Star Farms*, 225 F. Supp. 2d 567, 576-81 (W.D. Pa. 2002); *In re* Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 9-11 (D.D.C. 2000).

30 *See, e.g.*, *Rhodia*, 2007 WL 2826651, at *10 (quoting *Bersch*, 519 F.2d 974, 987 (2d Cir. 1975)); *National Australia Bank*, 2006 WL 3844465, at *6 (same).

31 *See, e.g.*, Robinson v. TCI/US West Cable Communications Inc., 117 F.3d 900, 906 (5th Cir. 1997) (expressly "adopt[ing] the Second Circuit's test"); Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 666 (7th Cir. 1998) (applying *Bersch* to private civil RICO claims); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31-32 (D.C. Cir. 1987) ("defer[ring] to *Bersch*" and adopting its "restrictive test").

32 *Robinson*, 117 F.3d at 906; *see* SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 420-21 (8th Cir. 1979); Travis v. Anthes Imperial, Ltd., 473 F.2d 515, 524 (8th Cir. 1973); Butte Mining PLC v. Smith, 76 F.3d 287, 290-91 (9th Cir. 1996); and Grunenthal GmbH v. Hotz, 712 F.2d 421, 424-25 (9th Cir. 1983).

33 *Id.* at 906 & n.11.

34 An appeal is currently pending in the Second Circuit in *National Australia Bank*, a case in which the author represents the lead defendants. *National Australia Bank*, *supra*, 2006 WL 3844465, *appeal docketed sub nom.* Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. Feb. 16, 2007). Links to some of the briefs on that appeal, including three briefs of *amici curiae* urging affirmance, may be found at http://tinyurl.com/ystuyq.

35 Of the securities cases cited in notes 31-32 *supra*, only *Zoelsch* appears to have been a class action, but the case does not appear to have involved a fraud-on-the-market claim. *See Zoelsch*, 824 F.2d at 28-29. *Bersch v. Drexel Firestone*, as noted above, was a class action, but likewise did not involve a fraud-on-the-market claim, but rather a claim of fraud in initial public offering prospectuses. *See Bersch*, 519 F.2d at 978-81.

It is not clear that the standards adopted in the Third, Eighth, and Ninth Circuits would lead to different outcomes than would result under *Bersch*, as illustrated by recent dismissals of f-cubed claims by district judges in the Third Circuit. *See In re* Royal Dutch/Shell Transport Sec. Litig., Civ. No. 04-374 (JAP), 2007 WL 3406599, at *8-*11 (D.N.J. Nov. 13, 2007); Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 370-74 (D. Del. 2006); *Tri-Star Farms*, 225 F. Supp. 2d 567, 572-81 (W.D. Pa. 2002). There do not appear to have been any recent district court opinions applying the conduct test in the Eighth or Ninth Circuits.

36 *See*, *e.g.*, *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 375-76 (S.D.N.Y. 2005) (applying a fact-sensitive six-element test that "form[]s a constellation of factors that must be considered," and rejecting "notion that a... cohesive doctrine" may be applied); *In re* Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571 (RJH), 2004 WL 2375830, at *6 (holding that "the location from where the allegedly false statements emanated, while important, has not been the only factor courts considered" in applying the conduct test); *In re* Royal Ahold N.V. Secs. & ERISA Litig., 351 F. Supp. 2d 334, 359 (D. Md 2004) (holding that "the decisive factor" under the conduct test may be "whether the relevant fraudulent conduct underlying the false or misleading statements took place in the United States, regardless of the fact that the false or misleading statements relied upon were issued in overseas prospectuses or press releases"); *In re* Nortel Networks Corp. Sec. Litig., No. 01 Civ. 1855 (RMB), 2003 WL 22077464, at *8 (S.D.N.Y. Sept. 8, 2003) (holding that "degree of economic activity connecting [defendant] to the United States" supports application of federal securities laws; internal quotation marks and citation omitted).

37 *Zoelsch*, 824 F.2d at 32 n.2.

38 *Id.*

39 *Vivendi Universal*, 2004 WL 2375830, at *7 (holding also that "[t]he United States has a strong interest in imposing its law over the conduct of corporate officers operating out of the United States... even if the officers were only operating out of the United States for part of the alleged class period and even if the officers spent approximately half their time carrying on their official functions from a non-U.S. office"); *see also In re* Vivendi Universal, S.A. Sec. Litig., 241 F.R.D. 213, 246 (S.D.N.Y. 2007) (certifying class that includes purchasers from France, England, and the Netherlands).

40 *Alstom*, 406 F. Supp. 2d at 397.

41 *Id.* at 396.

42 *Compare id.* ("the domestically-based conduct certainly served as an essential link in the causal chain leading to the losses suffered by foreign purchasers abroad") *with* Bersch v. Drexel Firestone, Inc., 389 F. Supp. 446, 457 (S.D.N.Y. 1974) ("these circumstances viewed *in toto* disclose conduct constituting an essential link in the offering in the United States"), *rev'd*, 519 F.2d 974 (2d Cir. 1975). Needless to say, *Alstom*'s holding directly conflicts with the holdings in the cases cited *supra* in notes 24-30.

43 Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746, 1758 (2007).

44 *Id.* (quoting F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004)).

45 542 U.S. 155 (2004).

46 Petition for a Writ of Certiorari at i, *Empagran*, 542 U.S. 155 (No. 03-724), 2003 WL 22762741; *see also Empagran,* 542 U.S. at 158 (describing issue as whether foreign plaintiffs could recover damages caused by "anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury").

47 *Empagran*, 542 U.S. at 159.

48 *Id.* at 159, 165.

49 *See id.* at 164, 175.

50 15 U.S.C. §§ 6a(1), (2); *see Empagran*, 542 U.S. at 162.

51 Empagran S.A. v. F. Hoffman-La Roche Ltd., 315 F.3d 338, 340, 347-48, 355-60 (D.C. Cir. 2003), *rev'd*, 542 U.S. 155 (2004).

52 *Empagran*, 542 U.S. at 169.

53 *Id.* at 164.

54 *Id.*

55 *Id.* at 164-65.

56 *Id.* at 165.

57 *Id.*

58 *Id.*; *accord id.* at 166 (repeating first question).

59 *Id.* at 166, 167 (emphasis added).

60 *Id.* at 165 (emphasis added).

61 *Id.* at 168.

62 *Id.* at 167.

63 *Id.*

64 *Id.* at 169 (emphasis added).

65 127 S. Ct. 1746 (2007).

66 *Id.* at 1753.

67 *Id.*

68 *Id.* at 1752 (quoting 35 U.S.C. § 271(f)(1)).

69 *Id.* at 1753-54.

70 *Id.* at 1754-56.

71 *Id.* at 1755-57.

72 *Id.* at 1758 (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioner at 28, *Microsoft*, 127 S. Ct. 1746 (No. 05-1056), 2006 WL 3693464).

73 *Id.*

74 *Id.* (quoting 35 U.S.C. § 271(f)(1)).

75 *Id.* at 1758-59 (quoting Brief for the United States as *Amicus Curiae*, *supra* n.72, at 29).

76 *See supra* note 6. Indeed, there is actually legislative history that cuts directly *against* the extraterritorial application of the federal securities laws. *See generally* Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677 (1990).

77 15 U.S.C. § 78j(b).

78 Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 772 (2008); *see also*, *e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975) (both text of statute and legislative history fail to "provide *any* indication that Congress considered the problem of private suits" under Section 10(b)).

79 F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 167 (2004).

80 *See generally*, *e.g.*, Michael Goldhaber, *"Shell Model" Opens Door to European Class Actions*, Am. Law., Jan. 7, 2008 (discussing the Netherlands), *available at* http://tinyurl.com/34mkhh; Alexia Garamfalvi, *U.S. Firms Prepare for European Class Actions*, Legal Times, Jun. 25, 2007 (discussing Europe generally), *available at* http://tinyurl.com/344co4; Ashurst LLP, The Availability of "Class Actions" in Europe (Dec. 2007) (discussing the United Kingdom, France, Italy, Spain, Sweden, Germany, and the Netherlands); Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the* Acquis Communautaire, 15 J. Transnat'l L. & Pol'y 281 (2006) (discussing the European Union, Sweden, the Netherlands, France, and Germany); Ted Allen, More Nations Open the Door to Securities Lawsuits (Mar. 7, 2006) (discussing Australia, Canada, Germany, Israel, Italy,

South Korea, and Sweden), *available at* http://tinyurl.com/3xyaza; Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, 30 Melb. U. L. Rev. 399 (2006); Michael Duffy, *"Fraud on the Market": Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 Melb. U. L. Rev. 621 (2005); Ted Allen, Interest in Class Actions Grows Outside the U.S. (June 14, 2005) (discussing Australia, Canada, the United Kingdom, France, the Netherlands, Germany, and the European Union), *available at* http://tinyurl.com/2m9s2b; Jason Betts, The Rise of Shareholder Class Actions in Australia (Apr. 21, 2005), *available at* http://tinyurl.com/3dtc5c; Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 Common L. World Rev. 123 (2002) (discussing Australia); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DePaul L. Rev. 401 (2002) (discussing Germany, Sweden, the United Kingdom, Australia, and Canada); S. Stuart Clark and Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 Duke J. Comp. & Int'l L. 289 (2001).

81 *Empagran*, 542 U.S. at 169.

82 *Cf. id.* at 165.

83 *Id.* at 166.

Criminal Law and Procedure

The Food-Chain Issue for Corporate Punishment: What Criminal Law and Punitive Damages Can Learn from Each Other

*By Christopher R. Green**

At the end of this month, the Supreme Court will hear arguments in *Exxon v. Baker* concerning a $2.5 billion punitive award against Exxon for the 1989 Exxon Valdez oil spill. The first question asks when, under federal admiralty law, a corporation may be punished for the actions of its agents. The Ninth Circuit affirmed liability for punitive damages under circuit precedent, following the Restatements of Torts and Agency, allowing corporate punitive damages if a misbehaving agent is "employed in a managerial capacity and acting in the scope of employment." [1] *Exxon v. Baker* presents the Supreme Court with the food-chain question for corporate punishment: how high in the corporate hierarchy must misbehavior go before the corporation itself may be punished? Every American jurisdiction allows corporations to be punished with criminal liability and with some form of punitive damages.[2] In both criminal law and the law of punitive damages, there is persistent division about the food-chain question. However, the fields develop with virtually no contact from one to the other, and the rules states adopt in each field have no correlation with the rules they adopt in the other.

The Food-Chain Issue in Corporate Punitive Damages

While Exxon argues in *Baker* that the Restatement rule for corporate punitive damages allows them too liberally, the Restatement actually adopts a comparatively restrictive approach. Many states allow corporate punitive damages if *any* employee misbehaves in the scope of employment, whether a manager or not. Disagreement between a Liberal Rule (allowing punishment for the actions of *any* employee in the scope of employment) and the Restrictive Rule (allowing punishment only for the actions of higher-level employees in the scope of employment) has persisted as long as the issue has been considered. For instance, in 1869, Maine's *Goddard* case adopted a Liberal Rule for corporate punitive damages. "All attempts… to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense." [3] However, Shearman and Redfield's treatise on negligence, published the same year, held that only the misbehavior of "superintending agents" could warrant corporate punishment. They wrote,

> In general, it may be said that exemplary damages cannot be allowed against a master for the negligence of his servants, however gross, if he is personally free from fault, and has maintained personal supervision over them. But this rule is not applicable, without qualification, to the case of a corporation or association having no power to act except through agents. In such cases, the negligence of a superintending agent must be deemed the negligence of the association itself.[4]

Disagreement persisted in 1893. That year, the Supreme Court, making pre-*Erie* general federal common law in the *Lake Shore* case, followed Shearman and Redfield's Restrictive Rule, holding that corporate punitive damages would be possible, but only if a sufficiently important employee misbehaved: "No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation."[5] This standard required more than the criminal intent of a minor employee. However, writing in evident response to *Lake Shore* later in the year, the Alabama Supreme Court maintained its Liberal Rule in the *Mobile* case. The court considered and rejected "the view taken by some courts of marked ability, namely, that, while corporations cannot be mulcted in punitive damages for the willfulness of such inferior employees as trainmen, they are responsible in such damages for the willful misconduct of such general executive officers as their presidents, general managers, etc."[6] The court explained why it thought all employees are created equal for the purposes of corporate scienter: "It can no more be said that the corporation has impliedly authorized or sanctioned the willful wrong of its president, in the accomplishment of some end within his authority, than that a similar wrong by a brakeman, to an authorized end, is the wrong of the corporate entity."[7]

One way to think of the dispute between the Liberal Rule and the Restrictive Rule is that it is a dispute over whether to recognize a defense of temporary insanity for corporations. Insane people are not punished,[8] but they must still pay compensatory damages.[9] The Liberal Rule, however, would punish a corporation for any actions of employees in the scope of employment—that is, whenever a corporation would be liable for compensatory damages. A Restrictive Rule, however, recognizes that it is improper to punish a corporation temporarily not in full control over a rogue low-level employee—a "temporarily insane" corporation, as it were.

A survey of current law in American jurisdictions (I include the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and federal law, for a total of fifty-five jurisdictions) reveals eighteen states that follow Liberal Rules for corporate punitive damages,[10] plus another three jurisdictions that allow corporate punitive damages without indicating the existence of a food-chain limit.[11] Twenty-three states, plus federal law under Title VII, have Restrictive Rules like that in the Restatement.[12]

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The Restatement itself leaves unsettled exactly who counts as a "managerial" employee.[13] Taken literally, the term suggests that managers are supervisors—that is, those who manage or supervise subordinates. An employee might, however, make very important decisions, like budgetary amounts, without directly supervising anyone. Congress, for instance, makes tremendously important decisions about the federal government without directly supervising members of the executive branch. Six Restatement-style jurisdictions define "managers" as policymakers, but most states lack any clear definition.[14]

Eight more states, plus five jurisdictions that also follow the Restatement, have rules that on their face forbid punishment of a principal unless the principal authorizes or ratifies misconduct by an agent.[15] The basic idea originated in Justice Story's 1818 admiralty opinion in *The Amiable Nancy*,[16] and was repeated in *Lake Shore* in 1893. However, it is not always clear how these rules would apply to a corporation. Because corporations only act through agents, a strict requirement of authorization or ratification would bar corporate punishment altogether. If a low-level employee misbehaves, and a mid-level employee authorizes or ratifies that misconduct, the corporation can still claim that it should escape punishment, because the corporation *itself* never authorized or ratified the mid-level-employee's misconduct. Indeed, as *Mobile* points out, the corporation could say the same even of the very highest-level employees' actions. I call this "the 5R Problem," for Restrictive Rule Ratification Requirement Regress. Because corporate *action* is always vicarious, corporate punitive liability is always vicarious as well; an uncompromising ban on vicarious punishment will therefore ban all corporate punishment. Shearman and Redman noted this fact in explaining their Restrictive Rule in 1869, and other courts and commentators have done likewise.[17] Rules that on their face ban all vicarious punishment must either forbid corporate punishment altogether or be relaxed when applied to corporations. *Lake Shore* takes the latter course. Its discussion begins by appearing to require ratification universally: "A principal … cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent."[18] *Lake Shore* makes clear, however, as quoted above, that corporate punitive damages are *not* eliminated altogether, provided that *scienter* is "brought home" to the corporation via a sufficiently-important employee. Other jurisdictions also make clear that corporate punitive damages are still available, even in the face of a no-vicarious-punitive-liability rule.[19]

Some courts have fashioned Restrictive Rules for corporate punitive damages that emphasize corporate policy or corporate culture, rather than the precise status of misbehaving employees. On the one hand, the Restatement allows corporate punishment only if a managerial employee misbehaved in the scope of employment, barring corporate punishment even if the behavior of the low-level employee was consonant with the corporation's implicit and informal customs, policies, practices, and culture. On the other hand, the Restatement allows corporate punishment for the actions of managerial employees, even when those managers violate corporate policy. The actions of managers, rather than corporate policy as such, determine whether corporate punitive damages are available. Three jurisdictions have incorporated corporate policy into their Restrictive Rules. The Supreme Court in its 1999 Title VII food-chain case, *Kolstad*, began with the Restatement rule, but added a good-faith defense.[20] A corporate defendant can escape punitive damages under Title VII be showing *either* (a) that the misbehaving employee was not "managerial," *or* that (b) even a managerial employee's actions were contrary to a good-faith corporate policy to comply with Title VII. Two jurisdictions have corporate punitive damages rules that, in essence, adopt only *Kolstad*'s second element, allowing even low-level employees' misbehavior to support corporate punishment, but providing a defense if employees' actions are contrary to general corporate policies to abide by the law.[21]

The Food-Chain Issue in Corporate Criminal Liability

Turning to criminal law, we find a very similar menu of possible approaches. We have a Liberal Rule, allowing corporate punishment for any employees' misbehavior in the scope of employment, and a variety of forms of Restrictive Rule, allowing corporate punishment only when a relatively high-level employee misbehaves. A Liberal Rule for corporate crime, following the same scope-of-employment rule that governs compensatory damages, and which the *Goddard-Mobile* tradition adopts for corporate punitive damages, was approved for federal law in *New York Central & Hudson* in 1909, and has been reiterated many times since then.[22] Eighteen states follow the same rule,[23] and another eleven jurisdictions allow corporate criminal liability without suggesting a food-chain limit.[24]

The federal Liberal Rule is tempered by two acknowledgements of the food-chain issue outside federal criminal law proper. First, chapter 8 of the Federal Sentencing Guidelines includes complicated rules that decrease corporate sentences if only low-level employees are involved, or if the crime occurs in spite of a corporate compliance program.[25] Second, near-identical Department of Justice memoranda issued by Deputy Attorneys General Eric Holder in 1999, Larry Thompson in 2003, and Paul McNulty in 2006 suggest that a generally law-abiding corporate culture, effective programs of corporate law-compliance, law-abiding history, and effective repudiation of employee misconduct all counsel against indicting a corporation.[26]

Unlike punitive damages, there is not a long tradition of states adopting food-chain limits on corporate criminal liability. However, the Model Penal Code's Restrictive Rule, adopted in 1962, has been influential. For major crimes, the MPC allows corporate punishment only for the actions of "high managerial agents," which it defines as policymakers.[27] Twenty-four states follow MPC-style rules,[28] seven defining the key term as policymakers,[29] eleven as including both policymakers and supervisors,[30] one as just supervisors,[31] and five lacking a definition.[32]

As in punitive damages, three jurisdictions have Restrictive Rules for corporate crime that incorporate corporate policy. One state follows a *Kolstad*-like rule, layering a due-diligence defense with a restriction to the acts of high managerial agents,[33] while two states allow a corporation to avoid punishment if an employee's action is contrary to corporate policy.[34]

Reasons for Corporate Crime and Corporate Punitive Damages to Follow the Same Rule

The most striking thing about the two rosters of jurisdictions is that there is no correlation between the food-chain rules states adopt for corporate crime and the food-chain rules they adopt for corporate punitive damages. Counting jurisdictions that allow corporate punishment without acknowledging a food-chain limit as following a Liberal Rule, I count eleven Consistently Liberal jurisdictions allowing either corporate criminal liability or corporate punitive damages for the acts of low-level employees,[35] sixteen Consistently Restrictive jurisdictions that impose food-chain limits on either form of corporate punishment,[36] eighteen "Federal Schizophrenia" jurisdictions imposing food-chain limits only on corporate punitive damages,[37] and ten "Pennsylvania Schizophrenia" jurisdictions imposing food-chain limits only on corporate criminal liability.[38] Slightly more American jurisdictions—twenty-eight to twenty-seven—take different sides of the food-chain issue in the two fields.

There are several good reasons for the law of corporate punitive damages and corporate criminal liability to follow the same rules—that is, for thinking that Federal Schizophrenia and Pennsylvania Schizophrenia really are pathological. First, the two areas of law pursue the same two goals: retribution and deterrence. This fact has undergirded analogies between the two areas before.[39] Second, a survey of the cases discussing the rationales for either a Liberal Rule or a Restrictive Rule reveals a consistent repetition of the same four arguments related to retribution and deterrence. Proponents of the Restrictive Rule claim that vicarious punishment is inherently unjust and that one cannot deter actions of one person by imposing punishment on a second person. Proponents of a Liberal Rule claim that corporations only act through agents and that corporations will only have the proper incentive to prevent low-level-employees' misbehavior if they feel a punitive sting whenever that misconduct occurs. All four of these arguments apply just as well in either criminal law or punitive damages. Third, the two fields feature similar mens rea and scienter requirements.[40] Because the food-chain issue in corporate punishment is essentially the problem of assessing corporate mental states, such similarity of guilty-mental-state requirements in the two fields should dictate similar resolution of the food-chain issue. Fourth, the decision between a Liberal Rule and a Restrictive Rule amounts to a decision about the extent of the corporate duty to stop low-level employees' misbehavior, simply by virtue of being a corporation. Given that criminal law and punitive damages both seek to enforce essentially the same duties to prevent anti-social conduct, there is no reason to enforce the corporate duty to stop low-level employee misconduct with only one form of punishment or the other. Fifth, ordinary, non-legal decisions about whether or not to blame an organization will also frequently raise food-chain issues: the more important a misbehaving employee is, the more likely that ordinary citizens will regard the organization itself as (pre-legally) blameworthy. If the law should mete out punishment based on ordinary citizens' pre-legal notions of blameworthiness, then both fields should resolve the food-chain issue the same way.

Jurisdictions suffering either Federal or Pennsylvania Schizophrenia should, therefore, attend to the unjustified difference in approaches in the two fields. Likewise, states adopting Restrictive Rules for both corporate punitive damages and corporate criminal liability should adopt the same rule in both fields. Assuming that the MPC's "high managerial" is more selective than the Restatement's "managerial," the two ALI approaches represent Pennsylvania Schizophrenia writ small—imposing Restrictive Rules in both fields, but a more restrictive one for corporate criminal liability than for corporate punitive damages. Of the sixteen Consistently Restrictive jurisdictions, only two adopt the same rule in both fields,[41] while three states have looser rules for corporate criminal liability—Federal Schizophrenia writ small.[42]

Lessons

I draw the general lesson that courts and commentators should devote more attention to the mismatch between corporate criminal liability and corporate punitive damages. Courts and legislators should not adopt a rule in one field without considering whether it makes sense in light of a contrary rule in the other. But there are three more particular lessons.

First, a lesson for corporate criminal liability from corporate punitive damages: *Where there is pressure for the full enforcement of a Liberal Rule, its shortcomings are more readily apparent.* Of the four possible approaches for corporate punishment, the most common is Federal Schizophrenia, allowing corporate criminal liability liberally but corporate punitive damages restrictively. While the difference is not enormous, the rules for corporate punitive damages are generally more restrictive than the rules for corporate crime.

One explanation for this difference, though not a justification, is that the criminal law is never fully enforced. As William Stuntz explains, because prosecutors need not prosecute every case that falls under statutory definitions of crime, lawmakers feel free to legislate broadly, worrying far more about negative errors (the possibility that serious misbehavior will improperly *fail* to be criminalized) than positive errors (the possibility that relatively minor misbehavior will be improperly over-criminalized).[43] In the food-chain context, legislators can leave the Liberal Rule in place, counting on politically accountable prosecutors to pick out the corporations that truly deserve punishment (for instance, by following the criteria of the Holder-Thomson-McNulty memoranda). Unelected plaintiffs, however, will reliably enforce a Liberal Rule for corporate punitive damages to the full, so there will always be more pressure to adopt a Restrictive Rule for corporate punitive damages.

The Holder-Thomson-McNulty criteria, and corresponding patterns of prosecutorial restraint at the state level, are a significant reason why broad statutory Liberal Rules are able to survive. Legislators should not, however, leave the application of the Holder-Thomson-McNulty criteria solely to prosecutorial discretion. As others have suggested, corporate defendants should have the chance to defend themselves by explaining that a particular employee's misbehavior was inconsistent with the general customs, culture, and policies of the corporation.[44] A corporate insanity defense makes sense.

Statutory codification of such standards would allow more systematic application of these criteria and require prosecutors to articulate their application in particular cases.

Turning our attention the other direction, I draw two lessons for corporate punitive damages from corporate criminal liability. First: *Rules crafted specifically for corporations avoid open-ended ratification-or-authorization requirements.* It is striking that, though several states have adopted ratification-or-authorization requirements for vicarious punitive damages, not one jurisdiction has adopted one that applies to corporate criminal liability. One possible explanation is that the rules for corporate punitive damages have almost always emerged out of a general discussion of vicarious liability, including individuals. The Restatements' managerial-employee approach applies both to individual principals and to corporations, but the MPC's rule, and every statute on corporate criminal liability that I have found, applies only to corporations.[45] An exclusive focus on corporations would make the 5R Problem a more salient objection to a general ratification-or-authorization requirement for vicarious criminal liability, and may explain why such rules are never adopted in criminal law.

As explained above, a no-vicarious-punishment rule, taken literally and not allowing for exceptions for some category of higher-level employees, would eliminate corporate punitive damages altogether. Unless the Court intends to foreclose corporate punitive damages in admiralty altogether, it should hold in *Exxon v. Baker* that the *Amiable Nancy* no-vicarious-punitive-liability rule does not apply to corporations. One way to do that might be to follow the Restatement; another way might be to follow the Fifth Circuit's suggestion that the *Amiable Nancy* rule should only apply if a corporation has proper policies for complying with the law; a third way would be to follow *Kolstad*'s hybrid of the two approaches.

A second lesson for corporate punitive damages from the criminal law: *Food-chain issues should inform the amount of corporate punishment, not merely its availability***.** The Federal Sentencing Guidelines establish an elaborate series of rules to measure whether a particular corporate defendant deserves a lower sentence because a rogue employee committed the crime. Neither the constitutional rules for the size of punitive damages nor most states' rules for the size of punitive damages, however, take account of the food-chain issue.[46] The law of punitive damages likewise should recognize that food-chain issues may warrant a *lower* corporate penalty, even if they do not warrant a bar on corporate punishment altogether. There is no good reason that the food-chain issue should produce only all-or-nothing answers.

Approaches to the food-chain issue that focus on corporate policy or corporate culture fit well with this conclusion. Corporate cultures can be more or less criminogenic; particular misbehavior can be a product of corporate culture and fit with corporate policy to a greater or lesser degree. One corporation may have policies that on their face require law-abiding behavior, but which are insufficiently enforced, allowing an informal corporate culture to tolerate misbehavior. A second corporation, however, may lack such policies entirely, and a third corporation may have policies which actively encourage illegal behavior. Applying a corporate-culture test for corporate punishment, all three might deserve punishment, but they deserve different amounts of it. Accordingly, corporations with a single bad apple should avoid punishment altogether, while corporations with increasing numbers of bad apples—that is, progressively criminogenic corporate cultures—should face correspondingly more severe punishment.

CONCLUSION

Resolving issues regarding the punishment of corporations may seem hard enough when we consider either corporate criminal liability or corporate punitive damages alone. Attempting to solve an issue in both fields at once may seem like an exercise in masochism. However, we should see the strong analogy between the two fields not as a way to make a difficult task even more difficult, but as a tremendously valuable problem-solving resource. Including both fields in our view at once can help us avoid pitfalls into which we would otherwise fall and see solutions we would otherwise miss. Seeing the pathology of both Federal and Pennsylvania Schizophrenia and attending to divergences in the development of corporate punitive damages and corporate criminal liability can help us see how either field can best approach corporate punishment.

Endnotes

1 Restatement (Second) of Torts § 909(c) (1976); Restatement (Second) of Agency § 217C(c) (1958) (same); *cf.* Restatement (Third) of Agency § 7.02 cmt. e (2006) (noting division of authority between Restatement and a less restrictive rule, commenting, "[t]he approach outlined in § 909 is preferable."); *see In re* Exxon Valdez, 270 F.3d 1215, 1233-36 (9th Cir. 2001) (following Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1386 (9th Cir. 1985), in following § 909). Other sections of § 909 allow for corporate punishment if a managing agent authorizes or ratifies misbehavior or recklessly retains a misbehaving employee. Exxon's brief in *Baker* says that this rule originated from the 1958 Restatement of Agency, *see* 2007 WL 4439454, *23, but in fact the language in § 217C was itself taken directly from § 909 of the *first* Restatement of Torts, from 1939.

2 As explained below, some states have idiosyncratic punitive-damages regimes: New Hampshire allows only "enhanced compensatory damages" for malicious torts; Michigan says that punitive damages are not really punitive; Nebraska requires civil fines to go to schools; and Louisiana, Massachusetts, Puerto Rico, and Washington all allow punitive damages only under statutes. The vast majority of American jurisdictions, though, allow common-law corporate punitive damages, and all of them allow corporate criminal liability.

3 Goddard v. Grand Trunk Ry., 57 Me. 202, 1869 WL 2230, *15 (1869).

4 Shearman & Redfield, A Treatise on the Law of Negligence § 601, at 654-55 (1869).

5 Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 111 (1893). The Court relied for this proposition in part on Caldwell v. New Jersey Steamboat Co., 47 N.Y. (2 Sickels) 282, 1872 WL 9721 (N.Y. 1872), which in turn relied on Shearman and Redfield's treatise. *See id*. at *9.

6 Mobile & O. R. Co. v. Seals, 13 So. 917, 919 (Ala. 1893).

7 *Id*. at 919-20.

8 Preferred Risk Mut. Ins. Co. v. Saboda, 489 So.2d 768, 770-71 (Fla. App. 1986).

9 Restatement (Second) of Torts § 895J, cmt. a (1976); Robert M. Ague, Jr., *The Liability of Insane Persons in Tort Actions*, 60 Dick. L. Rev. 211, 211 (1956); Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 Mich. L. Rev. 9, 9 (1924).

10 These are Alabama, Arizona, Arkansas, Georgia, Indiana, Louisiana, Maine, Massachusetts, Maryland, Michigan, Missouri, Montana, New

Hampshire, Oklahoma, Oregon, Pennsylvania, South Carolina, and Tennessee. *See* Mobile & O. R. Co. v. Seals, 13 So. 917, 919-20 (Ala. 1893); Haralson v. Fisher Surveying, Inc., 31 P.3d 114, 119-20 (Ariz. 2001); J.B. Hunt Transport, Inc. v. Doss, 899 S.W.2d 464, 469 (Ark. 1995); Johnson v. Allen, 613 S.E.2d 657, 663 (Ga. App. 2005); Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135, 137 (Ind. 1988); Rivera v. United Gas Pipeline Co., 697 So.2d 327, 336 (La. App. 1997) (punitive damages under statute); Muratore v. M/S Scotia Prince, 663 F.Supp. 484, 489 n.6 (D. Me. 1987) ("Although an 1869 case, Goddard continues to be good law."); Kansallis Finance Ltd. v. Fern, 659 N.E.2d 731, 737-38 (Mass. 1996) (punitive damages under statute); Embrey v. Holly, 442 A.2d 966, 970-71 (Md. 1982); Joba Const. Co., Inc. v. Burns & Roe Inc., 329 N.W.2d 760, 773-74 (Mich. App. 1982); Fischer v. MAJ Inv. Corp., 631 S.W.2d 902, 906 (Mo. App. 1982); Rickman v. Safeway Stores, 227 P.2d 607, 612-13 (Mont. 1951); Vratsenes v. N. H. Auto, Inc., 289 A.2d 66, 72 (N.H. 1972); Kurn v. Radencic, 141 P.2d 580, 581 (Okla. 1943); Johannesen v. Salem Hosp., 82 P.3d 139, 142 (Ore. 2003); Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1278 (3rd Cir. 1979) (Pennsylvania law); Hooper v. Hutto, 158 S.E. 726, 727 (S.C. 1931); Odom v. Gray, 508 S.W.2d 526, 533 (Tenn. 1974). Michigan and New Hampshire characterize exemplary damages idiosyncratically. Michigan calls them non-punitive, *see* Ray v. City of Detroit, 242 N.W.2d 494, 495 (Mich. App. 1976), while New Hampshire allows "enhanced compensatory damages" for malicious torts, see Figlioli v. R.J. Moreau Companies, Inc., 866 A.2d 962, 966 (N.H. 2005).

11 These are Nebraska, Puerto Rico, and Washington. *See* State ex rel. Stenberg v. American Midlands, Inc., 509 N.W.2d 633 (Neb. 1994) (allowing statutory corporate civil penalties, as long as the money goes to fund for schools, without suggesting food-chain limit); 1 L.P.R.A. § 13(e); 1 L.P.R.A. § 14 (allowing corporate punitive damages under civil rights statute); Garcia Pagan v. Shiley Caribbean, 22 P.R. Offic. Trans. 183, 191 (P.R. 1988) (applying 1 L.P.R.A. § 14 without suggesting food-chain limit); Rev. Code Wash. § 9.73.230(11) (exemplary damages allowed against police agency for illegal wiretapping); Kadoranian by Peach v. Bellingham Police Dept., 829 P.2d 1061 (Wash. 1992) (interpreting § 9.73.230(11) without suggesting any rogue-police-officer defense); Rev. Code Wash. § 19.86.090 (treble damages for unfair business practices); Edmonds v. John L. Scott Real Estate, Inc., 942 P.2d 1072 (Wash. App. 1997) (interpreting § 19.86.090 without suggesting food-chain limit).

12 These are Alaska, California, Colorado, Delaware, Florida, Guam, Idaho, Illinois, Iowa, Kansas, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, South Dakota, Texas, Utah, Vermont, Virgin Islands, West Virginia, and Wyoming, plus federal law. *See* Alaska Stat. § 09.17.020(k); Cal. Civ. Code § 3294(b); Fitzgerald v. Edelen, 623 P.2d 418, 423 (Colo. App. 1980); Brandt v. Rokeby Realty Co., 2006 WL 1942314, *22 (Del. Super. 2006); Fla. Stat. § 768.72(3)(b)-(c); Park v. Mobil Oil Guam, Inc., 2004 WL 2595897, *9 (Guam Terr. 2004); Openshaw v. Oregon Auto. Ins. Co., 487 P.2d 929, 932 n. 3 (Idaho 1971); Mattyasovszky v. West Towns Bus Co., 330 N.E.2d 509, 512 (Ill. 1975); Briner v. Hyslop, 337 N.W.2d 858, 867 (Iowa 1983); Smith v. Printup, 866 P.2d 985, 1003, 1004 (Kan. 1993); Minn. Stat. § 549.20(2); Smith's Food & Drug Centers, Inc. v. Bellegarde, 958 P.2d 1208, 1214 (Nev. 1998); Cavuoti v. New Jersey Transit Corp., 735 A.2d 548, 554 (N.J. 1999); Albuquerque Concrete Coring Co., Inc. v. Pan Am World Services, Inc., 879 P.2d 772, 777 (N.M. 1994); Loughry v. Lincoln First Bank, N.A., 494 N.E.2d 70, 74-75 (N.Y. 1986); N.C. Gen.Stat. § 1D-15(c); Dahl v. Sittner, 474 N.W.2d 897, 903 (S.D. 1991); Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387, 391 (Tex. 1997); Johnson v. Rogers, 763 P.2d 771, 778 (Utah 1988); Staruski v. Continental Telephone Co. of Vt., 581 A.2d 266, 273 (Vt. 1990); Hendricks v. Transportation Services of St. John, Inc., 1999 WL 395121, *7 (V.I. 1999); Baker v. Wheat First Securities, 643 F.Supp. 1420, 1428 n.4 (S.D.W.Va. 1986); Farmers Ins. Exchange v. Shirley, 958 P.2d 1040, 1052 (Wyo. 1998); Kolstad v. American Dental Association, 527 U.S. 526, 543 (1999).

13 For some confusion about who should count, *see* Kolstad v. American Dental Association, 527 U.S. 526, 543 (1999) ("[N]o good definition of what constitutes a 'managerial capacity' has been found.") (quoting 2 Ghiardi & Kircher, Punitive Damages: Law And Practice § 24.05, at 14 (1998)); Shoucair v. Brown University, 917 A.2d 418, 434 (R.I. 2007) ("elusive label"); Restatement (Third) of Agency § 7.03 cmt. e ("[T]here is no rigid test to determine whether an agent is a 'managerial agent'…."); *cf.* People v. Lanzo Const. Co., 726 N.W.2d 746, 753 (Mich. App. 2006) (similar confusion in corporate crime).

14 These are California, Guam, Illinois, Minnesota, Nevada, and New Jersey. *See* White v. Ultramar, Inc., 88 Cal.Rptr.2d 19, 22, 28 (Cal. 1999); Park v. Mobil Oil Guam, Inc., 2004 WL 2595897, *9 (Guam Terr. 2004); Kemner v. Monsanto Co., 576 N.E.2d 1146, 1157-58 (Ill. App. 1991); Tennant Co. v. Advance Mach. Co., Inc., 355 N.W.2d 720, 724 (Minn. App. 1984); Nittinger v. Holman, 69 P.3d 688, 691-92 (Nev. 2003); Cavuoti v. New Jersey Transit Corp., 735 A.2d 548, 559-61 (N.J. 1999).

15 The eight non-Restatement states are Connecticut, Hawaii, Kentucky, North Dakota, Ohio, Rhode Island, Virginia, and Wisconsin; the five jurisdictions also following the Restatement in some form are Colorado, Delaware, Kansas, West Virginia, and federal law. *See* Roget v. Grand Pontiac, Inc., 5 P.3d 341, 346 (Colo. App. 1999); Maisenbacker v. Society Concordia of Danbury, 42 A. 67, 70 (Conn. 1899); Ramada Inns, Inc. v. Dow Jones & Co., Inc., 1988 WL 15825, *5 (Del. Super. 1988); Beerman v. Toro Mfg. Corp., 615 P.2d 749, 755 (Haw. App. 1980); Kan. Stat. § 60-3702(d); Ky. Rev. Stat. § 411.184(3); Mahanna v. Westland Oil Co., 107 N.W.2d 353, 363 (N.D. 1961); Ohio Rev. Code § 2315.21(C)(1); AAA Pool Service & Supply, Inc. v. Aetna Cas. and Sur. Co., 479 A.2d 112, 116 (R.I. 1984); Freeman v. Sproles, 131 S.E.2d 410, 414 (Va. 1963); Hains v. Parkersburg, M. & I. Ry. Co., 84 S.E. 923, 926 (W.Va. 1915); Mid-Continent Refrigerator Co. v. Straka, 178 N.W.2d 28, 33 (Wis. 1970); Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893). *See also* Mercury Motors Exp., Inc. v. Smith, 393 So.2d 545, 549 (Fla. 1981) (later superseded by statute).

16 *The Amiable Nancy*, 16 U.S. (3 Wheat) 546, 559 (1818) (punitive damages improper against those who are "innocent of the demerit of this transaction, having neither directed it nor countenanced it, nor participated in it in the slightest degree"). It is worth keeping in mind that *The Amiable Nancy* involved an individual rather than a corporate defendant, and so had no occasion to consider whether different rules would apply to entities who only act through agents.

17 *See, e.g.*, Boise Dodge, Inc. v. Clark, 453 P.2d 551, 554 (Idaho 1969):

> We recognize that Idaho is one of those states which applies the rule that a principal is liable for punitive damages based upon the acts of his agents only in which the principal participated or which he authorized or ratified. Of course, a wooden application of this rule, which we reject, would effectively insulate all corporations from punitive damage liability, for a corporation can act only through its agents. On the other hand, it is wise policy from the standpoint of proper corporate responsibility to recognize that, when corporate officials and managing and policy-making agents engage in fraudulent activity in furtherance of corporate profits which inure to the benefit of shareholders, the acts of such agents must be attributed to the corporation.

See also American Law Institute, Enterprise Liability for Personal Injury II.C.9.III (1991) ("It is important to recognize … that dispensing with vicarious liability would de facto discard punitive damages in the enterprise setting. Corporations and other organizations who operate in that setting must act through their human employees…"); Commonwealth v. Angelo Todesca Corp., 842 N.E.2d 930, 937-38 (Mass. 2006) ("The defendant maintains that a 'corporation' cannot 'operate' a vehicle.… [But] [b]ecause a corporation is not a living person, it can act only through its agents. … By the defendant's reasoning, a corporation never could be liable for any crime."); 1 Stein on Personal Injury Damages § 4:31 (3rd ed., updated 2007) ("all jurisdictions apply vicarious liability [for punitive damages] in some circumstances").

18 *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893).

19 *See, e.g.*, Gray v. Allison Division, General Motors Corp., 370 N.E.2d 747, 752-53 (Ohio App. 1977) (allowing punitive damages against GM despite ratification requirement); Maisenbacker v. Society Concordia of Danbury, 42 A. 67, 69-70 (Conn. 1899) (noting that corporate punitive damages can still be available in some cases); Smith v. Printup, 866 P.2d 985, 1003, 1004 (Kan. 1993) (adhering to Restatement in face of statute with ratification requirement); Boise Dodge, Inc. v. Clark, 453 P.2d 551, 554 (Idaho 1969) ("Of course, a wooden application of this rule, which we reject, would effectively insulate all corporations from punitive damage liability, for a corporation can act only through its agents."); *cf. Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (suggesting that *Amiable Nancy*'s no-vicarious-punitive-liability rule only protects a corporation "if the corporation has formulated policies and directed its employees properly").

20 Kolstad v. American Dental Association, 527 U.S. 526, 542 (1999).

21 These are the District of Columbia and Mississippi. *See* Remeikis v. Boss & Phelps, Inc., 419 A.2d 986, 992 (D.C. 1980) ("general practice" of minor employees can support punitive damages); Gamble v. Dollar General Corp., 852 So.2d 5, 15 (Miss. 2003) (not allowing punitive damages where store manager's actions were contrary to corporate policy manual); Doe ex rel. Doe v. Salvation Army, 835 So.2d 76, 81 (Miss. 2003) (reversing punitive damages because an employee's actions were inconsistent with the corporate defendant's "goals and doctrines" and what the corporate defendant "promotes"). The Fifth Circuit's rule for admiralty also suggests that corporate policy is the key. *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642, 652 (5th Cir. 1989) (corporate punitive damages improper "if the corporation has formulated policies and directed its employees properly").

22 New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909).

23 These are Alaska, California, the District of Columbia, Florida, Indiana, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Wisconsin. *See* Alaska Stat. § 11.16.130(a)(1)(A), (b); W. T. Grant Co. v. Superior Court, 100 Cal. Rptr. 179, 180 (Cal. App. 1972); United States v. Sherpix, Inc., 512 F.2d 1361 (D.C. Cir. 1975); West Val. Estates, Inc. v. State, 286 So.2d 208, 209 (Fla. App. 1973); Indiana Code § 35-41-2-3(a); Kan. Stat. § 21-3206(1)-(2); 17-A Me. Rev. Stat. Ann. § 60(1); Commonwealth v. Beneficial Finance Co., 275 N.E.2d 33, 72-73 (Mass. 1971); Mueller v. Union Pacific R.R., 371 N.W.2d 732, 738 (Neb. 1985); State v. Zeta Chi Fraternity, 696 A.2d 530, 534-35 (N.H. 1997); State v. Ice & Fuel Co., 81 S.E. 737, 738 (N.C. 1914); State v. Eastern Coal Co., 70 A. 1 (R.I. 1908); State ex rel. Botsford Lumber Co. v. Taylor, 147 N.W. 72, 73 (S.D. 1914); State v. Louisville & Northern Railroad Co., 19 S.W. 229, 229 (Tenn. 1892); State v. Vermont Cent. R. Co., 27 Vt. 103, 1854 WL 3704 (Vt. 1854); Andrews v. Ring, 585 S.E.2d 780, 787 (Va. 2003); State v. Dried Milk Products Co-op, 114 N.W.2d 412, 415 (Wis. 1962).

24 These are Alabama, Connecticut, Maryland, Mississippi, Nevada, New Mexico, Oklahoma, Puerto Rico, South Carolina, the Virgin Islands, and Wyoming. For authorizations of corporate criminal liability without any suggestion of a food-chain limit, see Ala. Code § 13A-12-200.1(7); Ala. Code § 13A-8-23; Ala. Code § 13A-9-70(3); Ala. Code § 13A-11-70(3); Ala. Code § 13A-14-3; Conn. Gen. Stat. § 53a-3(1); Conn. Gen. Stat. § 53-303c; Conn. Gen. Stat. § 53a-281; Md. Code, Crim. Law, § 1-101(h); Randall Book Corp. v. State, 558 A.2d 715 (Md. 1989); Edward Hines Yellow Pine Trustees v. State, 94 So. 231, 232 (Miss. 1922); Nev. Rev. Stat. § 193.160 (sentencing of corporations); N.M. Stat. § 31-1-2(E); 22 Okla. Stat. Ann. § 516; 22 Okla. Stat. Ann. §§ 1301-1308; 21 Okla. Stat. Ann. § 105; 21 Okla. Stat. Ann. § 187.2; 21 Okla. Stat. Ann. § 331; 21 Okla. Stat. Ann. § 839.1; 21 Okla. Stat. Ann. § 839.1A; 21 Okla. Stat. Ann. § 918; 21 Okla. Stat. Ann. § 1513; Hardeman King Co. v. State, 233 P. 792, 792 (Okla. Crim. App. 1925); 33 L.P.R.A. § 3174; Pueblo v. Mena Peraza, 1982 WL 210571 (P.R. 1982); College of Engineers and Sewers of Puerto Rico v. Puerto Rico Aqueduct and Sewer Authority, 131 D.P.R. 735, 1992 WL 755500 (P.R. 1992); 33 L.P.R.A. §§ 3241-46 (sentencing of corporations); S.C. Code § 17-25-320; S.C. Code § 16-17-30; § S.C. Code § 40-5-320(A); Government of Virgin Islands v. O'Brien, 1985 WL 47217 (V.I. 1984); Wyo. Stat. § 6-1-104(a)(vii).

25 *See* U.S.S.G. § 8B2.1 (defining "effective compliance and ethics program"); § 8C2.5(f)(1) (allowing reduction in "culpability points" if crime occurred despite program); § 8C2.5(b) (increasing culpability points if higher-level employee is involved).

26 *See* Holder, Federal Prosecution of Corporations (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html; Thompson, Federal Prosecution of Business Organizations (January 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; McNulty, Principles of Federal Prosecution of Business Organizations (December 12, 2006), *available at* http://www. usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. These factors are listed in part II(A) of the Holder and Thompson memoranda and part III(A) of the McNulty memorandum.

27 *See* MPC § 2.07(1)(c); (4)(c). A broader rule applies to "violations" and statutes that clearly apply to corporations. *See* MPC § 2.07(1)(a), (5) (for such crimes, allowing liability for action of any employee, but allowing defense if high managerial agents acted diligently to prevent it).

28 These are Arkansas, Arizona, Colorado, Delaware, Georgia, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, and Washington. *See infra* notes 29 to 32.

29 These are Arizona, Guam, Kentucky, Minnesota, Ohio, Pennsylvania, and Texas. *See* Ariz. Rev. Stat. § 13-305(B)(2); 9 Guam Stat. § 4.80(c); Ky. Stat. § 502.550(2)(b); State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 19-20 (Minn. 1984); State v. CECOS Intern., Inc., 526 N.E.2d 807, 811 (Ohio 1988); 18 Pa. C.S. § 307(f); Tex. Penal Code § 7.21(2)(b)-(c).

30 These are Colorado, Georgia, Idaho, Illinois, Iowa, Missouri, Montana, New York, North Dakota, Oregon, and Washington. *See* Colo. Stat. § 18-1-606(b); Ga. Code § 16-2-22(b)(2); State v. Adjustment Dept. Credit Bureau, Inc., 483 P.2d 687, 691 (Idaho 1971); Ill. Stat. ch. 720, § 5/5-4(c)(2); Iowa Code § 703.5(2); Mo. Stat. § 562.056(3)(2); Mont. Stat. § 45-2-311(1)(b); N.Y. Penal Law § 20.20(1)(b); N.D. Cent. Code § 12.1-03-02(1); Ore. Stat. § 161.170(2)(b); Rev. Code Wash. § 9A.08.030(1)(c).

31 This is Michigan. *See* People v. Lanzo Const. Co., 726 N.W.2d 746, 753 (Mich. App. 2006).

32 Arkansas, Delaware, Hawaii, and Utah lack a definition of "high managerial agent," while Louisiana applies its rule to "officers." *See* Ark. Stat. § 5-2-502(a)(2); 11 Del. Code § 281(2); Haw. Stat. § 702-227(2); Utah Code § 76-2-204(2); State v. Chapman Dodge Center, Inc., 428 So.2d 413, 420 (La. 1983).

33 This is Ohio. *See* Ohio Rev. Code § 2901.23(A)(4) (basic MPC-style rule); Ohio Rev. Code § 2901.23(C) (due-diligence defense applicable to all crimes).

34 These are New Jersey and West Virginia. *See* N.J. Stat. 2C:2-7(c) (allowing defense if offense occurred despite the due diligence of the relevant high managerial agent); State v. Baltimore & O.R. Co., 64 S.E. 735, 735-36 (W.Va. 1909) (excluding corporate criminal liability for "a single offense committed by… an agent or servant in violation of the rules of such company."). The New Jersey approach, which applies to all crimes, is what the MPC applies to minor crimes ("violations"). *See* MPC § 2.07(1)(a), (5).

35 These are Alabama, Indiana, Maryland, Maine, Massachusetts, Nebraska, New Hampshire, Oklahoma, Puerto Rico, South Carolina, and Tennessee.

36 These are Colorado, Delaware, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Minnesota, New Jersey, New York, North Dakota, Ohio, Texas, Utah, and West Virginia.

37 These are federal law, Alaska, California, Connecticut, the District of Columbia, Florida, Kansas, Mississippi, Nevada, New Mexico, North Carolina, Rhode Island, South Dakota, Vermont, Virginia, the Virgin Islands, Wisconsin, and Wyoming.

38 These are Arizona, Arkansas, Georgia, Louisiana, Michigan, Missouri, Montana, Oregon, Pennsylvania, and Washington.

39 *See, e.g.,* Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); Philip Morris USA v. Williams, 127 S.Ct. 1057, 1066 (2007) (Stevens, J., dissenting) ("There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages."); Smith v. Wade, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting).

40 Smith v. Wade, 461 U.S. 30, 41 (1983).

41 These are Guam and Minnesota, whose Restrictive Rules in both fields make the actions of policymakers the key.

42 These are Illinois, which follows a policymaker-or-supervisor rule for corporate crime but a policymaker rule for corporate punitive damages; New Jersey, which has a due-diligence defense for corporate crime but a policymaker rule for corporate punitive damages; and New York, which follows a policymaker-or-supervisor rule for criminal law but a stricter rule for corporate punitive damages. For New York's "superior officer" punitive damages rule, *see* Loughry v. Lincoln First Bank, N.A., 494 N.E.2d 70, 76 (N.Y. 1986) ("The term 'superior officer' obviously connotes more than an agent, or 'ordinary' officer, or employee vested with some supervisory or decision-making responsibility.").

43 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).

44 *See, e.g.*, Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 Am. Crim. L. Rev. 1319 (2007); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095 (1991); *Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1257-58 (1979).

45 The fact that the Restatements' rule applies both to corporate and individual principals is important for understanding some comments that Exxon highlights in its brief in *Baker*. When the ALI discussed the Restatement (Second) of Torts in 1973, the reporter, Dean Wade, mentioned, "Many states now do not award punitive damages against an employer, and the trend, I think, although not heavily, is in the direction of not doing it." Am. Law Inst., 50th Annual Meeting Proceedings 1973 at 236 (1974). However, in reply, Albert Rosenthal noted, "I hope that this section is not removed from the Restatement, but secondly, if there are any comments to the effect that the trend is against this, against having punitive damages imposed upon the principal, that this be delineated in such fashion as to indicate that that does not apply to cases of corporations, who could, of course, be liable only through their agents, unless there is a trend away from imposing punitive liability upon corporations as well, which I suspect there probably is not." *Id*. at 238. The ALI then retained the section, as Rosenthal wished, without any commentary on the drift of the law. This distinction is particularly relevant because Exxon's brief in *Baker* highlights Wade's statement, *see* 2007 WL 4439454, *23, without noting the subsequent discussion of the distinction between vicarious punitive damages for corporations and vicarious punitive damages for individuals.

46 *See, e.g.*, Philip Morris USA v. Williams, 127 S.Ct. 1057, 1062-63 (2007) (constitutional rule considers reprehensibility, the ratio to compensatory damages, and the existence of other penalties). For rules on the size of punitive damages that list several factors, but not the food-chain issue, *see, e.g.*, Alaska Stat. 09.17.020(c); 21 Okla. Stat. § 9.1(A); Ky. Rev. Stat. § 411.186(2); Kan. Stat. § 60-3702(b); Mont. Stat. § 27-1-221(7)(b); Minn. Stat. § 549.20(3); Miss. Code § 11-1-65(e); Crookston v. Fire Ins. Exchange, 817 P.2d 789, 808 (Utah 1991); Model Punitive Damages Act § 7(a). Oklahoma and Minnesota's punitive damages statutes do list food-chain criteria. See 21 Okla. Stat. § 9.1(A)(6) (listing as factor for size of punitive damages "[i]n the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct"); Minn. Stat. § 549.20(3) (listing as factor for size of punitive damages "the number and level of employees involved in causing or concealing the misconduct").

Environmental Law & Property Rights

Property Rights in the Ninth Circuit, and Beyond

*By J. David Breemer, Damien M. Schiff & Elizabeth A. Yi**

Under modern constitutional law, rights in real property are protected principally by the Just Compensation Clause of the Fifth Amendment (incorporated as against the states by the Fourteenth Amendment's Due Process Clause) and the substantive component of the Fifth and Fourteenth Amendment's Due Process Clauses. For the past several decades, however, these rights have been disfavored in the federal courts. Even as there was a renaissance for constitutional protection of property rights in the late 1980s and early 1990s, property owners were losing the ability to vindicate these rights in federal courts. By 1997, property owners in the Ninth Circuit could invoke neither the protections of the Takings Clause or the substantive component of due process when faced with objectionable land use regulation.

Under-girding this situation is the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[1] There, the Court held that plaintiffs who contend that a state or municipality has taken their property without just compensation must litigate in state court to ripen a suit in federal court. In combination with res judicata barriers, this rule swallowed federal review of takings claims. Then, when the Ninth Circuit held in *Armendariz v. Penman* and progeny that a substantive due process property rights claim is treated as a takings claim, it swallowed substantive due process claims.[2] This law persisted for more than a decade, converting property owners into a pariah in the federal courts of the Ninth Circuit.

The landscape has changed radically, however, with the Ninth Circuit's recent decision in *Crown Point Development, LLC v. City of Sun Valley*. Relying on the Supreme Court's 2005 decision in *Lingle v. Chevron U.S.A., Inc.*, which rejected takings tests that focus on the rationality of regulation, the property owner in *Crown Point* successfully attacked the rationale of *Armendariz* and reopened the door to substantive due process in the Ninth Circuit.[3] The decision is worthy of consideration not only because it clarifies a confused area of property rights jurisdiction and represents a significant turn for property owners in the Ninth Circuit but also because it exposes a continuing problem in federal protection of constitutional property rights.

I. The Demise of Takings Protections in the Ninth Circuit and Rise of the Due Process Alternative

A. Federal Takings Law and the Williamson County Ripeness Barrier

The Takings Clause forbids the taking of private property for a public use without the payment of just compensation.[4] The government has a constitutional duty to compensate a property owner when it physically invades property regardless of the purpose of the invasion or its extent.[5] A taking can also occur by land use regulation when it either deprives the owner of all economically viable use of the property [6] or severely impacts the economic value of the property and interferes with the owner's reasonable expectations.[7] A regulatory taking may also occur when the government requires a land use applicant to dedicate property to the government in return for a permit if there is (1) no direct connection between the demand and the impact of the development,[8] or (2) the condition is disproportionate to the impacts caused by the development.[9]

Between 1981 and 2005, an additional category of regulatory takings liability existed for regulations that failed to "substantially advance a legitimate state interest."[10] However, this test was rejected as a legitimate takings standard in the 2005 *Lingle* decision, where a unanimous Supreme Court concluded that it was grounded in substantive due process concepts, not takings doctrine.[11]

Although the foregoing principles were largely developed in federal courts, they have all but disappeared from that system in the past twenty-five years. This situation arises from the Court's1985 *Williamson County* decision, a ruling that has only become more mystifying with the passage of time. Departing from past practice, the *Williamson County* Court held that a federal takings claim cannot be raised as an initial matter in a federal court. Rather, such a claim would ripen for federal review only after the claimant unsuccessfully sought just compensation in state procedures.[12] The Court articulated this rule after already deciding that the regulatory takings claim at hand was unripe due to the lack of a final administrative decision, and without any serious briefing on the issue of whether state compensation procedures are a proper ripeness predicate.

Putting aside logical and precedential critiques,[13] *Williamson County* at least seemed to anticipate federal judicial review of a federal takings claim after unsuccessful state compensation procedures.[14] Yet the decision has never functioned this way. Instead, it has operated as a total bar to federal vindication of physical and regulatory takings claims.[15] The primary reason for this is that any requirement that a takings claimant use state judicial procedures before seeking federal review conflicts with settled rules—such as res judicata and collateral estoppel—which bar federal courts from second-guessing prior state court decision.[16] Thus, when a property owner goes to federal court after unsuccessfully seeking state law remedies for the alleged taking, he is often told that the claim is barred, rather than ripened. This means that most federal takings plaintiffs are totally shut out of federal court: they cannot go there in the first instance under *Williamson County* because the claim is not "ripe," and they cannot file in federal court after it is ripe due to res judicata-type barriers to relitigation of previously prosecuted claims.[17]

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The Ninth Circuit is among those circuits that have consistently applied *Williamson County* rules to bar federal takings claims.[18] In 2004, that circuit was asked to loosen res judicata to allow takings claims in federal court when ripened in compliance with *Williamson County*. But the Ninth Circuit refused, and this decision was subsequently upheld by the Supreme Court in *San Remo Hotel v. City and County of San Francisco*.[19] Although four Supreme Court justices opined in *San Remo* that *Williamson County* should be reconsidered due to its questionable origin and its unanticipated effect on federal takings jurisdiction,[20] *San Remo* failed to alter *Williamson County*.[21] Accordingly, federal courts continue to tell takings claimants that, under *Williamson County,* their claims are not ripe for federal review until they have completed state court procedures, while at same time declaring that such procedures will trigger a permanent res judicata barrier.[22] Thus, the application of the Fifth Amendment is left solely in the hands of state courts, a circumstance the Supreme Court long ago scoffed at as irreconcilable with federal jurisdictional principles.[23]

B. The Substantive Due Process Option

With most federal takings claims shut out of federal courts under *Williamson County***,** property owners' only hope for federal protection from onerous land use regulation rested on the Due Process Clause of the Fourteenth Amendment.[24] Substantive due process theory seems to offer a potential way around Williamson County and a path into federal court because due process claims do not hinge on "just compensation," and therefore should not be subject to a state compensation predicate. In a series of post-*Williamson County* cases, the Ninth Circuit agreed that substantive process land use claims are immune from *Williamson County*'s state compensation requirement for takings claims, and therefore could be directly raised under 42 U.S.C § 1983 in the federal courts.[25]

Thus, freed from the shackles of *Williamson County*, substantive due process became a regular item on the Ninth Circuit's docket during the late 1980s and early 1990s. While the rational basis or arbitrariness review available for such claims could hardly be said to provide a high measure of protection, it was not toothless. In a number of Ninth Circuit cases, these substantive due process standards proved sufficient for property owners to head off suspect land-use actions.[26]

II. The Decline and Resurrection of Substantive Due Process in The Ninth Circuit: from *Armendariz* to *Crown Point*

The Ninth Circuit's substantive due process moment came to an abrupt halt with the court's mid-1990s decisions *Armendariz v. Penman*[27] and *Macri v. King County*.[28] As shown below, these decisions indirectly subjected substantive due process claims to *Williamson County*'s state compensation ripeness predicate, and thus to the aforementioned res judicata barriers.

A. Armendariz and Macri Subsume Due Process Claims in Unripe Takings Guarantees

In *Armendariz*, the en banc Ninth Circuit court considered whether property owners could prosecute a substantive due process claim arising out of allegations that a local government had closed their apartment buildings to drive down the value as part of a plan to transfer the property to a private party. The *Armendariz* court was particularly impressed by two Supreme Court decisions considering substantive due process claims against alleged police abuse: *Graham v. Connor*[29] and *Albright v. Oliver*.[30] In *Graham*, the Supreme Court held that a claim alleging excessive force by law enforcement officers during an investigatory stop "is most properly characterized as one invoking the [seizure] protections of the Fourth Amendment" and had to be raised under this Fourth Amendment vehicle, rather than through the concept of substantive due process.[31] *Albright* reached similar conclusions in a similar context.[32] From this precedent, the *Armendariz* court divined a general rule for subsuming due process claims in other constitutional protections: "[w]here a particular [constitutional] amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'"[33]

Turning to the property rights claims at hand, the Ninth Circuit characterized the *Armenedariz* plaintiffs' claim as a challenge to a taking of property for a private purpose. The *Armendariz* court stressed that Fifth Amendment takings law clearly held that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."[34] Based on this view, the court applied *Graham*, explaining that "because the conduct that the plaintiffs are alleging is a type of government action that the Fourth and Fifth Amendments regulate, *Graham* precludes their substantive due process claim."[35]

A year later, in *Macri v. King County*, the Ninth Circuit applied *Armendariz*'s rationale to bar a substantive due process claim against allegedly irrational land use regulation.[36] The plaintiffs there argued that the denial of a subdivision plan did not advance a legitimate state interest, and therefore violated their due process rights.[37] The *Macri* court disagreed, holding that such a claim arose exclusively under the Takings Clause because the Supreme Court had repeatedly held that a regulation that does not "substantially advance a legitimate state interest" causes an unconstitutional taking.[38] The *Macri* court relied on *Armendariz* in concluding that "[s]ince the Takings Clause 'provides an explicit source of constitutional protection' against the challenged [irrational] government conduct," the plaintiffs' substantive due process claim was subsumed by takings law.[39]

Macri therefore confirmed that *Armendariz*'s "due process claims subsumed in the takings clause" rule extended to typical substantive due process claims against allegedly arbitrary or irrational land use regulations. This ruling was significant not because it relabeled substantive due process claims as takings; without more, this changed nothing but the plaintiff's pleading requirements. But in connection with *Williamson County* the decision had a profound effect. As *Macri* acknowledged, treating a due process claim as a takings claim means that it will be considered unripe for federal review until state compensation procedures are completed, and this of course meant such claims would never make it to federal court.[40] For the first time since the Ninth Circuit was established, real property owners had no meaningful ability to vindicate their rights in federal courts.

B. Lingle: The Beginning of the End for Armendariz

The *Armendariz* /*Macri* barrier to property-based substantive due process claims was repeatedly reaffirmed and showed no signs of weakening until the Supreme Court's 2005 decision in *Lingle*. There, a unanimous Supreme Court repudiated the idea—originally articulated in *Agins v. City of Tiburon*—that a taking will occur when a regulation does not "substantially advance legitimate state interests."[41]

According to *Lingle*, regulatory takings standards focus "directly upon the severity of the burden that government imposes upon private property rights," not the manner in which it occurs.[42] Since the "substantially advances" test "reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights," but instead considers whether a regulation effectively is valid or achieves a legitimate purpose, it was not a proper takings test.[43] This conclusion was reinforced by the origin of the "substantially advances" test in due process concepts: an "inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."[44] But, the *Lingle* Court concluded, it "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."[45]

C. Crown Point Uses Lingle to Eviscerate Armendariz

While *Lingle* narrowed the protections available to property owners under the Takings Clause, it seemed to offer an important silver lining: if the "substantially advances" test was not part of takings law, and that law generally did not consider the legitimacy of land use regulation, subsuming substantive due process in takings law under the *Graham/Armendariz* rationale was tenuous. Thus, in its aftermath, commentators opined that *Lingle* opened the door for a return of substantive due process in the Ninth Circuit.[46] This sentiment would find judicial expression in *Crown Point*.

1. Background of Crown Point

Crown Point is the developer of a partially completed thirty-nine unit residential subdivision, known as Crown Ranch, on 9.76 acres of land in Sun Valley, Idaho, for which the City of Sun Valley ("City") refused to issue final permits.[47] Prior to December, 2002, the City did approve phases one through four on six and a half acres.[48] This left 3.29 acres for approval and construction as the final portion—phase five.

Under the City code, property within an RM-2 zone (like Crown Point's) *must* be developed at an average of four units per acre.[49] This meant Crown Point had to put a total of thirty-nine units on its 9.76 acres of land to develop it. When it got through phase four, the City had approved twenty-six of these units, a number Crown Point considered too few.[50] Due to the lower number, Crown Point was forced to apply for thirteen homes in phase five to meet the code's demand for four homes/per acre (thirty-nine units).[51]

When Crown Point submitted its application to build thirteen homes on phase five, it was approved by the Planning Commission, but then appealed to the City Council by people already owning homes in Crown Ranch.[52] They complained that thirteen units was too large a number. Although the City had put Crown Point in the position of having to apply for thirteen units, it agreed with the existing homeowners that thirteen was too many, and reversed the Commission's approval.[53] In so doing, it relied on negative personal opinions as to the impacts of the development while neglecting record evidence produced during the first four phases that contradicted the opposition's subjective beliefs.

After attempts at compromise failed, Crown Point filed a state law complaint in state court. Eventually, the state court concluded that the City's actions lacked substantial evidence and were arbitrary.[54] Crown Point then filed a substantive due process challenge in federal court. The City moved to dismiss on the basis that real property substantive due process claims were barred in the Ninth Circuit under *Armendariz* and progeny. The district court granted the City's motion.[55]

2. The Ninth Circuit's Decision

On appeal, Crown Point argued that its substantive due process claim challenging the City's denial as irrational and arbitrary could not be subsumed in takings law under *Armendariz* rule after *Lingle* ended the "substantially advances" takings test.[56] The Ninth Circuit agreed, stating that "*Armendariz* has been undermined to the limited extent that a claim for wholly illegitimate land use regulation is not foreclosed."[57] The court explained that because there "is no specific textual source in the Fifth Amendment for protecting a property owner from conduct that furthers no legitimate government purpose [after *Lingle*]... the *Graham* rationale no longer applies to claims that a municipality's actions were arbitrary and unreasonable, lacking any substantial relation to the public health, safety, or general welfare." In short, "*Lingle* pulls the rug out from under our rationale [in *Armendariz*] for totally precluding substantive due process claims based on arbitrary or unreasonable conduct."[58]

Although the City argued that substantive due process property rights claims should still be litigated under those takings guarantees remaining after *Lingle*,[59] the *Crown Point* court found this to be irreconcilable with *Lewis v. County of Sacramento*.[60] As the court explained, "Applying the *Lewis* rule to land use, the Fifth Amendment would preclude a due process challenge only if the alleged conduct is *actually covered* by the Takings Clause. *Lingle* indicates that a claim of arbitrary action is not such a challenge."[61] Recognizing that an intervening Supreme Court opinion allows a panel to repudiate a prior en banc opinion, the *Crown Point* panel declared that "it is no longer possible in light of *Lingle* and *Lewis* to read [the en banc] Armendariz decision as imposing a blanket obstacle to all substantive due process challenges to land use regulation."[62] The court summarized: "[w]e now explicitly hold that the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relation to the public health, safety, or general welfare."[63] Since *Armendariz* was the only basis for the district court's dismissal, the conclusion that *Lingle* undercut *Armendariz* required the reversal of the lower court's decision. In this way, *Crown Point* ended *Armendariz*'s decade-old reign over substantive due process in the courts of

the Ninth Circuit, a conclusion soon confirmed by another Ninth Circuit opinion, *Action Apartment Association, Inc. v. Santa Monica Rent Control Board.*[64]

CONCLUSION

Crown Point will be seen as an important decision helping to restore constitutional property rights in the federal courts. By divorcing substantive due process claims from takings law, claims against arbitrary and irrational land use regulation are once again free of *Armendariz*, and thus, free of *Williamson County*'s "state compensation" ripeness barrier designed for federal takings claims. Although *Armendariz/Graham* might still conceivably apply to the rare substantive due process claims against private takings and other conduct still covered by the Takings Clause after *Lingle*, it is dead letter with respect to the most common and successful substantive due process property claims: those asserting that "land use action lacks any substantial relation to the public health, safety, or general welfare."[65] The due process rights of property owners again stand as an independent cause of action against irrational and arbitrary land use regulations, thus putting property owners on equal footing with other plaintiffs in the federal courts when it comes to the Due Process Clause.

Despite this progress, problems remain. This is because *Crown Point* did not address the root of the decline in federal protection of real property: *Williamson County*. While there is no longer any *Armendariz*-like vehicle by which that decision can inhibit substantive due process claims, it continues to burden takings claimants. The Constitution guarantees just compensation for takings, and in the *Federalist* Alexander Hamilton considered it unquestionable that federal courts would have jurisdiction over issues arising under the explicit provisions of the Constitution.[66] Yet *Williamson County* continues to banish takings claimants from the federal courts on the theory they must litigate in state courts for ripeness. This rule is as outdated and untenable as *Armendariz* was after *Lingle*, and should be abandoned as soon as possible. Only then will the rights of property owners be fully restored in federal courts and landowners no longer treated as second class plaintiffs. In the meantime, *Crown Point* at least ensures that irrational or arbitrary land use regulation once again gives rise to federal damages in the federal courts of the Ninth Circuit.

Endnotes

1 473 U.S. 172 (1985).

2 75 F.3d 1311 (9th Cir. 1996).

3 544 U.S. 528 (2005).

4 *See* U.S. Const. amend. V.

5 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

6 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). The limited exception to the *Lucas* "categorical takings" rule is where the regulation enforces "background principles" of a state's property law. *See id.* at 1026-32.

7 Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

8 Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-837 (1987).

9 Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

10 Agins v. City of Tiburon, 447 U.S. 255, 261-262 (1980).

11 *See Lingle*, 544 U.S. at 548.

12 473 U.S. at 194-96.

13 *See* J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel--The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 291-300 (2006).

14 DLX Inc. v. Kentucky, 381 F.3d 511, 519-21 (6th Cir. 2004).

15 For a thorough discussion of the cases, see Breemer, *supra* note 13, at 253-65.

16 *Id.*; *see also,* Wilkinson v. Pitkin County Bd. of County Com'rs, 142 F.3d 1319 (10th Cir. 1998).

17 Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992) (citations omitted).

18 *See* Palamar Mobilehome Park Assn. v. City of San Marcos, 989 F.2d 362, 364-65 (9th Cir. 1993).

19 545 U.S. 323, 330-31 (2005).

20 *See id.* at 350-51 (Rehnquist, C.J., concurring in the judgment).

21 *Id.* at 337-38.

22 *See, e.g.,* Rockstead v. City of Crystal Lake, 486 F.3d 963 (7th Cir. 2007) (requiring takings claimant to litigate in state cort under *Williamson County* "ripeness" rules, but recognizing that this would permanently bar federal review due to res judicata).

23 *See* Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 285 (1913).

24 To state a claim for a violation of the substantive component of due process, a property owner must have a constitutionally protected property interest. Amazingly, there is some debate in the federal courts as to whether the ownership and use of real property is a protected due process property interest. But when it is clear that the requisite interest exists, the property owner must establish that a deprivation of that interest occurred in violation of "substantive due process." The traditional test for gauging land-use regulation is arbitrary or has no reasonable relationship to a legitimate state interest In recent years, a few federal courts have injected the subjective "shocks the conscience" standard from police abuse cases into the land-use context and a majority of the circuit courts continue apply a less demanding rational basis test.

25 *See e.g.,* Bateson v. Geisse, 857 F.2d 1300, 1303 (9th Cir. 1988) (plaintiff "was not required to seek 'just compensation' from state entities before bringing this substantive due process claim, and therefore this claim is ripe for adjudication.").

26 *Id.* (holding that a local government's refusal to issue a building permit after all the applicable regulations had been met was "arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, [that] amounts to a violation of that individual's substantive due process rights."); *see, e.g.,* Herrington v. Sonoma County, 834 F.2d 1488, 1501 (9th Cir. 1987) (misrepresentation of evidence gave rise to substantive due process violation); Lockary v. Kayfetz, 917 F.2d 1150, 1156 (9th Cir. 1990) (landowners asserted facts showing that denial of water permits was "arbitrary or even malicious conduct prohibited by due process."); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1508 (9th Cir. 1990) (finding that property owners denied a land use permit after multiple applications asserted facts supporting the conclusion that the City's actions were "motivated, not by legitimate regulatory concerns, but by political pressure from neighbors and other residents of the city to preserve the property as open space," and thus, were arbitrary in violation of due process).

27 75 F.3d 1311 (1996) (en banc).

28 126 F.3d 1125 (1997).

29 490 U.S. 386 (1989).

30 510 U.S. 266 (1994).

31 *Graham*, 490 U.S. at 354-95.

32 *Albright*, 510 U.S. at 268.

33 Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996) (en banc) (quoting *Graham*, 490 U.S. at 395).

34 *Armendariz*, 75 F.3d at 1320 (quoting Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984)).

35 *Armendariz*, 75 F.3d at 1324.

36 126 F.3d 1125 (1997).

37 *Id.* at 1129.

38 *Id.*

39 *Id.*

40 *Macri*, 126 F.3d at 1129.

41 447 U.S. 255 (1980).

42 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005).

43 *Id.*

44 *Id.* at 542.

45 *Id.* at 545.

46 *See, e.g.,* Michael Berger, Regulatory Takings Update, SL049 ALI-ABA 661, 664 American Law Institute-American Bar Association (2006).

47 Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 853 (9th Cir. 2007).

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 853 (citing Crown Point Development, Inc. v. City of Sun Valley, 156 P.3d 573, 579 (Idaho 2007))

55 *Crown Point*, 506 F.3d at 853.

56 *Id.* at 852.

57 *Id.* at 852-53.

58 *Id.*

59 *Id.*

60 523 U.S. 833 (1998).

61 *Crown Point*, 506 F.3d at 855.

62 *Id.* at 856.

63 *Id.*

64 2007 WL 4225774 (9th Cir. Dec. 3, 2007).

65 *See Crown Point*, 506 F.3d at 866.

66 *See* The Federalist No. 80.

Federalism and Separation of Powers

The Different Approaches of Chief Justice Roberts and Justice Alito on the Scope of State Power

*By Dan Schweitzer**

In their first full term together on the Supreme Court, Chief Justice John Roberts and Justice Samuel Alito voted alike more than any other pair of Justices. According to *U.S. Law Week*, the pair disagreed in only 6% of the cases decided in the 2006 Term;[1] by my count, the two reached different conclusions only five times.[2] This overwhelming level of agreement between the two new Justices makes their disagreement in last term's federalism cases all the more striking.

The two cases were *Watters v. Wachovia Bank, N.A.*,[3] involving a preemption claim, and *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,[4] involving a dormant Commerce Clause claim. In both cases, Chief Justice Roberts voted in favor of greater state power, while Justice Alito voted in favor of less. It is obviously too early to know whether these votes reflect the beginnings of distinct jurisprudences or will prove aberrational. But the tenor of the opinions—and the fact that Chief Justice Roberts and Justice Alito wrote the majority and dissenting opinions, respectively, in *United Haulers*—suggest that the two may hold very different views of the federal-state balance, at least outside the context of determining the limits on congressional power.

I. The Roberts Court's Federalism Docket: The Rise of Preemption and the Dormant Commerce Clause

Before turning to *Wachovia Bank* and *United Haulers*, a word on the Roberts Court's federalism docket is in order. The Rehnquist "Federalism Revolution" was marked by dramatic rulings that revived seemingly dormant constitutional limitations on federal power. Thus, in *United States v. Lopez*,[5] the Court revived the foundational principle that Congress possesses only enumerated powers; in *Printz v. United States*[6] and *New York v. United States*,[7] the Court revived the Tenth Amendment as the embodiment of certain inherent rights of states; and in *City of Boerne v. Flores*,[8] the Court made clear that Congress does not have plenary authority to regulate states under § 5 of the Fourteenth Amendment. Meanwhile, in a series of decisions,[9] the Rehnquist Court sharply limited the power of the federal government to abrogate the states' sovereign immunity—rulings based not only on the Eleventh Amendment, but on "postulates" that lie "[b]ehind the words of the constitutional provisions," and "which limit and control."[10]

The federalism docket of the Roberts Court has been quite different. In fact, "[s]ince Chief Justice Roberts has participated in the certiorari process, the Court has not agreed to hear a single case involving the constitutional federalism issues that formed the heart of the Rehnquist Court's Federalism Revolution."[11] The Roberts Court's cases addressing the federal-state balance have instead involved the issues of preemption and the dormant Commerce Clause.

To be sure, the Rehnquist Court addressed both those topics on multiple occasions. But, as many a critic has observed, no coherent doctrine emerged in either area.[12] For this reason, the Rehnquist Federalism Revolution is rightly perceived as having been about the issues discussed two paragraphs earlier and *not* about preemption and the dormant Commerce Clause. By contrast, so far, federalism in the Roberts Court (at least since Justice Alito's arrival) has involved *only* those two topics.

This is not to suggest that the early Roberts Court will not hear *any* cases assessing whether Congress acted outside the scope of its enumerated powers or wrongly trenched on state prerogatives. Surely it will. But whether it is because the Court successfully sent its message to Congress in *Lopez* and *Morrison* or because the Court has already worked its way through most of the federal statutes that purport to abrogate the states' sovereign immunity, few cases on the limits of Congress' power appear headed for the Court's docket.[13] For the time being, therefore, the vast run of federalism decisions likely to be issued by the Court will not be sweeping statements about the constitutional limits of federal power. Instead, they will address whether federal interests, reflected in statutes enacted by Congress or in the objectives of the dormant Commerce Clause, justify the displacement of state law.[14]

The nature of the Court's docket makes it far more difficult to assess where the new justices stand on federalism. Most of the cases comprising the Federalism Revolution were decided by 5-4 votes, with the "conservative" justices voting for more limited federal power, and the "liberal" justices voting for greater federal power. A justice took a position on the issue and stuck with it. (Once Justice O'Connor started drifting from the conservative position, in cases such as *Nevada Department of Human Resources v. Hibbs*,[15] *Tennessee v. Lane*,[16] and *Central Virginia Community College v. Katz*,[17] it signaled the end, or at least the dormancy, of the Revolution.)

This was not the case with respect to preemption and dormant Commerce Clause cases—which no doubt helps explain the muddled state of the doctrine in those two areas. Voting alignments in preemption cases were *ad hoc*, with justices often reversing the roles they took in the constitutional federalism cases, *i.e.*, with conservative justices voting for reduced state power and liberal justices voting for greater state power.[18] As to the dormant Commerce Clause, Justices Scalia and Thomas have taken the bold stance that the doctrine lacks any basis in the Constitution and should not be applied at all except (perhaps) in situations where the Court has already condemned the state conduct at issue as discriminating against interstate commerce.[19] No clear voting pattern emerged among the other justices, other than that Chief Justice Rehnquist

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almost invariably voted to uphold state and local laws, while Justice O'Connor regularly voted to strike down state and local laws.[20]

All this leads to the need for a caveat. One should be wary before placing too much weight on how a justice votes in a preemption case or two, or a dormant Commerce Clause case or two. Decisions in these areas depend greatly on the nuances of the particular federal and state statutes at issue, as well as (with respect to preemption) a justice's approach to statutory construction.

Nonetheless, justices do have *tendencies* in these areas; and justices do adopt starting presumptions (explicit and implicit) that sweep across many cases. From what we have seen so far, Chief Justice Roberts and Justice Alito have very different inclinations with respect to preemption and the dormant Commerce Clause. Section II will discuss their differing approaches in the first preemption case they heard together on the Court; Section III will discuss their differing approaches in the first dormant Commerce Clause case they heard together.

II. Preemption: *Watters v. Wachovia National Bank*

A. Background

The basic issue in *Wachovia Bank* was the validity of regulations issued by the Comptroller of the Currency under the National Bank Act that purported to preempt the application of state laws to state-chartered operating subsidiaries of national banks. Three separate strands of the law lurked behind that issue.

First, even before the recent subprime mortgage crisis, state Attorneys General and state Banking Commissioners had been actively attacking "predatory lending" practices.[21] Inevitably, some of the alleged wrongdoers were national banks and their subsidiaries. And there, of course, lay the rub. If the National Bank Act preempted states from going after national banks and their subsidiaries, which were violating the states' consumer protection laws, there would be a virtual regulatory vacuum. For, as the Michigan Banking Commissioner and some of her amici later argued, the Office of the Comptroller of Currency (OCC) does not see itself as a consumer protection agency. It did not bring its first action to address unfair and deceptive practices under § 5 the Federal Trade Commission Act until the year 2000;[22] and it rarely acted against deceptive lenders thereafter.[23]

Second, the National Bank Act contains an express preemption provision. Under 12 U.S.C. § 484(a) of the Act, "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law…."[24] The disputed issue in Wachovia Bank (or at least one way of viewing it) was whether § 484(a)—which by its terms covers only "national banks"—reaches the operating subsidiaries of national banks. The case arose because Michigan was trying to enforce its registration and financial statement requirements upon Wachovia Mortgage Corporation, a North Carolina-chartered entity licensed as an operating subsidiary of Wachovia Bank, N.A. and engaged in real estate lending in Michigan and elsewhere.

In arguing that § 484(a) did not preempt application of its laws to Wachovia Mortgage, Michigan pointed to 12 U.S.C. § 481, which gives the Comptroller only limited authority to examine "affiliates" of national banks, and implicitly leaves to the states the power to engage in comprehensive examinations of such entities. And, critically, Congress broadly defined "affiliate" to "include any corporation, business trust, association, or similar organization" that a national bank, "directly or indirectly, owns or controls."[25] Wachovia did not dispute that operating subsidiaries of national banks are "affiliates" of national banks.

Third, lurking in the *Wachovia Bank* case was the very important question whether federal agencies are entitled to *Chevron* deference when they issue rules purporting to preempt state law. This issue cuts across many subjects, as more and more federal agencies have issued rules or guidelines purporting to displace state law.[26] And it mattered here because the OCC issued a regulation, 12 C.F.R. 7.4006, which declared that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[27] According to the United States, these preemptive regulations "do not rest on an interpretation of Section 484(a), but rather implement the Comptroller's authority to define the scope of a national bank's 'incidental powers,' 12 U.S.C. 24 Seventh, and to adopt rules governing real estate lending activity, 12 U.S.C. 371(a)."[28]

The United States' reliance on OCC regulations brought to a head (or so it seemed) the clash between the presumption against preemption and the doctrine of *Chevron* deference. Which prevails when an agency seeks to exercise its general rulemaking authority by declaring that, to best effectuate the objectives of the statute, state law is displaced? The United States (and Wachovia Bank) argued that *Fidelity Federal Savings & Loan Association v. De la Cuesta*[29] and its progeny hold that "[w]hen an agency concludes, in an exercise of delegated policymaking authority, that displacement of state law is warranted in furtherance of a federal statute that it is entrusted to administer, the agency is acting within the core of its expertise" and is therefore entitled to full-blown *Chevron* deference.[30] Michigan responded that the Court expressly left this issue open in its 1996 ruling in *Smiley v. Citibank (S.D.), N.A.*[31]—which is inconsistent with the United States' view that *De la Cuesta* already resolved the issue.[32] And Michigan pointed to federalism concerns and institutional reasons why the presumption against preemption should not yield to a presumption *in favor of* preemption whenever a federal agency concludes that preemption is warranted.[33]

B. The Wachovia Bank decision

As it turned out, the majority in *Wachovia Bank* did not reach the issue of how much deference, if any, an administrative agency should receive when it purports to preempt state law. Instead, to the surprise of most people who had followed the case, the Court ruled in favor of Wachovia Bank (and the OCC) based on the National Bank Act itself. The Court therefore called the agency deference issue "an academic question" that is "beside the point."[34] Justice Ginsburg wrote the majority opinion, and was joined by Justices Kennedy, Souter, Breyer, and Alito. Justice Stevens wrote the dissenting opinion, which was joined by Chief Justice Roberts and Justice Scalia. (Justice Thomas recused himself from the case.)

Driving the majority opinion was its view that the National Bank Act (NBA) created a zone of federal activity that is free from undue state interference. According to the Court, "[i]n the years since the NBA's enactment, we have repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation."[35] Therefore, "[s]tate laws that conditioned national banks' real estate lending on registration with the State, and subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business."[36] The only serious issue here, found the Court, was whether a different result should obtain when the lending is undertaken by a state-chartered operating subsidiary of the national bank. The Court held it should not.

The Court reasoned that, "in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercises of a national bank's *powers*, not on its corporate structure." [37] Because an operating subsidiary exercises a national bank's powers, it is equally entitled to "[s]ecurity against significant interference by state regulators."[38] The Court dismissed the relevance of 12 U.S.C. § 481 on the ground that Congress adopted that provision in 1864, yet banks were not authorized to use operating subsidiaries until 1966.

Finally, the Court turned to the state's argument that the OCC regulations are not entitled to deference. The Court concluded that "[t]his argument is beside the point, for under our interpretation of the statute, the level of deference owed to the regulation is an academic question. Section 7.4006 merely clarifies and confirms what the NBA already conveys…."[39] Whether or not the presumption against preemption trumps *Chevron* deference remains an open question.

C. The Dissent

Justice Stevens' dissent, joined in full by Chief Justice Roberts, is an impassioned defense of the states' role in our federalist system. The opening paragraph expresses concerns over the "significant impact of the Court's decision on the federal-state balance" and Justice Stevens amplifies that theme throughout the dissent's many pages.[40]

The first two parts of the dissent discussed the long history of state regulation of national banks, Congress' longstanding belief that state banks and national banks should stand in a position of "competitive equality," and the absence of any express congressional authorization for national banks to use state-chartered operating subsidiaries to perform their functions.[41] All this set the stage for the dissent's conclusion that Congress should have been taken at its word when, in § 484, it expressly preempted only state visitation of "national banks" themselves, while dealing extensively with "affiliates" (such as operating subsidiaries) in § 481.[42] According to the dissent, this alone tells us that Congress did not intend to preempt state regulation of operating subsidiaries. And "[e]ven were it appropriate to delve into the significant impairment question," the dissent found "[t]here is no evidence, and no reason to believe, that compliance with the Michigan statutes imposed any special burdens on Wachovia Mortgage's activities…."[43]

Having found that the NBA does not itself preempt Michigan's laws, the dissent stated that "the most pressing questions in this case are whether Congress has delegated to the Comptroller of the Currency the authority to preempt the laws of a sovereign State as they apply to operating subsidiaries, and if so, whether that authority was properly exercised here."[44] The dissent answered both questions with a resounding no.

The dissent first concluded that an agency does not have the power to preempt state laws merely on account of its being delegated the power to regulate conduct generally. According to the dissent, "there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation…. [T]he lesser power [to decide that national banks may use operating subsidiaries] does not imply the far greater power to immunize banks or their subsidiaries from state laws regulating the conduct of their competitors."[45]

The dissent next concluded that even if Congress had conferred preemptive authority on the OCC, and the OCC intended to exercise that power, "it would still not merit *Chevron* deference."[46]

> No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance. To be sure, expert agency opinions as to which state laws conflict with a federal statute may be entitled to "some weight," especially when "the subject matter is technical" and "the relevant history and background are complex and extensive." But "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad preemption ramifications for state law." For that reason, when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference.[47]

Finally, the dissent concluded with a final word about federalism. The Tenth Amendment should "remind the Court that its ruling affects the allocation of powers among sovereigns. Indeed, the reasons for adopting the Amendment are precisely those that undergird the well-established presumption against preemption."[48]

D. Analysis

The competing opinions in *Wachovia Bank* tell us more, I think, about Chief Justice Roberts' preemption jurisprudence than it does Justice Alito's. The relevance of federalism principles to preemption cases is far from being universally accepted. For example, Justice Scalia has specifically argued that—at least in cases involving express preemption provisions—the Court should engage in ordinary statutory construction, without distorting the analysis by applying a presumption against preemption.[49] And an increasing number of conservative commentators are contending that a strong belief in federalism principles should lead one to construe federal statutes as being *more* preemptive, not less.[50] It is therefore notable that Chief Justice Roberts fully joined an opinion that emphatically and unambiguously linked broad federalism considerations with preemption doctrine. (It is also notable that Justice Scalia joined the opinion in full, though that is a matter for another day.)

It is equally significant that Chief Justice Roberts agreed that "when an agency purports to decide the scope of federal preemption" it is not entitled to *Chevron* deference. As noted, this is an issue that cuts across a broad swath of substantive fields and rests at the intersection of two complex doctrines. The United States, Wachovia Bank, and several of its amici forcefully

argued that, as a matter of precedent and policy, agencies should receive *Chevron* deference in that situation.[51] By rejecting that argument, Chief Justice Roberts confirmed that he places a very high value on federalism and state sovereignty.

Less can be divined about Justice Alito's take on federalism and preemption. The majority opinion did not squarely respond to the federalism rhetoric contained in the dissent and did not address the *Chevron* deference issue. One reading of Justice Alito's decision to join the majority is that it was case-specific. He simply concluded that, given the nature, history, and structure of the national banking system, national banks—and their instrumentalities—should be free from undue state interference. Perhaps there is no reason to believe this signals anything about Justice Alito's general views about preemption.

On the other hand, the case was a close one, and the Court's reasoning was hardly compelled by the statute. Indeed, the United States did not even argue that the Michigan laws were preempted by the statute itself; it relied solely on the OCC regulations. So, in the first seriously-contested preemption case in Justice Alito's tenure, the Justice came down on the side of federal power (and the business community). That is not an auspicious beginning, from the perspective of state power. And when viewed in conjunction with his dissenting opinion in *United Haulers*, to which we will now turn, it suggests a readiness to limit state power in the interest of national uniformity.

III. The Dormant Commerce Clause: *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*

A. Background

Once again, waste disposal served as the crucible for the development of dormant Commerce Clause doctrine.[52] *United Haulers* was a follow-up of sorts to *C & A Carbone, Inc. v. Town of Clarkstown*,[53] which had been the Court's most recent waste disposal case. As the Court noted at the outset in *Carbone*, "[a]s solid waste output continues apace and landfill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment."[54] The Town of Clarkstown attempted to address its solid waste situation by building a solid waste transfer station, which would receive waste, separate out the recyclable items, and then ship the recyclable and non-recylcable waste to appropriate facilities or landfills.[55] There was one problem, however: paying for the station.

The town arranged for a local private contractor to build the station and operate it for its first five years, after which the town would purchase it for $1. The facility would be financed by "tipping fees," that is, the fees the station would charge haulers for each ton of waste dropped off. But how could the town ensure a high enough volume of waste to cover the yearly costs—particularly when the $81 per ton tipping fee charged by the facility was higher than the market rate?[56] The answer was to enact a "flow control ordinance," "which require[d] all solid waste to be processed at [the] designated transfer station before leaving the municipality."[57] In *Carbone*, the Court held that this ordinance violated the dormant Commerce Clause by discriminating against out-of-state transfer station operators in favor of a preferred, "single local proprietor."[58]

The Town's core argument was that the ordinance treats all operators (apart from the favored facility) equally badly. *All* potential competitors, whether in or out of state, were out of luck. The Court rejected that line of reasoning, stating that "[t]he ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."[59] Either way, the ordinance is a protectionist measure benefiting a local enterprise.

Justice Souter's dissent emphasized a different point: that "Clarkstown's transfer station is essentially a municipal facility,"[60] and that the "Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist."[61] The majority in *Carbone* did not respond to Justice Souter's argument and wrote its opinion as though the transfer station in question were a run-of-the-mill private enterprise.

B. The United Haulers Decision

The stage was thus set for *United Haulers*, which also involved the constitutionality of a flow control ordinance requiring all solid waste to be processed at a designated local facility. There was only one "salient difference" between the ordinance at issue in *Carbone* and the one at issue in *United Haulers*: the ordinance at issue in *United Haulers* "require[d] haulers to bring waste to facilities owned and operated by a state-created public benefit corporation."[62] The Court concluded that the public ownership of the facility made all the difference, and upheld the ordinance. Chief Justice Roberts authored the majority opinion; Justice Scalia concurred in part of the opinion; Justice Thomas filed an opinion concurring in the judgment; and Justice Alito wrote the dissent, which was joined by Justices Stevens and Kennedy.

The first (and less interesting) part of Chief Justice Roberts' opinion held that the Court did not resolve this issue in *Carbone*.[63] That settled, he turned to the core question: whether the dormant Commerce Clause forbids a state or local government from favoring government-owned enterprises over competitors. He held it does not. "Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens…. Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism."[64] After observing that "[l]aws favoring local government... may be directed toward any number of legitimate goals unrelated to protectionism," Chief Justice Roberts added a very telling point:

> The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government. The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition.[65]

This is a powerful call for judicial restraint in this area of

the law. And it is made all the more powerful by its setting: a case where the Court is deferring to a local government's decision to remove an area of commerce from the private sector, a decision presumably unappealing to a conservative such as the Chief Justice. Yet he wrote, "[i]t is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services."[66]

After holding, with little difficulty, that the flow control ordinance satisfied the balancing test set forth in *Pike v. Bruce Church, Inc.*,[67] Chief Justice Roberts' opinion closed with a dramatic and noteworthy flourish. After observing that the petitioners sought to invalidate the ordinance under both the per se anti-discrimination rule and the *Pike* balancing test, he wrote:

> There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner* v. *New York*, 198 U.S. 45 (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.[68]

This is a clarion call to the judiciary to apply the dormant Commerce Clause sparingly, at least when there is no obvious discrimination against interstate commerce. It bears adding that Justice Scalia, because of his disapproval of the *Pike* balancing test, did not join this part of Chief Justice Roberts' opinion, which therefore was merely a plurality opinion. But Justice Scalia's disapproval of *Pike*, as well as Justice Thomas' disapproval, means that at least six Justices agree with this call for a "weaker" dormant Commerce Clause. Justice Alito is not among them.

C. Justice Alito's Dissent

Justice Alito's dissent disagreed with Chief Justice Roberts' opinion on a variety of fronts. He concluded that *Carbone* already decided the issue adversely to the local governments, and that, in any event, there is no justification for permitting "discrimination in favor of a state-owned entity."[69] According to Justice Alito, "state-owned enterprises are accorded special status under the market-participation doctrine," but not where, as here, the state is "acting both as a market participant *and* as a market regulator."[70]

Justice Alito took a dim view of state-run businesses and an expansive view of the Court's ability to deal with the problem.

> Experience in other countries, where state ownership is more common than it is in this country, teaches that governments often discriminate in favor of state-owned businesses (by shielding them from international competition) precisely for the purpose of protecting those who derive economic benefits from those businesses, including their employees.[71]

In Justice Alito's view, discrimination in favor of local enterprises, whether publicly or privately owned, may serve both protectionist and legitimate ends. The Court must, therefore, look not at the legislative *ends* but rather at the legislative *means*. And when the means is to discriminate against interstate commerce, the law is subject to strict scrutiny.[72]

D. Analysis

Chief Justice Roberts' opinion is a powerful call for a less vigorous dormant Commerce Clause and, concomitantly, more powerful state governments. Based on both separation of powers and federalism principles, his opinion struck two blows for state power. First, it established the principle that, as a general matter, laws discriminating in favor of state and local governments themselves will be upheld. This result does not seem surprising. State and local monopolies—of services ranging from trash collection to electricity distribution—are not a novel concept. Whether or not they are wise public policy, it would seem far too late in the day to hold them invalid under the Commerce Clause. Still, the issue was an open one and Chief Justice Roberts wrote a forceful opinion in favor of the states.

Second, the opinion expressed deep skepticism of striking down laws under the *Pike* balancing test. Given the disdain with which *Lochner* is generally viewed in the legal community, Chief Justice Roberts' comparison of an aggressive use of the dormant Commerce Clause to that decision is striking. The opinion's condemnation of using the dormant Commerce Clause "to rigorously scrutinize economic legislation passed under the auspices of the police power" was part of a closing peroration that clearly sought to send a message to the legal community. Many dormant Commerce Clause cases are fact-specific and not of great jurisprudential import; this one was different. Chief Justice Roberts' opinion was a shot across the bow.

Justice Alito's dissent reflects a very different conception of the dormant Commerce Clause. To Justice Alito, the dormant Commerce Clause imposes on courts a responsibility to ensure a free market of goods and services across state lines. Courts should not shirk their obligation to strike down state disruptions of that market—even when the disruption takes the form of the state monopolizing a traditional government function. The federalism interest in ensuring a broad sphere of state autonomy to experiment and take innovative measures as local conditions necessitate apparently takes a back seat.

CONCLUSION

There is every reason to believe that Chief Justice Roberts and Justice Alito—as principled, conservative jurists—will be generally supportive of the Rehnquist Federalism Revolution. But under the broad label "federalism" lays myriad discrete doctrines covering an array of constitutional provisions and statutory disputes. It remained to be seen what particular form their respective federalism jurisprudences would take. So far, the evidence suggests that on the issues of preemption and the dormant Commerce Clause, Chief Justice Roberts will be far more supportive of state power than Justice Alito.

Earlier on, I issued the caveat that we should be wary of placing too much weight on just a couple of opinions—particularly in areas of the law as fact-dependent as preemption and the dormant Commerce Clause. That caveat has more strength with respect to gauging Justice Alito's jurisprudence than with respect to Chief Justice Robert's. The dormant Commerce Clause opinion written by Chief Justice Roberts and the preemption opinion he joined both espoused principles that go well beyond the facts of the two cases and the statutes

at issue. This does not mean, of course, that Chief Justice Roberts will rule for the states in every preemption and dormant Commerce Clause case. There will inevitably be cases where the states have a weak position and will not obtain his vote. But the *Wachovia Bank* and *United Haulers* opinions strongly suggest that Chief Justice Roberts will go into these cases with a deep understanding of the states' interests and an inclination to uphold state power where possible.

It is harder to gauge Justice Alito's jurisprudence because the opinions he wrote and joined were not as far-reaching and can more readily be attributed to the particular statutory schemes at issue. Perhaps *Wachovia Bank* will prove to be an aberration. Nonetheless, at this juncture, he appears to take a more free-market (business) friendly approach to preemption and dormant Commerce Clause cases than does his colleague at the center of the bench.

We should learn a great deal more about both justices' approaches this term. On the Court's docket are four preemption cases and one dormant Commerce Clause case.[73] Come July 2008, we will have much more data with which to assess their respective federalism jurisprudences.

Endnotes

1 76 U.S.L.W., *Supreme Court Today*, at 3055 (August 7, 2007).

2 Cunningham v. California, 127 S. Ct. 856 (2007); Limtiaco v. Camacho, 127 S. Ct. 1413 (2007); Zuni Public School Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007); Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786 (2007).

3 127 S. Ct. 1559 (2007).

4 127 S. Ct. 1786 (2007).

5 514 U.S. 549 (1995).

6 521 U.S. 98 (1997).

7 505 U.S. 144 (1992).

8 521 U.S. 507 (1997).

9 Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

10 *Seminole Tribe*, 517 U.S. at 68 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

11 Dan Schweitzer, *Federalism in the Roberts Court*, NAAGazette, Nov. 6, 2007, at 4. The Roberts Court did decide an Eleventh Amendment case and a Fourteenth Amendment case in early 2006 (just prior to Justice Alito's elevation to the Court), but the Court had already granted certiorari in both cases when Roberts joined the Court. *See* Central Virginia Community College v. Katz, 546 U.S. 356 (2006) (ruling that states have no sovereign immunity from proceedings brought pursuant to the Bankruptcy Clause); United States v. Georgia, 546 U.S. 151 (2006) (holding that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity with respect to conduct that actually violates the Fourteenth Amendment).

12 *See*, *e.g.*, Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 232 (2000) ("Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-14, at 1102 (3d ed. 2000) ("The Supreme Court's approach to Commerce Clause issues, despite such structuring devices as the emphasis on less restrictive or less discriminatory alternatives, often appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles.").

13 United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress lacked the power under the Commerce Clause to enact §13981 of the Violence Against Women Act).

14 In describing preemption and the dormant Commerce Clause this way, I am borrowing from Viet Dinh, who stated that the various types of preemption and the dormant Commerce Clause are all parts of a "rather smooth continuum" of "federal displacement of state law." Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2112 (2000).

15 538 U.S. 721 (2003).

16 541 U.S. 509 (2004).

17 546 U.S. 356 (2006).

18 Ernest A. Young, "Federal Preemption and State Autonomy," *in* Federal Preemption: States' Powers, National Interests 263 (Richard Epstein & Michael Greve, eds. 2007).

19 *See* Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 610-20 (1997) (Thomas, J., dissenting); General Motors Corp. v. Tracy, 519 U.S. 278, 312 (Scalia, J., concurring).

20 For example, Chief Justice Rehnquist dissented from 8-1 and 7-2 decisions that struck down state and local laws in West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994), Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance, 505 U.S. 71 (1992), and Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992). Meanwhile, between the 1993 Term (when Justice Ginsburg joined the Court) and the end of her tenure, Justice O'Connor ruled against state and local power in every 5-4, 6-3, or 7-2 case. See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995); Barclays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298 (1994); West Lynn Creamery; C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); and Oregon Waste Systems. I did not count Granholm v. Heald, 544 U.S. 460 (2005), which focused more on the meaning of the Twenty-First Amendment than the dormant Commerce Clause.

21 *See* Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2282-85 (2004).

22 Brief of AARP et al. as Amici Curiae in Support of Petitioner at 12, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

23 *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 352 (2004); Brief of Petitioner at 25-26 n.87, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

24 In *Wachovia Bank*, the Court quoted an earlier opinion as having defined "visitation" as "the act of a superior or intending officer, who visits a corporation to examine its manner of conducting business and enforce an observance of its laws and regulations." 127 S. Ct. at 1568 (quoting Guthrie v. Harkness, 199 U.S. 148, 158 (1905)) (internal quotation marks omitted by the Court).

25 12 U.S.C. § 221a(b).

26 *See* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 227 (2007) (citing examples from the Food and Drug Administration, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration).

27 The regulation built upon earlier regulations which declared that operating subsidiaries of national banks operate subject to the same "terms and conditions" as their parent national banks. 12 C.F.R. 5.34(e)(3), 24a(g)(3)(A).

28 Brief for the United States as Amicus Curiae Supporting Respondents at 7-8, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

29 458 U.S. 141 (1982).

30 Brief for the United States as Amicus Curiae Supporting Respondents at 24, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

31 517 U.S. 735, 744 (1996).

32 Brief of Petitioner at 31, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342).

33 *Id*. at 31-34.

34 *Wachovia Bank*, 127 S. Ct. at 1572.

35 *Id*. at 1566-67.

36 *Id*. at 1568.

37 *Id*. at 1570 (internal citation omitted).

38 *Id*. at 1571.

39 *Id*. at 1572.

40 *Id*. at 1573 (Stevens, J., dissenting). The dissent, in its slip opinion form, was 24 pages—seven pages longer than the majority opinion.

41 *Id*. at 1573-78.

42 *Id*. at 1578-80.

43 *Id*. at 1580.

44 *Id*. at 1582.

45 *Id*. at 1583.

46 *Id*. at 1584.

47 *Id*. (internal citations omitted).

48 *Id*. at 1585.

49 *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 545-48 (1992) (Scalia, J., concurring).

50 *See* Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and its Limits*, in Federal Preemption: States' Powers, National Interests 309-12 (Richard Epstein & Michael Greve, eds. 2007) (arguing that "preemption doctrines should reduce the federalism risks that lie at the heart of the dormant Commerce Clause: state protectionism, balkanization, and... cost externalization"); Dinh, *supra* note 14, at 2092-97.

51 Brief for the United States as Amicus Curiae Supporting Respondents at 23-25, Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (No. 05-1342); Brief for the Respondents at 35-36, 39-44, *Watters*; Brief for Administrative Law Professors as Amici Curiae in Support of Affirmance at 4-27, *Watters*; Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents at 21-30, *Watters*.

52 *See also* Oregon Waste Sys., Inc. v. Dept. of Envt'l Quality, 511 U.S. 93 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources, 504 U.S. 353 (1992); Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

53 511 U.S. 383 (1994).

54 *Id*. at 385-86.

55 *Id*. at 387.

56 More precisely, "the town guaranteed a minimum waste flow of 120,000 tons per year.... If the station received less than 120,000 tons in a year, the town promised to make up the tipping fee deficit." *Id.*

57 *Id*. at 386.

58 *Id*. at 392.

59 *Id*. at 391.

60 *Id*. at 419.

61 *Id*. at 421.

62 United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1790 (2007).

63 *Id*. at 1794-95.

64 *Id*. at 1795.

65 *Id*. at 1796.

66 *Id.*

67 397 U.S. 137, 142 (1970).

68 *United Haulers*, 127 S. Ct. at 1798.

69 *Id*. at 1804-05, 1806 (Alito, J., dissenting).

70 *Id*. at 1806, 1807.

71 *Id*. at 1808.

72 *Id*. at 1808-09.

73 The preemption cases are Riegel v. Medtronic, Inc. (No. 06-179); Rowe v. N.H. Motor Transp. Ass'n (No. 06-457); Chamber of Commerce v. Brown (No. 06-939); and Warner-Lambert Co. v. Kent (No. 06-1498). The dormant Commerce Clause case is Kentucky Dep't of Revenue v. Davis (No. 06-666).

Financial Services and E-Commerce

Reflections on the Mortgage Bust and the Inevitable Political Reaction

*By Alex J. Pollock**

We enter 2008 amid the housing and mortgage bust which has, as night the day, followed the housing and mortgage bubble. The deflation of this bubble, and the subsequent credit panic, was the biggest financial news of 2007, and as the deflation of the bubble continues into the new year, it is as much political as financial news. In every housing finance bust, there is an irresistible urge for politicians to "do something" —and they always do. In a financial panic, everybody wants to get a government guarantee, and in one form or another such guarantees are usually provided. Former House Banking Committee Chairman Jim Leach has said that, "The precept of doing nothing should be off the table."[1] The Secretary of the Treasury recently remarked, "Nothing is worse than doing nothing."[2] This is not true in economics, but it is absolutely true in politics.

The Deflating Bubble

To some astute observers, it was apparent by 2005 that the great American house price inflation of the 21st century, along with the unsustainable expansion of subprime mortgage credit—which both fed the price increases and seemed justified by them—had created a bubble. But bubbles are notoriously hard to control, because so many people are making money from them while they last. As Walter Bagehot so rightly said in 1873:

> All people are most credulous when they are most happy; and when much money has just been made, when some people are really making it, when most people think they are making it, there is a happy opportunity for ingenious mendacity. Almost everything will be believed for a little while.[3]

By now it is a little hard to remember the former political enthusiasm at rising home ownership rates and the former economic enthusiasm at complex financial innovation. This has been replaced by an international credit market panic; credit contraction with central bank expansion; the closing or bankruptcy of more than a hundred subprime lenders; layoffs; large losses and a deep recession in the homebuilding industry; still accelerating mortgage delinquencies, defaults, and foreclosures; tens of billions of dollars of announced losses by U.S. and foreign financial firms; heavy losses by private mortgage insurance companies; falling house prices and sharply falling house sales; falling state and municipal real estate tax revenue; tightening or disappearing liquidity; increasingly pessimistic forecasts; and, of course, increasing political recriminations.

In mid-2007, typical estimates of the mortgage credit losses involved were about $100 billion. Then they grew to $150 billion, a number cited by Fed Chairman Bernanke (which I believe to be a reasonable estimate of the ultimate credit losses, not including the market value losses from leveraged investments in subprime securities). Other forecasts have the total losses at $250 billion, $300 billion, and even $400 billion. "A hundred billion here, a hundred billion there, and soon we're talking about real money," one is tempted to comment. In financial booms, a competition tends to develop in predicting how high things will go; in the bust, there is a similar competition in predicting how bad they will get. Obviously, uncertainty is high—and a large premium for uncertainty is one reason market prices are depressed.

The most recent bubble and current bust display all the classic patterns of recurring credit over-expansions and their painful aftermaths, as colorfully described by Bagehot, Charles Kindleberger,[4] and Hyman Minsky.[5] Such expansions are always based on the euphoric belief in the ever-rising price of some asset class—in this case, houses and condominiums. This appears to offer a surefire way for buyers, borrowers, lenders, investors, and speculators to make money, and indeed they all do, for a while. As long as the prices always rise, everyone can be a winner. A good example of the bubble spirit was the 2005 book by a housing economist: *Are You Missing the Real Estate Boom? Why the Boom Will Not Bust and Why Property Prices Will Continue to Climb Through the Rest of the Decade*. A similar work from the dot.com stock market bubble, *Dow 40,000*, is currently quoted by Amazon at 32 cents for the hardcover edition.

This time we apparently had the greatest house price inflation in U.S. history. The price inflation stimulated the lenders, the loan brokers, the investors, the bond salesmen, the borrowers, the speculators, the homebuilders, and the flippers. The value of residential real estate about doubled between 1999 and 2006, increasing by $10 trillion. With a total value of about $21 trillion, this is a huge asset class and component of household wealth. The U.S. residential mortgage loan market is the biggest credit market in the world, with outstanding credit grown to over $10 trillion, of which about $1.3 trillion represents subprime mortgages. Securitized U.S. mortgages, prime and subprime, are owned around the world.

Financial Fragility and the Plank Curve

The unexpected acceleration of subprime mortgage losses and the disruption of the securitized mortgage market created a discontinuous global financial freeze-up. Why was the financial reaction so severe? The short answer is leverage and short-term financing of long-term, risky assets. If the price of an asset is always rising, more leverage always seems better. If the price of an asset is always rising, the credit experience of loans made to finance it will be good, with low delinquencies and defaults, so that the risk of the loans seems less and less, even as the risk is in fact increasing. This process Minsky called the "endogenous build-up of financial fragility." He described the central behavioral elements as follows:

> Acceptable financing techniques… depend upon the subjective preferences and views of bankers…. Success breeds a disregard

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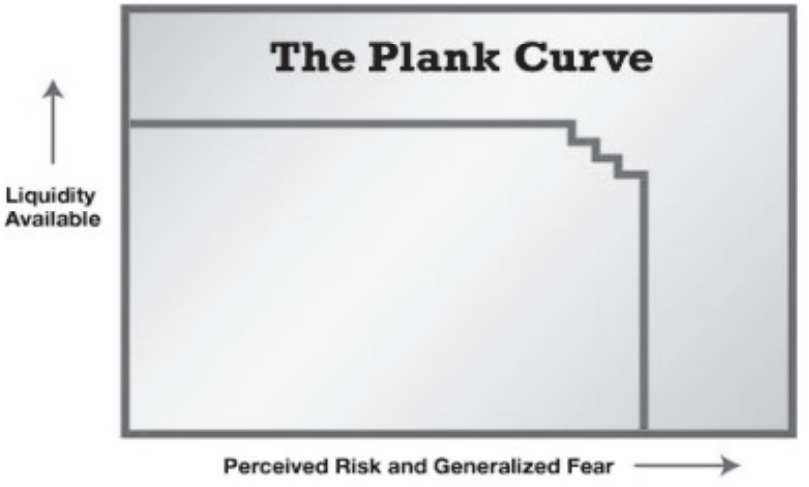
> of the possibility of failure; the absence of financial difficulties over a substantial period leads to the development of a euphoric economy in which short-term financing of long positions becomes a normal way of life.[6]

Normal, that is, until the short-term financing is no longer available. When the price of the asset no longer rises, then begins falling, with credit defaults and losses rising instead, overconfidence is replaced by fear. Everybody becomes conservative all at once, and the short-term lenders withdraw—and that creates the panic. The overall pattern was nicely summed up by Velleius Paterculus in his history of Rome (30 AD): "The most common beginning of disaster was a sense of security."

A sense of security in the subprime market was created by models, and securitized subprime mortgages were leveraged in two ways.

First, they were divided into classes or "tranches" of various credit risk, based on the models of investment banks and the credit rating agencies. The resulting junior tranches, sold to yield-hungry investors in both domestic and international markets, were highly leveraged, or sensitive, to the credit losses being worse than the models expected. Junior tranches were then purchased in new collateralized debt obligation ("CDO") vehicles and re-tranched into further senior and junior securities, based on the models, making them even more sensitive to model accuracy, as well as more difficult to understand.



The source is Alan E. Grunewald and Alex J. Pollock, "Money Managers and Bank Liquidity," 1985.

Second, many investors then added to this risk financial leverage, financing subprime mortgage securities with short-term borrowings in the form of repurchase agreements or asset-backed commercial paper. Providers of such short-term credit do not wish to have any meaningful risk and will quickly flee questionable exposures. The resulting structure thus became hyper-leveraged to worse-than-expected outcomes.

As we know now, the reality of subprime credit defaults and losses has turned out far worse than the models predicted, the market value of subprime mortgage-backed securities has dropped far more than expected, and the short-term lenders rapidly withdrew their credit in August 2007. Consider that, for the first half of 2007, the financial world was treated to pontifications about "abundant liquidity" or even "a flood of liquidity," which would guarantee a firm market bid for risky assets and narrow spreads. Suddenly, with bubble turned to bust, there was a "liquidity crisis." At a discussion of the problems of the mortgage bust last fall, a senior economist from a international institution intoned, "What we have learned from this crisis is the importance of liquidity risk." "Yes," I replied, "that's what we learn from every crisis." Indeed, the tendency of financial markets to re-learn the same lessons every decade or so is one of the most intriguing things about them. The liquidity dynamic is shown by the graph of the Plank Curve shown here, which represents the amount of short-term credit available in the market as a function of uncertainty and fear. The name of the curve derives from the path of a man walking the plank.

Was it prudent for lenders and leveraged investors to rely so much on models and on bond ratings based on models? Well, what is prudence? In the definition offered by John Maynard Keynes, "A prudent banker is one who goes broke when everybody else goes broke."

Inevitable Political Reaction

With scores of subprime mortgage lending companies out of business, all remaining lenders, including all the major ones, have cut back drastically on subprime lending or exited altogether and raised mortgage credit standards. Obviously, this reduces the availability of mortgage credit and thereby the demand for houses, just at a time when there is excess supply and high for-sale inventories of new houses, existing houses and condominiums. On top of that, there are record numbers of vacant for-sale houses.

It is evident that an excess supply of houses combined with reduced demand means a trend of falling house prices. The great house price inflation is correcting, and must continue to correct, but how far will prices fall? Informed forecasts suggest perhaps a 15% average drop spread over two years or so. This would suggest about a $3 trillion loss of wealth for American households.

Unfortunately, falling house prices tend to trigger higher mortgage defaults, as the house comes to be worth less than the amount owed. This is especially true when loans were made with small or no down payments, as they were, and were made to speculative borrowers, as they were. A key factor in the models used to analyze the risk of mortgages is house price appreciation ("HPA" in the trade lingo). But now the reality is HPD: house price depreciation.

The possibility of a self-reinforcing downward spiral of defaults, declining house prices, losses, credit contraction, and foreclosures—or, in other words, a "debt deflation,"—in so large and important a sector as housing-mortgage finance makes the deflating bubble a hot political issue. Late-cycle political reaction is inevitable. There are two categories of

possible government responses: temporary programs to "bridge the bust"; and fundamental, long-term improvements in the operation of the mortgage market.

To try to ameliorate the probable overshoot of the downward cycle is a reasonable project with much historical precedent. History is clear that governments always intervene in such situations, not always successfully. As the savings and loan crisis gathered force in 1986, for example, the Federal Home Loan Bank Board (FHLBB) published an annual report showing "PUBLIC CONFIDENCE" carved in stone. This turned out to be a tombstone, as the thrifts collapsed and the FHLBB itself was abolished a few years later.

Any "bridging the bust" intervention should be clearly defined as temporary, inhibit as little as possible personal choice and long-run market innovation and efficiency, and should not bail out careless lenders and investors, or speculative borrowers.

Both the Administration and Congress want to use the FHA as a means to create a refinancing capability for subprime mortgages. This is reasonable because the FHA is already a subprime lending institution, and the best way to deal with a troubled subprime loan is to settle it with the proceeds of a new, more affordable refinancing. But with falling house prices, the amount the FHA or anybody could responsibly refinance is liable to be less than the outstanding principal owed on the old subprime mortgage. The owners of these mortgages, typically investors in structured securities issued by a securitization trust, must take a loss for the difference. Investors in speculative instruments should not be bailed out. In economic value the loss has occurred already: it is a matter of the loss being realized. To accept less than full repayment in settlement of a troubled loan from the proceeds of an FHA refinancing, the mortgage servicer, which acts as agent for the investors, would have to be confident that this was a better outcome for the investors than proceeding to foreclosure. Fortunately, from this particular point of view, foreclosure is an extremely expensive process for the investors.

Thus, I believe that a special, temporary program (say for three years) in which the FHA could refinance up to 97% of the current value of the house, even with the existing loan in default, would be a good idea. The investors could accept a loss on any difference between that and the amount owed, which would be an alternative preferable to foreclosure for the investors, as well as obviously so for the borrowers. This would allow the borrowers to go forward with a small positive equity in the property and a loan of more appropriate size.Supposing that the FHA could insure loans in this manner, they would still need to be funded at favorable rates. To help achieve this, I favor granting Fannie Mae and Freddie Mac a special increased portfolio authorization, strictly limited, however, to a segregated portfolio solely devoted to refinancing subprime mortgages. Such a special authorization might be for $100 billion each, easily able to be financed in turn by Fannie and Freddie debt issuance. A very interesting historical analogy to this kind of approach was the Home Owners' Loan Corporation, created by the Home Owners' Loan Act of 1933. [7]

A simple proposal for fundamental improvement of the mortgage market is to make clear to borrowers what the mortgage really means to them with a straightforward one-page form. The subprime mortgage boom obviously overshot on risk creation, but should people be free to take a risk in order to own a home, if they want to? The answer is *Yes*, provided they understand what they are getting into. This is a pretty modest risk, to say the least, compared to those our immigrant and pioneer ancestors took.

And should lenders be able to make risky loans to people with poor credit records, if they want to? *Yes*, provided they tell borrowers the truth about what the loan obligation involves in a straightforward, clear way. A market economy based on voluntary exchange and contracts requires that the parties understand the contracts they are entering into. A good mortgage system requires that the borrowers understand the key facts about how the loan will work and, in particular, how much of their income it will demand. Nothing is more apparent than that the current American mortgage system does not achieve this. Instead it tries to describe 100% of the details in legalese and bureaucratese, which results in approximately zero information transfer to the borrower.

To have informed borrowers who can protect themselves, the key information must be simply stated and clear, in regular-sized type, and presented from the perspective of what commitments the borrower is making and what that means relative to household income. Then the borrowers can "underwrite themselves" for the risk. I have proposed to Congress such a one-page form, "Basic Facts About Your Mortgage Loan," along with brief explanations of the mortgage vocabulary and some avuncular advice for borrowers.[8] This seems to me an idea which should be implemented as a fundamental reform, whatever else is done or not done.

An old banking boss of mine used to say, "Risk is the price you never thought you'd have to pay." This price, including the price of the coming government interventions, will continue to be paid by many parties as the deflation of the housing and mortgage bubble proceeds in 2008.

Endnotes

1 Quoted in *Is Debate on a Mortgage Fix Near Its Tipping Point?* Am. Banker, Dec. 20, 2007.

2 "Remarks by Secretary Paulson on Actions Taken and Actions Needed in U.S. Mortgage Markets at the Office of Thrift Supervision National Housing Forum," Dec. 3, 2007, *available at* http://www.treas.gov/press/releases/hp706.htm.

3 Walter Bagehot, Lombard Street 78 (1962).

4 *See generally* Charles P. Kindleberger, Manias, Panics, and Crashes (1978). *See also* 5th ed. (rev. Robert Z. Aliber, Palgrave, 2005).

5 *See* Financial Commitments and Instability, ch. 9 *in* Hyman P. Minsky, Stabilizing an Unstable Economy (1986)

6 *Id*. at 213.

7 Alex J. Pollock, *Crisis Intervention in Housing Finance: The Home Owners' Loan Corporation*, AEI Financial Services Outlook, Dec., 2007, *available at* www.aei.org.

8 Alex J. Pollock, *Bank Consolidation, Subprime Mortgage Issues, and the One-Page Mortgage Disclosure: Testimony to the House Committee on Oversight and Government Reform, Subcommittee on Domestic Policy*, May 21, 2007. Testimony and the proposed one-page form available at www.aei.org.

Free Speech and Election Law

State Voter ID Requirements and the Constitution

*By Allison R. Hayward**

Most likely because it is an election year, the argument in *Crawford v. Marion County Board of Elections*, has attracted spirited attention, and almost forty briefs from outside groups. Supporters of the law, which requires Indiana voters to present a government-issued photo ID before voting (or vote provisionally or swear indigency or other inability to obtain an ID) argue that an ID requirement is necessary to prevent voter fraud.[1] If polling places do not ask for ID, the argument goes, cheaters can take advantage of bloated voter registration lists and low voter turnout to send phonies to vote in the name of others. This voting fraud crime is known as "impersonation fraud." Opponents argue that ID requirements attack a phantom problem, because there is little evidence of impersonation fraud.[2] What these laws succeed in doing, they contend, is prevent lawful voters from voting, and that the laws disproportionately impact the poor, elderly, and other voters from groups less likely to have the necessary ID. As these voters are disproportionately Democratic, voter ID laws are, say the critics, just a partisan Republican ploy.

The problem with both perspectives is that they attempt to score public policy points in the context of constitutional adjudication. The question before the Court in *Crawford* is not whether Indiana's voter ID requirement is good policy, canny politics, or even whether it is justified. The question is whether it is *facially* unconstitutional for a state to impose this specific ID requirement on all voters.

Administration of elections—even elections to federal office, is a task the Constitution commits to state lawmakers, "but the Congress may at any time by law make or alter such regulations," and each house of Congress can, constitutionally, judge the elections and qualification of its own members. Of course, this does not give states complete freedom to enforce whatever restrictions on voting they choose—the Constitution has very specific things to say about voting discrimination by race, sex, or age, or conditioning voting on payment of a tax or fee. The Constitution also requires states to extend "due process" and "the equal protection of the law" to all.

In the voting context, states have long had laws restricting the voting rights of felons, mentally incapacitated persons, aliens, and individuals residing only a short time in the jurisdiction; and every state but one requires that voters register in order to be eligible to vote. Congress has weighed in as well, with laws governing states' voter registration processes and the maintenance of voting registration lists, prohibiting discrimination in election administration and practices, and requiring federal approval of changes to voting procedures in those jurisdictions "covered" by Section 5 of the Voting Rights Act.

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So, to the extent individuals have a "right" to vote, it is a "right" that is in great part a creature of state law, as modified by Congress. Provided that a state's voting restrictions fall within the scope of recognized state authority and are reasonable, the Constitution tolerates divergence among states. We have elections to federal office, but we do not have *national* elections.

How does the Indiana law measure up? Many states have some form of identification requirement for in-person voting at the polls.[3] Even the most lenient states require individuals who register by mail to produce identification to vote a regular ballot the first time they show up to the polls. This is true notwithstanding the difficulty of demonstrating anywhere a consistent threat to election integrity from "impersonation" fraud.

Indiana's law is more burdensome, to be sure—if a person lacks the required ID, that voter may cast a "provisional" ballot, but that ballot will only count if the voter within ten days produces proof of identity. For the person in this situation, this procedure is a pain.

But how big a pain? According to briefs filed by Marion County in this case, in the local 2007 election (the first under the new ID law) thirty-four voters in Marion County (out of 166,103) were denied regular ballots because they lacked the proper identification, and cast provisional ballots instead.[4] Two of the thirty-four then followed up later with identification. There may have been other voters turned away on Election Day who left rather than cast a provisional ballot. Yet even if we increase the number of rejected voters by a factor of *ten*, we still have a "burden" of a fraction of a percent. Admittedly, the 2007 election was a low-turnout local election, and one would expect the most motivated and established voters to participate. Yet, once motivated by a contentious issue, fraud may be all the more tempting in a low-turnout context, because fewer votes would be required to turn the result.

The stakes in the *Crawford* case are less about election integrity than about what discretion the Court will recognize in state lawmakers. As noted before, election administration has been a state responsibility through history, and state excesses have been addressed via statute and constitutional amendments. Yet petitioners in this case are skeptical that state politicians should be trusted with such discretion—as elected officials conflicts of interest would seem to carry the day. Control over election regulation could further insulate these incumbents from competition, making politics less responsive and representative.

A number of briefs in *Crawford* argue that state choices should be subject to greater Court scrutiny, and found constitutional only if justified by a strong state interest (there is some divergence on how substantial that interest need be) and designed to regulate only so much activity to serve that interest.[5] The Indiana law fails under elevated scrutiny, they argue, since

there is scarce evidence of impersonation fraud. Moreover, the law was enacted by Republicans for partisan purposes.

Yet respondents can point to the negligible burden imposed by the ID requirement, the existence of voter fraud generally in select contexts, and the popularity of the law in the state to argue that the Court should respect state discretion here as it has in other election administration contexts. Partisan motives can be found behind many legislative votes, and do not undermine a law's constitutionality. With evidence that no more than a miniscule fraction of legitimate voters may be "disenfranchised" by the requirement, at worst the law is ineffective, and merely a sop to public opinion. Were the Court to reject on Constitutional grounds state laws that are ineffective yet politically popular, the volume of such challenges would soon become immense.

A related claim is that none of the parties challenging the law have been injured by it, and lack standing to bring this claim.

It is almost always risky to guess how the Court will handle any case, but here we may see a majority form behind a consensus that, whatever the standard of scrutiny, there just is not a litigant with standing, or harm of a *constitutional* dimension, in this *facial* challenge.[6] Laws governing voter registration and voting will impose some burden, and that burden is more heavily borne by voters with less education, experience in voting, and funds. If this ID requirement is facially unconstitutional, then it is hard to see how many other voting laws, including registration requirements, remain on the books.

If the Court reaches deeper into the issues, we may see four Justices supporting state discretion (Alito, Roberts, Scalia, and Thomas) and four Justices applying elevated scrutiny to the law (Breyer, Ginsburg, Souter and Stevens). This is a facial challenge to the law, and thus petitioners have the burden of arguing that the law is unconstitutional in essentially all applications. To find for petitioners, these Justices would need to fashion an argument that resolves this point against the state. The petitioners' brief, aware no doubt of this problem, specifically plays to Justice Breyer's standard, articulated in *Randall v. Sorrell*, that laws presenting certain "danger signs" receive closer scrutiny.[7] But since *Randall* was an as-applied challenge to a state campaign finance restriction, it is not clear that Breyer's locution is useful here.

Justice Kennedy, not surprisingly, may again occupy the swing position, and given his penchant for impressionistic assessments, could conclude the law is facially constitutional, based perhaps upon the lack of real burden, the historic role of state in election administration, the posture of the case as a facial challenge, the popularity of ID requirements, the broad incorporation of ID laws in other states, and perhaps other reasons. States and litigants may be left with a murky decision that provides little guidance in future cases.

In short, the safer bet is that the Supreme Court will uphold the Indiana Voter ID law against this facial challenge. A narrow decision focused on standing, or perhaps issues of federalism, could also provide useful precision to an inchoate area, and assist state lawmakers in understanding the discretion they have and the considerations they must honor.

Endnotes

1 Ind. Code § 3-5-2-40.5 (voting in person requires proof of identification showing a photograph, a name that conforms with the registration records, was issued by state or US government, has not expired as of precious general election.) If the precinct board knowingly fails to challenge a voter whose ID is inadequate, that member has committed a felony. § 3-14-2-14. A voter without adequate ID may cast a provisional ballot, then produce within 10 days adequate ID or swear an affidavit that the voter has an objection to being photographed or is indigent and cannot afford ID. § 3-11.7-5-2.5(b)-(c).

2 Brief of Petitioners, Indiana Democratic Party v. Rokita, No. 07-25, at 7.

3 Brief of Amici Texas, et al., Crawford v. Marion County Board, No. 07-21, at 9-14 (describing variety of state Voter ID laws).

4 Brief for respondent Marina County Election Board, Crawford v. Marion County Board, No. 07-21, at 8-9.

5 *See* Brief of Amici Brennan center, et al., No. 07-21, at 8 (applying balancing test); Brief of Amicus Prof. Erwin Chemerinsky, NMo 07-21, at 9-12 (noting confusion in precedent, advocating "close scrutiny" when law denies vote, balancing when law poses indirect burden). Professors Chris Elmendorf and Dan Tokaji also co-authored an amicus bried devoted to the standard of scrutiny, as did Prof. Rick Hasen.

6 "Petitioners elected to bring a facial challenge... [s]uch a challenge is the 'most difficult challenge to mount [and] is undercut by the undisputed fact that they have failed to identify a single individual in Indiana whose ability to vote depends on that law." Brief of the Amicus United States, No. 07-21, at 10 (citing *United States v. Salerno*).

7 Brief for Petitioners Indiana Democratic Party, No. 07-25, at 24, 29.

California Court Broadens Student Speech Protections in Public Schools

*By Paul J. Beard, II**

For decades California has been a leader in protecting the free speech rights of students in public high schools. Last year, a state court issued a decision expanding California law's already broad protection of even the most offensive and politically incorrect student speech. In *Smith v. Novato Unified School District*, the California Court of Appeal decided that two politically charged student articles in a school paper that angered students and parents (one on immigration and the other on "reverse racism") were not unprotected incitement, as school officials argued, but rather protected speech that could not be restrained or punished.[1] In doing so, the court adopted a narrow interpretation of "incitement" under California law that confers on student speech perhaps the greatest protection of any state in the country—and much greater protection than the First Amendment provides.

Besides setting an important precedent for California students, *Smith* exemplifies federalism at work. While California law has become increasingly protective of student speech rights, the U.S. Supreme Court's First Amendment jurisprudence has become decreasingly so. This article explores this and other issues raised in *Smith*.

I. Background of Federal and California Law on Student Speech

In 1969, the U.S. Supreme Court issued its landmark decision on student speech in *Tinker v. Des Moines Independent Community School District*, where high school students claimed a First Amendment right to protest the Vietnam War by wearing black armbands on campus.[2] The Court declared that student speech enjoyed the full protection of the First Amendment, unless such speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[3] Justice Stewart, in his concurrence, identified the central premise of *Tinker*: "[S]chool discipline aside, the First Amendment rights of children are co-extensive with those of adults."[4]

Tinker forced state and local governments to review their student speech policies, and California was one of the first to codify its broad protections. In 1978, the California Legislature added Section 48907 to the Education Code, which protects student speech—including in school-sponsored forums, like school newspapers—against prior restraint or punishment. The statute recognizes only four broad categories of unprotected speech. It states, in relevant part, that public school officials may prohibit only student speech that is "obscene, libelous, or slanderous," or that "so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school."[5]

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The first published decision to interpret Section 48907 was the California Court of Appeal's 1988 opinion in *Leeb v. DeLong*.[6] By that time, however, the U.S. Supreme Court had substantially curtailed student speech protections under the First Amendment. While not expressly overruling *Tinker*, the Court created substantial exceptions to it, giving school officials broad authority to control student speech.[7] For example, in *Hazelwood School District v. Kuhlmeier*, the Court said that school officials could prohibit speech in school-sponsored activities, like school newspapers, if such prohibitions are "reasonably related to legitimate pedagogical concerns."[8]

Both *Leeb* and the court of appeal's 1995 decision in *Lopez v. Tulare Joint Union High School District Board of Trustees* made clear that Section 48907 remains unaffected by the Court's evolving First Amendment jurisprudence on student speech.[9] The *Leeb* court observed that "[t]he broad power to censor expression in school sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is not available to this state's educators" under Section 48907.[10] The reason was that Section 48907 "constitutes a statutory embodiment of the *Tinker* and related First Amendment cases *at that time*."[11] Thus, Section 48907 was to be interpreted in light of the First Amendment jurisprudence existing at the time of its enactment in 1978. This interpretive view of Section 48907 would prove dispositive in *Smith*.

II. Smith v. Novato Unified School District

A. The Facts of the Case

Between 1998 and 2002, Andrew Smith was enrolled at Novato High School, a public school in the Novato Unified School District in Marin County, California. Following the 9/11 terrorist attacks, while a senior and student in a journalism class, Smith submitted an opinion-editorial on illegal immigration entitled "Immigration" for publication in the school newspaper *The Buzz*. "Immigration" expressed Andrew's objections to and ideas for addressing illegal immigration. The article also included some offensive remarks about immigrants in general.[12]

With the approval of the journalism advisor and the principal, "Immigration" was published in *The Buzz* and distributed at the high school the morning of November 13, 2001. No one complained about the article that day, but the following day a few parents arrived on campus to complain to the principal. Some students walked out of their classrooms in protest of the article as well. The principal called the district's superintendent to inform him of the reaction to the article. Without reading the piece, the superintendent immediately ordered that all remaining copies of *The Buzz* be retracted. Accordingly, the principal directed the journalism advisor to collect remaining copies of the paper.[13]

Later that morning, the principal invited upset parents and students to the campus lecture hall to vent their feelings about the article. At the meeting, which lasted the day, the principal apologized for "misinterpretation and misapplication of" the

district's policies in allowing "Immigration" to be published.[14] That day, the principal and superintendent also sent a letter home with students. The letter stated, in relevant part:

> Yesterday the November issue of our school's student newspaper, *The NHS Buzz*, was distributed. This issue included an opinion article representing the beliefs of one student that negatively presented immigrants in general and Hispanics in particular. We are writing to express our deepest regrets for the hurt and anger this article has generated for both students and their parents. *This article should not have been printed in our student newspaper, as it violates our District's Board Policy. . . [and Human Relations and Respect Mission Statement]* . . . .[15]

The district instructed teachers to review its speech policies in class and conducted a second meeting about "Immigration" the following evening. Approximately 200 students, parents, and staff expressed dismay over the article. Against this backdrop, Smith was assaulted and attacked on two separate occasions in November.[16]

The following month, the district's Board of Trustees held a public meeting, where the principal reiterated that "Immigration" should never have been published, because it violated the district's speech policies. She confirmed that she had retracted the remaining copies of *The Buzz* containing the article, and students and parents, along with the Smiths, spoke about their reactions to the piece.[17]

In February, 2002, Smith submitted a second opinion-editorial entitled "Reverse Racism." The article discussed Smith's views on so-called "reverse" discrimination—*i.e.,* government-based discrimination against white individuals in favor of racial minorities. Again, the journalism advisor and principal approved Andrew's article for publication. However, in light of the hostile reaction to "Immigration," the principal and superintendent decided that "Reverse Racism" would be published alongside a counter-viewpoint or not at all. The principal directed the journalism students to vote on whether (1) to delay publication of the February 2002 issue to wait for a counterpoint to "Reverse Racism" to be produced or (2) to publish the February 2002 issue without "Reverse Racism." Faced with this choice, a choice never before imposed on the journalism students, they voted to pull "Reverse Racism" from the issue in order to avoid delays in publication.[18]

B. The Smiths Sue the District for Violation of Andrew's Speech Rights

The Smiths filed suit in state court against the district, the principal, and the superintendent (collectively, "the District") on May 2, 2002.[19] The Smiths alleged violation of Andrew's speech rights under the state and federal constitutions, and under California Education Code § 48907.[20] They argued that both "Immigration" and "Reverse Racism" were protected speech under federal and state law. They argued further that the District's public condemnation of "Immigration" and its discipline of Andrew for publishing it violated his speech rights. They also argued that the District's imposition of a unique counterpoint requirement for "Reverse Racism" was a form of unlawful prior restraint.[21]

Shortly after the lawsuit was filed, "Reverse Racism" was published in the May 2002 issue of *The Buzz,* alongside a counterpoint. However, the Smiths still had a claim that the District's unique counterpoint requirement, along with the imposed delay on publication, constituted illegal prior restraint on speech. Following a bench trial, the trial court entered judgment against the Smiths, who appealed.[22]

C. The Court of Appeal Decision in Smith

In a unanimous opinion, the court of appeal held that both "Immigration" and "Reverse Racism" constituted protected speech under Section 48907, and that the District violated Andrew's speech rights with respect to the first.[23] The most significant aspect of the decision is its application of Section 48907's "incites" provision. The District argued that the articles constituted unprotected incitement because they contained offensive fighting words, and because of the disruption on campus in reaction to their publication. The Smiths argued that an objective evaluation of the articles revealed that they contained nothing urging or calling upon any student to break any law or school regulation, or to cause any disruption on campus. The Smiths contended that the unreasonable reaction is irrelevant to the question of whether such speech objectively incites.

The meaning of Section 48907's "incites" provision was an issue of first impression, but the court was not without substantial guidance. First, the lower court looked to the plain meaning of the term "incites" as defined in *Black's Law Dictionary*.[24] The court noted that the definition "focuses on conduct that is directed at achieving a certain result"—*i.e.,* the objective meaning and effect of speech, not the subjective feelings of the audience to that speech.[25] The court confirmed that this plain meaning of "incite" is consistent with the established meaning of the term in other areas of California law.[26]

Second, the court consulted federal cases existing at the time of Section 48907's enactment—cases decided on the question of whether *adult* speech constituted unprotected incitement.[27] For example, it considered the most important federal case on "incitement" in the adult speech context, *Brandenburg v. Ohio*,[28] which states that "incitement" is speech that "advocate[s] or encourage[s] violent acts" or that is "directed to incit[e] or produc[e] imminent lawless action."[29] The court observed that the "incitement" cases were clear on one fundamental point: the focus is on "*inciting* speech, rather than speech that may result in disruption or other harm."[30] The court therefore made certain that its interpretation of Section 48907's "incites" provision observes the long-established "heckler's veto rule"—*i.e.,* the rule that "speech that seeks to communicate ideas, even in a provocative manner, may not be prohibited merely because of the disruption it may cause due to reactions by the speech's audience."[31]

Having considered the plain meaning of the term "incites," federal cases existing at the time of Section 48907's enactment, and relevant California case law, the court of appeal articulated the test for identifying speech that "so incites" under Section 48907:

> [A] school may not prohibit student speech simply because it presents controversial ideas and opponents of the speech are likely to cause disruption. Schools may only prohibit speech that incites

> disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance.[32]

The court concluded that, even assuming a substantial disruption occurred after "Immigration" was published, the opinion-editorial was still protected speech under Section 48907, because it did not incite disruption.[33] While the court considered the article to be "disrespectful" and "unsophisticated," it contained no "direct provocation or racial epithets."[34] As to "Reverse Racism," the court implicitly concluded that the opinion article was protected speech as well.[35]

Having applied Section 48907's "incites" provision to conclude that Smith's articles were protected, the court next considered whether the District violated his rights. It held that the District's actions with respect to "Immigration" did so infringe.[36] For the court, the District's repeated and public declaration that "Immigration" should never have been published, and its order retracting remaining copies of the paper, conveyed "the threat of censorship" and the "chilling" of the exercise of future protected speech, in violation of Section 48907:[37] "In the aftermath of 'Immigration' the District succumbed to the fear and disruption and discontent. While understandable, this was not permissible."[38] However, the court concluded that the District's response to "Reverse Racism" did not infringe Smith's speech rights, because the District had not required, but merely recommended, that Andrew's article be published with a counterpoint.[39]

The court of appeal unanimously reversed the trial court's judgment and remanded for proceedings consistent with its decision.[40] The California Supreme Court rejected the District's petition for review. However, in December 2007 the District filed a petition for writ of certiorari in the U.S. Supreme Court.[41] That petition is currently pending before the Court.

CONCLUSION

Smith is noteworthy for two reasons. First, it narrowly defines the "incites" provision of Section 48907, providing California public school students with broad protection of politically incorrect speech. By creating a clear and objective test for incitement, which ignores the heckler's veto, *Smith* confirmed that under California law students enjoy the same rights to express unpopular views as the adult on the street corner.

Second, *Smith* confirms what the Founding Fathers knew all along: federalism works well. At the time *Smith* was argued before the court of appeal, the U.S. Supreme Court issued its latest decision on student speech: *Morse v. Frederick.*[42] In *Morse*, the Court created yet another exception to *Tinker*, holding that a school official did not violate a student's First Amendment rights by confiscating a banner reasonably viewed as promoting illegal drug use. While *Morse* may be considered a blow to speech rights, the First Amendment provides only the *floor* of protection for student speech. States like California may continue to experiment in the area by providing greater protections for student speech than federal law. *Smith* did just that.

Endnotes

1 150 Cal. App. 4th 1439 (2007).

2 393 U.S. 503 (1969).

3 *Id.* at 509. At issue was the question of whether public high school students had a First Amendment right to wear black armbands while on campus, in protest of the Vietnam War.

4 *Id.* at 514-15 (Stewart, J., concurring).

5 Cal. Educ. Code § 48907.

6 198 Cal. App. 3d 47 (1988) (interpreting Section 48907's "slander" provision).

7 Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986); New Jersey v. T.L.O., 469 U.S. 325 (1985).

8 *Hazelwood*, 484 U.S. at 273.

9 Lopez v. Tulare Joint Union High School District Board of Trustees, 34 Cal. App. 4th 1302, 1315, 1317-20 (1995); *Leeb*, 198 Cal. App. 3d at 54.

10 *Leeb*, 198 Cal. App. 3d at 54.

11 *Lopez*, 34 Cal. App. 4th at 1318 (emphasis added).

12 *Smith*, 150 Cal. App. 4th at 1446-47. For example, the article contained the following statements: "I'll bet that if I took a stroll through the Canal District in San Rafael that I would find a lot of people that would answer a question of mine with 'que?', meaning that they don't speak English and don't know what the heck I'm talking about…. Seems to me that the only reason why they can't speak English is because they are illegal…. 40% of all immigrants in America live in California … because Mexico is right across the border, comprende?"

13 *Id.* at 1447.

14 *Id.*

15 *Id.*at 1448-49 (emphasis added).

16 *Id.* at 1448.

17 *Id.*

18 Smith v. Novato Unified Sch. Dist., 150 Cal. App. 4th 1439, 1449 (2007).

19 Both Andrew and his father, Dale Smith, filed suit. Dale Smith's citizen and taxpayer standing was necessary to preserve the facial challenges to the District's speech policies, should Andrew graduate before termination of the suit.

20 The Smiths also challenged the facial constitutionality of the District's speech policies, on grounds of vagueness and overbreadth. But the Smiths did not prevail on that claim at any stage of the litigation.

21 *Id.*

22 *Id.*

23 *Id.* at 1457-59, 1465. The court did not need to consider whether the District's actions violated the First Amendment. The court correctly recognized that Section 48907 is more protective. *Id.* at 1452.

24 Smith v. Novato Unified Sch. Dist., 150 Cal. App. 4th 1439, 1455 (2007) (citing the dictionary's definition of "incite" as "[t]o arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in motion; as, to 'incite' a riot").

25 *Id.*

26 *Id.* (citing various speech cases, both civil and criminal).

27 *Id.* at 1457-1458.

28 *Brandenburg*, 395 U.S. 444.

29 *Smith,* 150 Cal.App.4th at 1457 (citing *Brandenburg*, 395 U.S. at 447).

30 *Id.*

31 *Id.* (citing, inter alia, *Tinker*, 393 U.S. at 508-09 and Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

32 *Id.* at 1457-1458.

33 *Id.* at 1458.

34 *Id.*

35 *Id.* at 1465.

36 *Id.* at 1461-1464.

37 *Id.*

38 *Id* at 1465.

39 *Id.* (unpublished portion).

40 *Id.* at 34 (unpublished).

41 The District alleges that the case presents a federal question: First, Section 48907 facially violates the First Amendment. Second, as applied, the statute violates students' "property interest" in public education, in violation of the Fourteenth Amendment.

42 127 S.Ct. 2618 (2007).

Intellectual Property

Google's Book Project

*By David McGowan**

Is it better to ask forgiveness than permission? Google believes so. Its agents are copying books by the truckload.[1] Stanford, Harvard, Oxford, and the Universities of California, Michigan, Texas, and Virginia have opened their doors (and stacks) to the project. Estimated conservatively, Google is copying tens of thousands of books each week.[2] Agreements with publishers cover some of this copying, but much of it is done without permission.

In September 2005, the Authors' Guild and three individual writers brought a class action suit against Google in the Southern District of New York on behalf of all authors holding rights to works contained in the University of Michigan Library—though the logic of the claims extends to authors generally. The complaint alleges infringement on behalf of the three named plaintiffs and prays for injunctive relief and a declaration in favor of the class. Milberg, Weiss represents the plaintiffs.[3]

The Copyright Act grants authors the exclusive right to reproduce their works. In that respect, it plainly favors permission over forgiveness. That the rights are exclusive implies injunctive relief against infringement—a property rule, in the familiar Calabresi-Melamed framework—and injunctions favor permission as well.[4] But the Act also provides a fair use defense.[5] Reproduction within the boundaries set by the "fuzball factors of fair use," as Judge Easterbrook has called them, is not infringement.[6] It requires no permission.

This essay argues that Google should prevail on a fair use defense of its project.[7] The project makes searches of the books' text more comprehensive and precise without substituting for sales in current markets or pre-empting entry by rights-holders into probable future markets. My examination also implies, however, that it does not matter very much which way a court rules on that question: Google and rights-holders probably will bargain to an efficient result either way. Lastly, this analysis provides a useful perspective on two copyright policy issues, with which I conclude.

Two aspects of Google's project are relevant here: what it is copying and what it is doing with the copies. Each aspect of the program has legal and economic dimensions. The most important of these relates to the fraction of copied works that is subject to copyright, and, as to those, what Google allows the public to see.

Google proposes to copy substantially all books in existence.[8] Books are either in the public domain or subject to copyright. Government publications, books published before 1923, and books whose authors failed to renew copyright when renewal was required are part of the public domain.[9] The rest are subject to the exclusive rights of authors or their assignees.

Whether Google's copying substitutes for market transactions will be the key point of our fair use analysis, so an economic distinction is relevant as well. Of works subject to copyright, some are in print and available for sale or likely to be revived in the near term. Others are not. Out-of-print books may be divided further: some owners can be found at reasonable cost and others cannot. Books whose owners cannot be found after a reasonable search are called "orphan works."[10]

It is possible to get a rough sense of the proportion of books falling into each category. Books published before January 1, 1978, were subject to a limited initial term (twenty-eight years after publication) with the possibility of renewal. During that time, most authors did not renew their rights. Landes and Posner found rates of renewal for works registered between 1910 and 1991 (after which renewal became automatic) to vary between 3% and 20% of registered works. The renewal rate increased over time, but the data support the conclusion that, historically, over three-quarters of works registered have not been worth the relatively minor cost of renewal.[11]

These numbers are for all works, but the numbers for books are not materially different. Indeed, they are slightly lower—the average renewal rate for books between 1935 and 1970 was 8%. Registrations and renewals for books have risen over time,[12] implying an increase in the value of rights in books; but, even so, the value of the stock of books published in any given year depreciates rapidly.[13]

The Copyright Act of 1976 abolished the renewal requirement for new works almost thirty years ago, so the fraction of books subject to copyright will rise over time.[14] At present, though, because Google is copying many books published before 1923 (all of which are in the public domain) and many books published when renewal was required, a significant fraction of works at issue are in the public domain. Copying these books does not create liability, of course; but the size of the fraction becomes relevant to transaction costs we will consider in a moment.

These registration data are consistent with more direct market analysis. Only a tiny fraction of books remain in print for the duration of their copyright term. Landes and Posner found that only 1.7% of books published in 1930 were still in print in 2001. This finding is consistent with estimates in a brief filed by the Internet Archive in *Eldred v. Ashcroft*, which found that only 2.3% of all books published between 1927 and 1946 were available for purchase in 1996.[15]

Books not currently in print presumably generate no sales for authors. Any market for them is a market for used books, in which revenues go to owners of copies, not authors of works. Judging by the historical data, the fraction of books Google is copying subject to copyright but out of print is very high—probably over four-fifths. When added to the fraction of works in the public domain, these data suggest that a very small fraction of the works being copied is available for sale.

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Because we are dealing with so many books, this small fraction is still a very large number. And I do not suggest that infringement can be excused by copying unprotected or out-of-print works in addition to valuable works. The fraction of such works is relevant, however, to the cost to Google of obtaining permission to copy before copying, and to the risk of harm to the market for a work. These factors in turn are relevant to fair use analysis.

Which brings us to what Google is doing with its copies. Once the digits comprising a book's text reside on Google's servers, what happens next depends on the copyright status of the book. For all works, Google allows users to search the text of a book to locate points of interest. You need not rely on an index to determine whether a book speaks to your particular interest. For works in the public domain, Google makes available the full text of the work and generally allows users to download the work. Works subject to copyright cannot be downloaded.[16] How much of them can be read depends on whether Google has an agreement with the rights-holder. In my experience, when a search returns a book subject to an agreement between Google and a rights-holder, the user can read a page or so before and after the appearance of the term for which the user searched. If no such agreement covers the book, the user sees only a sentence or two surrounding the term.

So, for example, say I am interested in the role of Chinese workers in building the transcontinental railroad. I type "Central Pacific Railroad Chinese" as a search. The first book in the results page is George Frederick Seward's *Chinese Immigration in its Social and Economical Aspects*, which was published by Scribners in 1881.[17] The book is in the public domain, and I may download it to read at my leisure or link it to a "library" of books maintained on Google's servers and accessible though my Google account. Google copied the book from the Stanford library. It copied the second book on the list (actually a transcript of an 1876 California Senate hearing on Chinese immigration), from the University of Michigan. Both these books are designated as "full view."

The fourth book on this results page is Steven Ambrose's *Nothing Like it in the World: The Men Who Built the Transcontinental Railroad, 1863-1869*. The book is under copyright, and its presentation is very different. The first thing that catches my eye is a Simon & Schuster logo and the phrase "pages displayed by permission." The book is linked to two reviews and five stores that sell it. It is designated "limited preview."

I type "Chinese" in the box for searching the content of the book itself and get one or two-page excerpts surrounding the appearance of the word. I learn that in the Bancroft library at the University of California at Berkeley there are English-Chinese phrase books published in 1867, which teach English speakers how to say "Come at seven every morning," "Go home at eight every night" and "He wants $8 per month? He ought to be satisfied with $6.00. I think he is very stupid." Chinese speakers learn to say: "Yes, madam," "You must not strike me," "He does not intend to pay me my wages," "He claimed my mine," "He assaulted me," and so on. I am hooked. I click the Amazon link and the book is in my shopping cart.

I could go on, but you get the point.[18] All of each book is copied, but how much you can read of any given work depends on its copyright status and whether Google has an agreement with the rights-holder. If Seward's book were subject to copyright, my download would be a reasonably good substitute for a copy bought from a store. The few pages of Ambrose I can read do not substitute for the book, which is why I bought it.

Copying all of a work presents a hard, but not impossible, case for the fair use defense. Whether copying substitutes for the purchase of a work is the most important element in fair use analysis.[19] Substitution plays a role in two of the four non-exclusive factors the Copyright Act states should be included in fair use analysis. The first factor is the purpose or character of the use, including whether it is commercial. Courts analyze uses in various ways in addition to the commercial/non-commercial distinction mentioned in the statute. The most common variation asks whether a use is transformative or simply straightforward reproduction.

Transformative copying changes a work in some way.[20] Substantial changes may imply that the copy satisfies a different sort of demand than the original work; insubstantial changes imply substitution. For this reason, and because all defendants claiming fair use claim to have transformed works in some way, the first factor almost always goes the same way as the fourth factor, which calls for analysis of "the effect of the use upon the potential market for or value of the copyrighted work."[21] (The second and third factors are almost never important, and probably should not be when courts treat them as important.)

Though transformative uses present a stronger case for the defense than straightforward copying, courts in some cases have found non-transformative copying of whole works to be fair use. *Sony Corp. of America v. Universal City Studios, Inc.* (the "Betamax" case) is the best-known example.[22] It is largely irrelevant to Google's project, but because it is so well known, and because it involves whole work copying, I take a moment here to explain why that is.

In *Sony*, the holders of rights in some broadcast television programs sued the manufacturers of hardware that could copy those programs. The Copyright Act did not explicitly provide for secondary liability, the only theory on which the maker of a device like the Betamax could be liable; but the U.S. Supreme Court imported the contributory infringement principles of the Patent Act to decide the case.[23]

The Patent Act standard imposed liability only on devices not capable of substantial non-infringing uses.[24] The Court found that non-transformative copying of television programs could be fair use where consumers copied the programs to watch them at a later time ("time shifting"). That finding saved Sony from liability for its users' acts, without requiring the Court to elaborate on how far non-transformative copying of entire works might qualify as fair use. (The Court did not decide, for example, whether copying programs to build a library of favorite shows would count as fair use.) For that reason, and because the programs at issue were distributed free of charge to consumers, it is a weak precedent where Google's project is concerned.

More relevant are three types of cases from the circuit courts. The Ninth Circuit leads the way on two of them, and the Second Circuit on the third. (This division explains why the case was filed in New York rather than California.) Two of the three types of cases suffer from partly flawed reasoning. The flaws should be corrected, but the cases contain sound reasoning as well. It is the sound reasoning, not the flaws, that supports Google's defense.

The first type of case holds that even copying all of a work in connection with a commercial endeavor may be fair use where the copying is an intermediate step toward some non-infringing end. *Sega Enterprises, Ltd. v. Accolade, Inc.* is the most important of these precedents.[25] Accolade made computer games. It copied Sega's games to learn how they worked with Sega's game console so it could make its games compatible with the console, too. The result was that Sega console owners could play Accolade games.[26] The Ninth Circuit later extended this ruling to copying by a firm that wrote a program allowing Sony computer games to play on computers rather than Sony consoles (it built down from the game, while Accolade built up from the console).[27]

Sega is a poorly reasoned precedent. The court held that Accolade's copying was fair because it facilitated the production of more games for the Sega console, thus promoting the creation of expression.[28] It was wrong about that. For the most part Accolade did not write new games for the Sega console. It was more interested in porting its existing games to Sega's platform so it could make more money from costs that were mostly sunk already. Not surprisingly, the court botched the analysis of the market effect of Accolade's copying. It said the effect might not be so bad (because Accolade's games might not be substitutes for Sega's) and that any harm was acceptable because Sega's "attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression...."[29] The court should have treated Sega as a company selling a system (the console hardware plus the game software) in competition with other systems: Accolade copied to tap into the system, and the economics of the copyrighted games were inseparable from the economics of the system of which they were a part. It did not. Instead the court treated the Sega console as a market unto itself; the court implicitly considered competition within the Sega platform to competition among platform vendors. There is no logical or economic basis for such a preference.[30] Experience with the Supreme Court's ill-fated *Image Technical Services* opinion suggests that competition in the primary market for systems is more relevant to social welfare than competition in single-firm "aftermarkets."[31]

The *Sega* court's misuse of the loaded term "monopoly" and its resort to appealing but diffuse phrases such as "promoting creative expression" are signs that the court stopped thinking about the case at hand and started thinking in terms of slogans. The result was a ruling that made it hard for Sega to implement the classic model of charging a low price for hardware and taking profits in software sales, in effect price discriminating between casual players and serious gamers. There was no point in creating incentives for Sega to increase console prices, as the court's ruling did.[32]

Notwithstanding these flaws, the *Sega* court was right to presume that even copying of an entire work might be fair use where the copying at issue is an intermediate step to some lawful use. The court's imperfect application of this premise to Accolade's copying should not obscure the principle that proper fair use analysis focuses on market effects in sensibly defined markets, not on intermediate steps that do not themselves have such effects, or on formalist abstractions. As we will see, the case against Google replicates the *Sega* courts errors, while the case for Google's defense draws on this valid insight.

In two other cases, the Ninth Circuit dealt with allegations of infringement against search engines. *Kelly v. Arriba Soft Corporation*,[33] involved a search engine that copied pictures it found on various websites and reproduced them as small, low-resolution, "thumbnail" images.[34] When a user typed a search, Arriba's thumbnails appeared as responses; they also served as links to sites where a user could get a full-sized copy of the image. The user could copy the thumbnail to his or her computer, but they could not be enlarged without severely degrading the quality of the image. (Arriba deleted from its servers the original pictures it used to make the thumbnails.)

The Ninth Circuit held that Arriba had a fair use defense to this aspect of its copying. It made two points. The first was that the small, grainy thumbnails Arriba made available to those who used the search engine did not substitute for Kelly's full-size works. The second was that Arriba's copying improved access to information on the Internet. On this latter point, the court argued that Arriba's copying was transformative because it altered the function the thumbnails served. Instead of satisfying aesthetic demand, the court reasoned, the images served as search tools. However, transformation in fair use analysis generally refers to altering the work itself, not what it does.[35] Arriba did alter the works, by turning them into thumbnails, so the court's "transformative function" idea was unnecessary. It was also a bit misleading. The search point would be better captured by saying Arriba had created a new collective work—its database—of which Kelly's transformed images were only a fairly small part. Either way, the important point was that Arriba's copying took no sales from Kelly while helping users compare many images at once.

The *Kelly* court's result rightly minimized the transaction costs of the useful work performed by search engines. Arriba could and did agree not to search Kelly's own site; but other websites posted Kelly's pictures, too. These sites presumably displayed the work of photographers other than Kelly. To skip all such sites in order to avoid copying Kelly would be to skip the work of other photographers, too, some of whom might be perfectly happy to have Arriba catalogue their works. Even if Kelly and Arriba could agree on sites to skip, other sites might copy Kelly's work after the list was drawn up, leaving Arriba vulnerable to liability.

In such an environment, it makes sense to presume that copying is lawful and then deal with any substitution effects on a more tailored basis.[36] That is what happened at the district court level in the Ninth Circuit's next search engine case, *Perfect 10, Inc. v. Amazon.com, Inc.*[37] The plaintiff in that case sold from its website pictures of nude women. It sued Google, among others, on theories similar to those at issue in *Kelly*. By

the time *Perfect 10* reached the courts, though, a market had developed for thumbnail images (chiefly for displaying on cell phones, where a smaller image is desirable and resolution is less important). The district court thought that development reason enough to distinguish *Kelly* and find that Google was unlikely to prevail on its fair use defense. The court issued a creative injunction under which Google was not liable for copying and posting thumbnails initially, but would be liable for keeping them posted after an author asked Google to take the image down.

The Ninth Circuit reversed. It agreed with *Kelly* that reproducing a work in a database counts as transformation: "a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool."[38] The court faulted the district court for not finding facts regarding actual harm to the download market. Contradicting its own caution against asserting facts without findings, it then asserted that the market for thumbnail downloads "is not significant at present" and concluded that the importance of Google's use outweighed "any incidental superseding use or the minor commercial aspects of Google's search engine and website."[39]

These conclusions are at odds with the relevant statutory language. Section 107 of the Act directs courts to ascertain "the effect of the use upon the *potential* market for or value of the copyrighted work."[40] The most natural reading of this language is that authors' exclusive rights extend to new markets in which a work could be exploited.[41] That reading also finds support in the Supreme Court's opinion in *Campbell v. Acuff-Rose*, which treated as relevant to the fourth fair use factor markets for "potential derivative uses... that creators of original works would in general develop or license others to develop."[42] (The conclusions also ignore the sensible inquiry of *Kelly*: whether unrestricted and widespread adoption of the defendant's copying would harm the potential market.[43]) Nevertheless, the *Perfect 10* court was correct to note that copying to facilitate search creates social benefits. Its suspect analysis of market harm does not undercut the importance of that fact.

These cases tend to favor Google by upholding the defense for useful copying that does not displace an author's market or reasonably probable potential market. Cutting against its defense are cases rejecting fair use claims raised in defense of copying needed to transmit a work in a different medium from the one in which it was sold. The Second Circuit rejected a fair use claim advanced by a defendant who marketed a system that would allow people in one area to listen by telephone to local radio programs broadcast in other areas. Retransmission over telephone lines, the court said, might serve a different purpose than local broadcasting; but that was not the same as transforming the works (the contents of the broadcasts) themselves. The court cited Judge Leval's comment that a use that "merely repackages or republishes the original" is unlikely to be a fair use.[44]

Finally, a district court in the Southern District of New York had no trouble rejecting the fair use defense asserted by MP3.com, a firm that copied tens of thousands of sound recordings onto its servers as a first step in offering a service that would allow users to listen to streamcasts of sound recordings they already owned, provided they could first prove that they owned the CD. Relying on the *Betamax* case, MP3.com claimed this service allowed users to "space shift" the place at which they listened to their music, without having to lug their CDs along with them.

The court found an easy prima facie case of infringement and rejected the claim that streamcasting transformed the streamcast works. It distinguished between innovation, which MP3.com represented, and transformation of a work, which it did not. The court also rejected the claim that streamcasting would increase sales of sound recordings by making them more useful. "Any allegedly positive impact of defendant's activities on plaintiffs' prior market," the court said, does not free "defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works."[45]

Google's copying does not fit squarely within the holdings of any of these cases. Its copying is an intermediate step to the creation of a database of books whose texts can be searched word-by-word. Unlike *Sega*, however, it does not copy only to identify interface elements and then substitute its own work for the copied game. The copied works are included in the database and contribute to its value.

Unlike *Kelly,* Google does not save the works it copies in a form less useful than the original. Books appear as clean digital copies of the original work. For those willing to read on screen, they would be perfectly good substitutes for hard copies. For those who prefer hard copy, only the binding, not the work as such, would be wanting. Unlike *Perfect 10*, users cannot download works subject to copyright; this fact simply strengthens Google's defense relative to the defense upheld in that case.

For its part, *MP3.com* presented no question or analysis of a searchable database that itself would count as a collective work. Because Google only provides full access to public domain works, there is no risk in Google's project analogous to the risk one suspects existed in *MP3.com*—that users would be able to gain access to recordings they had not already bought so that *MP3.com*'s copying would substitute for purchases of protected works.

In cases involving fair use, the Copyright Act cannot be read formally. The statute commands courts to consider the consequences and the fairness of uses.[46] The best courts can do is tailor the defense to provide the greatest benefits in terms of permitted uses consistent with the need to preserve incentives for the creation of works in the first place. Bargaining is one key to such tailored analysis. Where bargaining is possible, in most cases it will produce results more efficient than judicial administration. Absent some reason to distrust bargaining, therefore, courts should condemn uses that substitute for it. They should allow uses where bargaining is unlikely to work.

This principle deals adequately with many cases, but it does not favor either side with respect to Google's book project. Google can and does negotiate with publishers, a fact that cuts strongly against a fair use finding. As a presumptive matter, the text and economic structure of the Act require that in such a case bargaining precede copying. On the other hand, books are not organized on library shelves either by year or by publisher.

Requiring ex ante negotiation for works subject to copyright would increase the cost of the project by requiring successive trips to the same shelf to copy first the books in the public domain and then those covered by publisher agreements. That would entail delay, which is a cost to users, and would omit orphan works from the database.

One might respond that Google could avoid successive trips to the shelves by negotiating all publisher agreements before copying anything. However, that would create a holdout problem among publishers. It would also be legally pointless with respect to the large fraction of books in the public domain and practically pointless with respect to the smaller fraction of orphan works. Most importantly, the first principle usually pertains to uses where copies reach the public and satisfy some form of demand. That is not the case with Google's project. Users get only very small glimpses of works subject to copyright but not subject to an agreement with a publisher—much less than would be needed to treat the publicly available reproduction as even a partial substitute. That does not mean it is an easy case for Google, but it does mean the bargaining presumption should be weaker than in an ordinary case.

A second useful principle favors copying that creates tangible benefits and does not substitute for transactions in a market or usurp a market a rights holder is likely to exploit. This more direct cost-benefit analysis requires greater judicial scrutiny of the facts, and thus presents greater risk of judicial error. It is inevitable, however, because the fourth statutory factor cannot be analyzed fully in any other way.

There is no risk that Google's un-bargained for snippets will substitute for works.[47] Nor is there any reason to believe any publisher will undertake to create a database of all works, even those in the public domain and those of its rivals, which is what Google is doing. The probability of author or publisher entry into such a market being low, there is no real risk that by copying without permission Google is usurping prospective entry by rights-holders.[48]

At the same time there are two tangible payoffs to Google's copying that do not cut into the market or potential markets of any work. Copying is necessary to index the text of each work, and that indexing makes search results more precise. Instead of relying on title or author fields, or an index compiled by a publisher, a user can search for what books actually say.

The second payoff comes from the scope of the database. I can find Ambrose's book on the trans-continental railroad on Amazon or on the shelf in Borders. I cannot simultaneously find Seward's work in those places, and I might not be able to find the full array of in-print works that might be responsive to a search of Google's database. Broader yet more precise searches make research more efficient. Both public domain works and those subject to copyright must be copied to maximize this benefit. In some cases, such searches might facilitate more precise and comprehensive comparison shopping, which counts as a public benefit, too.[49]

Two conclusions follow from this analysis. First, the arguments for treating Google's copying as fair use are stronger than the arguments against the defense. The copying generates tangible benefits by allowing text searching of books without superceding either a rights-holder's current market or probable prospective markets. Tailoring favors allowing this particular and unusual copying of whole works in connection with a commercial enterprise.

The second conclusion is that for all but orphan works it does not matter very much whether a court finds Google's copying to be fair. Google cannot display large amounts of content without the publisher's permission; but the publishers are not going to create such a comprehensive database on their own, and they are better off being in the database than out of it. (As to orphan works, their existence provides reason to favor Google's defense now and to favor legislative action soon; I discuss pending legislation below.) The situation is congenial to bargaining, which is almost certain to occur regardless how a court rules. The ruling will affect the distribution of gains from Google's copying, of course—Google either will or will not have to pay some form of statutory damages—but it is unlikely to affect significantly the content of the database. To borrow a familiar concept, the initial assignment of rights in this situation will not determine the ultimate use of the works at issue.[50]

Against the analysis in the preceding section, one might argue that it would be a bad thing if Google and the plaintiffs settle. A *New Yorker* story on the project reports that Professors Larry Lessig and Tim Wu worry that such a settlement will harm competition. Their reported concern is that a settlement would set a precedent that would impede the creation of similar databases by persons or firms poorer than Google. In antitrust terms, to quote Professor Wu, "if they settle the case with the publishers and create huge barriers to newcomers in the market there won't be any competition. That's the greatest danger here."[51]

Lessig and Wu are brilliant scholars and advocates, and one suspects their ideas cannot be done justice in a popular magazine article. To the extent such worries exist, however, I believe they are unfounded. A payment by Google to publishers meets neither of the most widely recognized definitions of an entry barrier; it is a cost to Google, not an impediment to others.[52] Lessig and Wu no doubt understand that; so it is better to read them as worrying that the plaintiff class members might agree to give Google the exclusive right to reproduce their works in a commercial database, making it impossible for competing firms or groups to construct equally comprehensive databases. Framed this way, the concern would be about the risk that plaintiffs (which include trade associations) might facilitate collusion among their members with regard to Google's project.[53]

Agreements among competing rights holders are presumptively cause for concern, but there is little reason for worry here.[54] As a general matter, Google's database and search technology are complements to any given text; they make the text easier to find and (possibly) buy. In antitrust terms, agreements between authors and Google should be treated as vertical arrangements, which are almost always lawful. (That is true even though Google's copy might substitute for purchase of a work—it will not, unless the author agrees to terms allowing downloading.)

Collusion among authors might be possible; but if it occurred, it would increase the authors' power relative to Google's. Colluding authors would be less likely to grant exclusive rights than authors negotiating on their own, and thus less likely to create barriers to entry. The prospect of collusion therefore does not justify the reported concern about barriers, and may in any event be policed under antitrust analysis rather than suspicion of bargaining in general.

Google's project provides a useful perspective on some copyright policy questions. I discuss two of them here: legislative proposals pertaining to orphan works, and needed but improbable re-institution of renewals.

As the data provided earlier suggest, orphan works are a general problem of copyright policy and a serious problem for a project as ambitious as Google's. Potentially useful works should not lie fallow because their owners cannot be found after a reasonable search.

An analogy to the law of real property suggests one solution to this problem. At common law, a landowner who cared so little for his property that he did not assert his rights in the face of open, notorious, and adverse uses lost his title. Why not adapt the principle to deal with the orphan works problem? A user willing to make an orphan work widely available (as by digitizing it and placing it in a database) could claim the remaining term in the work. Alternatively, the law could place orphan works (which, by hypothesis, are out of print) in the public domain for all to use, or enact a compulsory license allowing reproduction of out-of-print works.[55]

Scholars tend to exaggerate differences between the law of real property and copyright, but the concept of adverse possession would have to be adapted, were Congress to extend it to copyright.[56] Uses of works are non-rivalrous, so they do not signal to the world that a user claims rights in the work as occupation signals such a claim to real property. There also might be disputes over priority of use of an orphan work.

Both problems could be resolved through formation of a registry for assertion of adverse use maintained by the Copyright Office, and adoption of a priority rule for adverse users. (A similar registry for current owners would ameliorate the problem by making it easy for users to find owners to bargain with.) Whether the cost of such a system would be worth the benefit is a fair question, and the answer would require more research.

The advantage to such a system is that an adverse user would take whatever portion of the term remained, which might be necessary to induce the user to sink costs into reviving the orphan work. Placing the work in the public domain would not solve this problem, and a compulsory license would make it worse by increasing the cost of reviving the work.

A pending bill would at least improve on the present situation. I find it less appealing than either the adverse possession or public domain alternatives, but it is more likely to be adopted. It is HR 6052, the proposed Copyright Modernization Act of 2006. Title II of that Act (the "Orphan Works Act" of 2006) limits significantly the liability of infringers who are unable to locate the owner of a copyright after a reasonable search, and eliminates liability for infringers who do not seek commercial gain but aim at charitable, religious, scholarly or educational purposes.[57]

The bill leaves open the possibility of injunctive relief for non-transformative copying, but requires courts enjoining nonprofit uses for such purposes to take into account any harm an injunction might cause such an infringer. The bill precludes injunctions of new works that transform orphan works; it limits liability in such cases to payment of reasonable compensation and attribution to the author of the transformed material. Google's book project provides a good example of why such legislation is desirable.

The second point, also highlighted by the data recounted earlier, is that periodic renewals are an important tool for placing disused works into the public domain. Renewals were a constant feature of copyright law from the Statute of Anne in 1710 and the original Copyright Act in 1789 until their abolition in 1992. Renewals did sometimes lead to forfeiture for inattentive rights-holders and create problems for some well known derivative works, such as Hitchcock's *Rear Window*.[58] These idiosyncratic costs, however, are almost certainly more than offset by increased utilization of works in the public domain and reduced transaction costs.

Historically low renewal rates imply that many works subject to protection under the current regime of a single fixed term are in fact not worth the trouble to renew. They would be better off in the public domain, where they could be used without transaction costs and without the risk of incurring statutory damages. There is no pending legislation to re-institute renewals, but Google's project provides a useful example of the benefits such legislation would provide.[59]

Google's project therefore provides a useful perspective on the key components of a copyright system that is as close to optimal as we are likely to get. We should favor a relatively short initial term, renewable indefinitely (to allow those who continue to manage works to recover the costs of doing so and prevent the dissipation of their investments while placing in the public domain works not worth the expense).[60] Re-institution of renewal would itself solve most of the orphan works problem. Any lingering problems could be dealt with through limitations on damage awards and injunctions.

CONCLUSION

Ambrose's *Nothing Like it in the World*, I am sorry to say, is not a very good book. It is repetitive and hagiographic. Google's book project will not save you from bad purchases. Because of that project, however, I can turn to Seward's book, and more, without displacing (indeed, while increasing) sales of Ambrose's book. Nothing would be gained by condemning as infringement a project that produces such results. Though little would be lost, either—that is the bargaining point—the case for the fair use defense is strong enough to defeat presumptive liability for infringement.

Endnotes

1 For a description, *see* Jeffrey Toobin, *Google's Moon Shot*, New Yorker February 5, 2007, *available at* http://www.newyorker.com/reporting/2007/02/05/070205fa_fact_toobin.

2 *Id.*

3 The Association of American Publishers subsequently filed its own suit against Google.

4 eBay, Inc. v. MercExchange, L.L.C., 126 S.Ct. 1837, 1841 (Roberts, C.J., concurring) (2006).

5 17 U.S.C. §107.

6 Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. L. Rev. 207, 208.

7 An interesting aspect of Google's project, which I largely ignore here, is its offer to allow publishers to opt out of its copying. Richard Epstein has analyzed this aspect of the program. Richard A. Epstein, What Light if Any Does the Google Print Dispute Shed on Intellectual Property Law, Jan. 23, 2006 (copy on file with author).

8 Toobin, *supra* note 1.

9 Renewal was required for works published before January 1, 1978, the effective date of the Copyright Act of 1978, until renewal became automatic in 1992. *E.g.,* Robert A. Gorman & Jane C. Ginsburg, Copyright 357 (6th ed. 2002).

10 Register of Copyright, Report on Orphan Works 1 (2006).

11 William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 234-39 (2003). These data imply an average annual depreciation rate (the rate at which the number of registrations in a given year shrinks to the always-lower number of renewals for those works) of 8.3% of works registered in any given year, which in turn implies that the commercial life of an average work ranged between 8 and 18.5 years. 99% of works registered in 1934 had fully depreciated by 2000.

12 Landes & Posner, *supra* note 11, at 242, Tables 8.7-8.8.

13 Landes and Posner estimate an average depreciation rate for books of 9.2%, a number probably inflated by the inclusion of pamphlets in the data set. *Id.*

14 In 1992, Congress made renewal automatic for works published before 1978 that were still in their first term. Pub. Law 102-307, 106 Stat. 264.

15 An amicus brief filed by the Internet Archive in the *Eldred* case provided the following data:

> In 1910, 13,470 books were published in the United States. In 2001, only *180* of these titles are available for purchase from any publisher worldwide. The numbers for other decade years are similar: 1920 (8422 published, 307 in print in 2001); 1930 (10,027 published, 174 in print); 1940 (11,328 published, 224 in print); 1950 (11,022 published, 431 in print).

(Citations are omitted). The brief reports these data were derived by comparing the American Library Annual and Book Trade Almanac for 1872-1957 to Books In Print. The brief is available at http://cyber.law.harvard.edu/openlaw/eldredvashcroft/cert/archive-amicus.html.

These data must be qualified when thinking about Google's project. The data refer to all books, while Google is only copying those books its partner libraries thought worth buying. I am not sure this fact cuts one way or the other. Libraries might choose either relatively obscure, niche works that are more likely than average to go out of print, or they might choose particularly important works that are more likely than average to stay in print. I am not aware of any research on this point; for present purposes I will assume that the averages apply to libraries well enough for purposes of legal analysis.

16 I should say they cannot be downloaded so far as I can tell. Google may have agreements with some authors that allow downloading

17 Seward was the nephew of William H. Seward, Lincoln's Secretary of State. George Frederick became American consul at Shanghai in 1861, became consul-general to China in 1864, and became Minister to China in 1875. *See* Paul Hibbert Clyde, *Attitudes and Policies of George F. Seward, American Minister at Peking, 1876-1880*, 12 Pac. Hist. Rev. 387, 388 (1933).

18 Nothing is perfect, of course. On a whim I search for Henry Friendly. His *Benchmarks* is listed, but no page previews are available, and it is categorized as "fiction." On the other hand, the book is linked ("find this book in a library") to WorldCat, which lists libraries close to me (presumably based on the location of my ISP) where I can borrow it. I will not do that (it is on my shelf), but the search also returns *The Reminiscences of Judge Henry J. Friendly*, a work I have never heard of, possibly because it is listed as a microfiche of a 1960 typescript generated in a Columbia University oral history project. The nearest library that has it, according to WorldCat, is the University of Central Oklahoma, which deserves credit for the fact. No preview available here.

19 I refer to purchase for simplicity. The analysis would be no different if the transaction involved a license rather than a sale.

20 A typical example is the scanning and reproduction of a portion of a photograph as part of a larger collage, *Blanch v. Koons,* 467 F.3d 244 (2d Cir. 2006), or reproduction of smaller-than-original image as part of a historical work. Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605 (2d Cir. 2006).

21 Courts that do fair use by the numbers frequently load up their first factor analysis with arguments that are really about substitution and then refer back to that analysis when they get to factor four. That approach gets things backwards. The best way to assess the degree of the defendant's transformation, though, is to ask whether it substitutes for the original work, so it is simpler and more sensible to read the first factor off of the fourth.

22 464 U.S. 417 (1984).

23 *Id*. at 435. The relevant portion of the Patent Act is 35 U.S.C. §271(c).

24 464 U.S. at 440.

25 977 F.2d 1510 (9th Cir. 1992).

26 The court presumed the code that allowed the games to play on the hardware was itself outside the scope of copyright under Section 102 of the Act.

27 Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000).

28 *Sega*, 977 F.2d at 1532.

29 *Id*. at 1524.

30 *E.g.*, Joseph Farrell & Michael L. Katz, *The effects off antitrust and intellectual property law on compatibility and innovation*, 43 Antitrust Bull. 609, 641-42 (1998) (noting theoretical indeterminacy).

31 Eastman Kodak Co. v. Image Technical Servs, Inc., 504 U.S. 451 (1992). For criticism of the opinion, *see* Richard A. Posner, Antitrust Law 236 (2d Ed. 2001); Herbert Hovenkamp, The Antitrust Enterprise 157-58, 309-10 (2005).

32 To say that Accolade could copy to "port" its games to Sega's console was to say that Sega could not control the content its system displayed. That could lead to wasteful results. Suppose a firm wanted to sell only nonviolent video games or to guarantee to parents that no game depicting graphic sexual content would work on its consoles. *Sega* undercuts its ability to back such a warranty with copyright law; it would have to resort to constant technical tweaks to keep unwanted firms off its platform, sinking costs in a wasteful game of cat and mouse.

33 336 F. 3d 811 (9th Cir. 2003).

34 *Kelly* therefore represents a form of intermediate copying such as was at issue in *Sega*. Arriba copied the full-size images and then reproduced them as thumbnails. The *Kelly* court rightly focused on the market effect of the thumbnails, not the intermediate copying of the full-size image.

35 Justice Souter's opinion for the Court in *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994), characterized transformation by asking whether a copier "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message...." A copier also may transform an image by placing it in a context that alters a viewer's understanding of the image. A newspaper might reproduce a picture of a stolen painting, for example. In that case, the reproduction adds to news of a crime, rather than satisfying whatever sort of aesthetic demand the picture would normally aim to fulfill. *Cf.* Núñezez v. Caribbean International News Corp., 235 F.3d 18 (1st Cir. 2000) (finding televised reproduction of near-nude modeling photos was fair use where purpose of reproduction was to report on controversy regarding suitability of model to serve as Ms. Puerto Rico).

36 The presumption is consistent with the real property rule that uninvited guests are not trespassers until told to keep off land, which is the sensible default in the trespass to chattels cases as well.

37 508 F. 3d 1146 (9th Cir. 2007). The district court's initial opinion is *Perfect 10, Inc. v. Google*, Inc., 416 F.Supp. 2d 828 (C.D. Cal. 2006). A copy of the preliminary injunction itself is on file with the author.

38 508 F.3d at 1165.

39 *Id*. at 1165-66.

40 17 U.S.C. §107 (emphasis added).

41 American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930-31 (2d Cir. 1995).

42 510 U.S. 569, 592 (1994). There is a degree of circularity in that analysis, because markets are unlikely to arise if free copying is the rule. It is awkward to find against fair use on the ground of harm to a market that would not exist absent the ruling at issue. This circularity cuts both ways, however, and to the degree one has faith in bargaining to allocate resources, it makes sense to read "potential" in the Act to include newly emerging markets as well as the extent of the work's chances in an existing market. The Ninth Circuit should not have sidestepped the language of the Act, though its ultimate conclusion regarding the costs and benefits of the relevant use might still be correct, particularly if tailored into a notice-and-takedown regime, as the district court did.

43 *Kelly*, 280 F.3d at 943.

44 Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) (citing Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1993)).

45 UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349 (S.D. N.Y. 2000). To the same effect is Judge Easterbrook's opinion in *BMG Music v. Gonzalez*, 430 F. 3d 888 (7th Cir. 2005).

46 Sometimes economic analysis does not explain a sensible application of the defense, which then rests simply on a normative assertion that the copying was fair. The best example is the Rev. Jerry Falwell's reproduction and use for fundraising purposes of Larry Flynt's attack on Falwell. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986).

47 Unless of course someone hacks into Google's servers and frees all the copies for downloading, but I would hold Google liable for that and let it pursue the hackers.

48 There is a competing project sponsored by the Open Content Alliance, which includes Microsoft, Yahoo, and several major libraries. Toobin, *supra* note 1.

49 *E.g.* Sony Computer Entertainment America, Inc. v. Bleem, 214 F. 3d 1022 (9th Cir. 2000) (affirming finding of fair use for reproduction of "screen shots" of video games used for comparative advertising).

50 Ronald H. Coase, *The Problem of Social Cost, in* The Firm the Market and the Law 95 (1988).

51 Toobin, *supra* note 1.

52 It is not a cost entrants would have to incur that an incumbent market participant did not, which was George Stigler's definition, nor is a payment by Google a condition that allows it to enjoy supra-competitive profits for a significant time, which was Joe Bain's definition. It may well be that there are large economies of scale in copying, which might imply that Google's cost of copying is lower than that of potential entrants. If one cares about total economic surplus, as I do, that fact would not be a problem. If one cares strictly about consumer surplus, it might be a problem, but even then the payment from Google to the publishers would be unrelated to the worry about market power.

53 My thanks to Professor Lessig for clarifying this point.

54 Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941)

55 The basic idea behind such proposals is quite old. It can be traced at least to a failed bill introduced in Parliament in 1735, which would have allowed anyone to reproduce under compulsory license works that were "scarce and out of print." Ronan Deazly, On the Origin of the Right to Copy 100 (2004). As Deazly puts it, "[w]ith the existence of the right to print the work free from invasion, there came a concomitant duty to ensure that the work would always be publicly available." *Id*. The measure was called the *Bill for the better Encouragement of Learning, and for the more effectual securing the Copies of Printed Books to the Authors or Purchasers of such Copies, during the Times therein mentioned*. The bill died in the House of Lords, in part due to the backfiring of an attempt by Alexander Pope to secure its passage. *Id*. at 102-03.

56 For an example, see Peter S. Menell, *Intellectual Property and the Property Rights Movement*, 30 Regulation 367 (2007). For a reply, *see* Richard A. Epstein, *The Property Rights Movement and Intellectual Property, A response to Peter S. Menell*, 30 Regulation 4 (2007). Menell uses Epstein to exemplify what Menell sees as the flawed reasoning of the property rights movement. Epstein certainly needs no help from me, but I do wish to associate myself with the sins of the movement—as soon as I find out what those are.

57 The infringer is liable only for a reasonable compensation for use of the work, not for statutory damages, costs, or attorney's fees. The bill places on the owner of the orphan work the burden of establishing the amount of reasonable compensation (in the form of a hypothetical license transaction).

58 Stewart v. Abend, 495 U.S.207 (1990). *Rear Window* derived from the short story *It Had to Be Murder* by Cornell Woolrich. Woolrich sold to a production company the right to make a movie of the story. That sale included his agreement to renew his rights and assign the renewal term to the company. Renewals could only be made within a year of the expiration of the rights, however, and Woolrich died before he could renew. The renewal term passed to his estate, which was not bound by his agreement. Thus the litigation.

59 Abolition of renewals is often associated with U.S. accession to the Berne Convention because foreign authors accustomed to single terms were often said to be vulnerable to inadvertent loss of their renewal terms; but Berne does not require abolition of renewal terms. It requires only that foreign authors be placed on at least an equal footing with U.S. authors.

60 The proposal is from Landes & Posner, *supra* note 11, at 215-234.

Major League Baseball Advanced Media Whiffs in Federal Court: The Right of Publicity & the First Amendment Collide on the Base Paths

*By Alec D. Rogers**

In recent decades, Major League Baseball has made great strides in developing its business operation. No longer content to make money from tickets, concession sales, and a few radio and TV contracts, it has created an entirely new joint venture, Major League Baseball Advanced Media ("BAM"), that allows the baseball club owners to fully monetize not only the games themselves but nearly every aspect of the sport's appeal.[1]

Recently, however, that effort suffered a serious setback when the U.S. Court of Appeals for the Eighth Circuit ruled that a baseball fantasy league operator did not need BAM's permission to use the names of major league players and their statistics in *C.B.C. Distribution and Marketing, Inc. vs. Major League Baseball Advanced Media, L.P. and Major League Baseball Players Association* ("*CBC*").[2] As a result, the revenue and control of fantasy sports will reside with the fantasy league operators, rather than BAM, which had acquired all of the relevant rights from the players themselves.

The Eighth Circuit's opinion is another development in an area of law known as the "right of publicity," or the ability of individuals to block others from using their identities for profit. Earlier publicity cases explored the contours of the right itself, and defined it relative to related areas of law, such as the right of privacy and false light. More recently, however, courts have had to reconcile the right of publicity with our First Amendment world. These are the questions that *CBC* explores in regards to baseball players and their performance records.[3]

The Fantasy Sports Industry

Games based on the *outcome* of real sporting events have been around for decades. Two of the best known, APBA Baseball and Strat-O-Matic Baseball, were launched in 1951 and 1961, respectively. Similar games have come and gone in the intervening years. Such games generally use cards representing actual baseball players. Players roll the dice and refer to the batters' and pitchers' cards to determine the outcome of each at bat. For instance, more dice rolls result in hits on better hitters' cards than weaker hitters' cards and more outs on better pitchers' cards than worse pitchers' cards. In that way, the game results mimic real life performance. Despite many variations, these games have one thing in common—they are based on prior years' performances. Cards for any particular season are released after the season is over. Unlike a real general manager or field manager, those who play the game ("owners" or "managers") already have some idea how the actual athletes ("players") will perform overall because they know the odds of the particular outcomes.

To overcome this gap between reality and existing board games, so-called "fantasy sports" have developed. They are different in that they are *forward*-looking. The concept was created in the late 1970s and early 1980s and popularized with the publication of *Rotisserie Baseball*.[4] Fantasy gamers choose their players, field a team, and then base the outcome of their games and season by tracking their players' actual performances as the season progresses. There are infinite variations on this basic model, and some leagues have draft, trade, and other rules that rival in complexity those of the real sports. Still, the basic concept remains the same. Fantasy games have emerged in virtually all closely followed sports.

Those who wish to play fantasy sports do not need to play one provided by a game company. They could, in theory, do everything by themselves, keeping track of their players' performances, translating the real players' performances into fantasy league points, and keeping all of the necessary records throughout the season. Such tasks, however, are extremely time-consuming and tedious. As a result, an entire industry has grown up revolving around automating those tasks, while at the same time providing the players with the sort of news and analysis that they need to remain competitive. For instance, if a player is injured in real life and does not play, and his fantasy owner leaves the injured player on his active roster, rather than substituting a backup, the player will not score any points. Similarly, that player's real life backup will acquire substantially increased value as a starter and may be picked by the first fantasy owner who learns of the injury, assuming the backup was not already on one of the fantasy teams.

This industry has burgeoned to the point where it now has its own trade association. The Fantasy Sports Trade Association (FTSA) currently lists 112 companies that both run leagues and provide information and analysis for players. Providers include both large, well-known companies, such as CBS sports, ESPN, Yahoo, and many smaller, obscure companies. Some charge fees for more feature-laden games, with interactive graphics. Others provide basic "pen and paper" style, barebones versions for free, hoping to make money off advertising revenue. Similarly, many websites offer advice on which players to choose and play each week, some for free, others for a subscription fee.

A look at the FTSA's membership reveals an industry that is diverse and highly competitive. With many companies offering league membership for free, those that charge a fee need to constantly improve to justify the additional cost. In short, it is a thriving, competitive industry in which 17 million people are estimated to play. The total revenue affiliated with fantasy sports has been estimated at $1.5 billion.[5]

For most of its existence, the fantasy sports world has grown up outside and apart from the actual sports leagues themselves. However, it appears that the explosion of the games' popularity, and the associated revenue that it can bring, has caught their attention. The effort of BAM to assert its legal rights over the information required to play fantasy baseball, player names, and performance statistics put in motion the chain of events that led to the *CBC* Decision.

Background to *CBC*

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In January 2005, BAM struck a deal with Major League Baseball Players Association (MLBPA), which represents nearly all major league baseball players. The agreement gave BAM "the personal attributes and marketing power of Major League baseball players as a group" for five years for over $50 million. BAM turned around and sent letters to some fantasy baseball operators requiring them to cease their operations.

Such letters created an obvious threat of litigation to fantasy sports league operators. Many of them had previous agreements with the MLBPA that allowed them to use the players' names, statistics, and more. On February 5, 2005, one operator which had previously contracted with the MLBPA, CBC Distribution and Marketing, filed a lawsuit in the U.S. District Court for the Eastern District of Missouri. In its complaint, CBC alleged that BAM had "threatened" that CBC's continued use of baseball statistics violated BAM's intellectual property rights. BAM had threatened, according to the complaint, to "force CBC to discontinue" the use of statistics. CBC sought a declaratory judgment that it had not violated BAM's rights, nor that it had engaged in false or deceptive advertising or any other prohibited trade practice under state or federal law. It further sought injunctive relief "Enjoining Major League Baseball… from interfering with CBC's business related to fantasy sports…."

CBC noted that it had entered into a contract with MLBPA in 2002, which had expired at the end of 2004. The contract had given CBC the right to use names, nicknames, numbers, likenesses, signatures, pictures, playing records, and biographical data. On January 19, 2005, however, BAM notified CBC that it had entered into an exclusive relationship with MLBPA for such rights, and that it now possessed the sole right to sublicense them. Accordingly, it required CBC to halt any use of them. CBC attached to its complaint a letter to another fantasy sports company, USAToday.com, alleging that its use of property similar to CBC's violated various laws, including section 43(a) of the Lanham Act and "applicable state law." [6] Taken together, these letters, according to the complaint, created a "reasonable apprehension" that BAM would sue CBC, entitling it to declaratory relief.

The Right of Publicity

The right of publicity, stated simply, is why Nike must pay Michael Jordan substantial sums of money to name its premier line of sneakers "Air Jordans," and to use his image to promote them. Or why someone cannot simply market an Alex Rodriguez baseball glove without the superstar New York Yankee third baseman's permission. While it is a relatively evolving area of the law, in essence, the right of publicity protects individuals against the deliberate commercial exploitation of their identities.

The right of publicity is generally traced to the U.S. Court of Appeals' decision in *Haelan Laboratories v. Topps Chewing Gum* that baseball players' likenesses and statistics could not be placed on chewing gum cards absent their consent.[7] Such an assertion was different from the traditionally accepted right to privacy or an assertion of property rights. Today, the majority of states recognize the right of publicity as a matter of common law, statutory law, or in some cases, both. Accordingly, it has been codified in the American Law Institute's *Restatement of Unfair Competition (Third)* ("*Restatement*").

As formulated in the *Restatement*, the right of publicity is present when a defendant uses the plaintiff's name as (1) a symbol of her identity; (2) without her consent; and (3) with the intent to obtain a commercial advantage. It is not enough that the defendant used the same name if the facts indicate that it was not proxy to identify the plaintiff, nor is it enough that the defendant used the name unless it can be shown the intent (realized or not) was to benefit commercially by using the plaintiff's name.

An obvious problem is how the right to publicity is to be reconciled with the First Amendment's freedom of speech. On its face, the right to publicity would seem to prohibit an unauthorized biography of a movie star or politician, and a million other uses, in a manner that would be very troublesome, unless we acknowledge that the First Amendment protects a great number of activities that would otherwise meet the *Restatement*'s three pronged test. There are also numerous questions that arise when applying the right in different cases, especially those that differ from the more paradigmatic ones discussed above.

The District Court Opinion[8]

The parties each moved for summary judgment. The district court convened a teleconference to narrow the issues and the parties' assertions. CBC informed the court that it was seeking to use players' statistics, by which it meant their names and performance records. MLBPA and BAM acknowledged that such information was in the public domain for many purposes, but stated that their assertion of the right of publicity was limited to CBC's use of players' names *in conjunction* with their fantasy games. Additionally, CBC relayed that it was asserting that the BAM/MLBPA claim of the right to publicity, even if valid, could not be raised consistent with the First Amendment. Accordingly, the court stated the issues before it for consideration were

> whether the players have a right of publicity in their names and playing records as used in CBC's fantasy games; whether, if the players have such a right, CBC has, and is, violating the players' claimed right of publicity and if this right has been violated by CBC… whether… the First Amendment applies and, if so, whether it takes precedence over the players' claimed right of publicity...[9]

The court held that CBC's use of the players' names and performance records did not violate the Missouri right of publicity. Although it did not, therefore, technically need to decide the constitutional issues, it analyzed them as well, concluding that even had the Missouri right of publicity provided a basis for suit, the First Amendment rights of CBC would have barred its application.

The Right of Publicity

The court noted that Missouri had a common law right of publicity established in *Doe v. TCI Cablevision.*[10] It stated that under Missouri law, consistent with the *Restatement*, there needed to be a showing that the defendant (1) used the plaintiff's name as a symbol of his identity (2) without consent and (3) with the intent to gain a commercial advantage. The

court stated that the second element was undisputed, and then proceeded to deal with questions of commercial advantage and whether the players' names as used by CBC were as a symbol of their identity.

In order to show the requisite intent to obtain commercial advantage, the court noted that intent to injure need not be shown. Using a player's name to create an impression of an endorsement would, alone, be sufficient to satisfy this prong, said the court. Using the name to attract attention would be evidence (presumably not conclusive) of intent to obtain commercial advantage. Neither was at issue in the present case, according to the court. There was no evidence that any player's name was used to suggest an endorsement of CBC's games. Further, since *all* fantasy games use players' names and records, it could not be said CBC's use was for commercial advantage. Cases cited by BAM and MLBPA to the contrary, the court noted, involved use of the plaintiff's *likeness*—something not at issue in the case at bar. Accordingly, the court ruled that the commercial advantage prong of the right to publicity claim had not been met.

Despite concluding that one necessary prong of the Missouri law's requirements was not met, the court proceeded to determine the other disputed prong: whether the use of the names was as a symbol of their identity. CBC's use did not involve "the character, personality, reputation, or physical appearance of the players…." Rather, it merely involved historical facts about the player, not their "persona or identity." From this the court concluded that "CBC does not use in its fantasy baseball games Major League baseball players' names separately or in conjunction with their playing records as a symbol of their identity." Coupled with the lack of intent to gain competitive advantage, the court concluded "the elements of the right of publicity are not present…."[11]

The court discussed the policies that lay behind Missouri's common law right of publicity. It cited numerous sources for different propositions, including the *Restatement* and various state and federal cases. What they all boiled down to, in the end, was "preventing harmful or excessive commercial use of one's celebrity in a manner which could dilute the value of the person's identity."[12] Players earned their living by playing and endorsing their products—not by publishing their records. CBC's use of their names and statistics, then, "does not go to the heart of the players' ability to earn a living as baseball players."[13] Further, because the information is in the public domain already, CBC did not receive anything for free for which it would otherwise have to pay, said the court. In fact, fantasy sports increased baseball's popularity, which in turn benefited the players by increasing their earning power through playing baseball, reasoned the court. The underlying rationale of the right of publicity, then, would not be served by applying it to this case, in the district court's view.

The First Amendment

Despite finding that MLB had failed to demonstrate a prima facie claim to a right of publicity for its players, the court proceeded undaunted to tackle the "what if" constitutional issue of whether a successful application of state law to CBC's use of the players' information would run afoul of the First Amendment. The court held that it would.[14]

The court noted that the First Amendment applied to historical facts; that they were used in a commercial, digital context was irrelevant. Quoting the U.S. court of appeals decision in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, the district court in CBC held that it was required to "'balance the magnitude' of restricting the expression at issue 'against the asserted governmental interest in protecting' the right of privacy."[15]

In so doing, the court quoted the distinction made by the U.S. Supreme Court in *Zacchini v. Scripps-Howard Board*[16] between incidental uses and those that "'*go the heart of a [person['s]] ability to earn a living*,' and which involve '*the very activity by which the entertainer acquired his reputation in the first place*.'"[17] CBC's use, the court noted, did not interfere with the players' ability to reap rewards from playing baseball or "the heart" of their ability to earn a living. The district court noted that the court in *Cardtoons* had thought it important that the return on activity in question (being an entertainment star) was still of sufficient magnitude to induce an adequate supply of those willing to perform. Other governmental rationales for the right of publicity, such as efficient allocation of resources, protection against consumer fraud, and unjust enrichment were not present, concluded the court. Finally, the court noted that, should the players' claim of publicity prevail, the First Amendment rights of CBC would be extinguished. Presumably, this needed to be compared to the comparatively small amount of income the players would lose in comparison to the amount they made playing baseball and endorsing products.

The Court of Appeals Opinion

The court of appeals affirmed the lower court's opinion.[18] The court based its decision, however, on a different rationale than the lower court. It held that CBC had violated Missouri's law on the right to publicity. The application of that law, however, violated the First Amendment.

Right of Publicity

The court noted that the parties were in agreement as to one of the three prongs of Missouri's publicity law—there was no consent. The district court, however, was in error when it ruled that the other two prongs of Missouri's three part test were not met. The use of the players' names were sufficient to constitute a symbol of their identity in this case, because there was "no doubt that the players' names that CBC used are understood by it and fantasy baseball subscribers as referring to actual major league baseball players." The district court's reading of the identity prong to require more than mere use of a name in a context where the name was sufficient to identify the actual person identified was a misreading of the law's requirement in that regard. "When a name alone is sufficient to establish identity, the defendant's use of that name satisfies the plaintiff's burden to show that a name was used as a symbol of identity."[19]

In analyzing the "commercial advantage" prong, the court of appeals acknowledged that the case at bar did not "fit neatly into the more traditional categories of commercial advantage," in that the names were not used to promote the game by intimating endorsement. However, the court, noting *Doe's* favorable citation of the *Restatement,* pointed out that

the *Restatement* contained a broader definition of commercial advantage that extended to use "in connection with services rendered by the user," and that a successful plaintiff will not have to show perspective purchasers would be confused into believing the use of the name constituted an endorsement. Finally, the district court erred in believing "commercial advantage" referred to promoting the user's products over another's. Instead, the court of appeals emphasized "commercial" where the district court had emphasized "advantage" and read "commercial advantage" as merely meaning "for purposes of profit." Because CBC had knowingly used the players' names, which were in this case synonymous with their identities, for profit, the Missouri right of publicity had been breached by CBC.

First Amendment

Having found that CBC's use of players' named constituted a breach of BAM's rights under the Missouri right of publicity, it turned to the question of whether CBC's First Amendment rights trumped the application of the Missouri law. Here, the court agreed with the dicta in the district court, stating that the U.S. Supreme Court's ruling in *Zacchini* required state law rights of publicity to be balanced against the First Amendment, and concluded that "CBC's First Amendment rights in offering its fantasy baseball products supersede the players' rights of publicity."[20]

In so concluding, the court first noted that the information in question was already in the public domain. Accordingly, said the court, "it would be strange law that a person would not have a First Amendment right to use information that is available to everyone."[21] That CBC's use of the speech was for entertainment purposes rather than informational was not relevant said the court, the line between them too fine for courts to engage in. The court also rejected the notion that the information was not protected because it appeared as text in a computer program rather than spoken speech.

The court was heavily influenced by a California court of appeals case that contemplated many of the same issues. In *Gionfriddo* v. *Major League Baseball* the court had ruled that several baseball players' negligible economic interests in their records and images were outweighed by "the public's enduring fascination with baseball's past," and that Major League Baseball could therefore use verbal and video descriptions of their play without violating California's common law right of publicity.[22] It had noted that "Major league baseball is followed by millions of people across this country on a daily basis… The Public has an enduring fascination in the records set by former players." In turn, past performances establish a context for appreciating current players, according to the *Gionfriddo* court. Because such information concerning Major League Baseball players' performances "command a substantial public interest," they constituted a constitutionally protected form of expression.[23]

Alternatively, the interests protected by state rights of publicity were not seriously involved in this case, according to the court. The state interests the court identified were to protect a person's ability to earn a livelihood and incentivize productive activity by ensuring that the party producing it was able to reap the benefits. Baseball players are "handsomely rewarded," according to the court, implying that baseball and its players were doing well enough to make a substantial living, and would continue to operate even if the fantasy sports leagues were allowed to continue to operate without their consent or being compensated. Nor was there any danger of the public being misled into believing that the game was endorsed by any other players, which was another goal of the law of publicity.[24]

CONCLUSION

In deciding to change from MLBPA's model of selling rights to any fantasy company willing to pay the asking price and exerting more control over who could operate the games, BAM appears to have shot itself in the foot. It is likely that BAM will not be entitled to any revenue from such operators, and there is the distinct possibility that the other rights BAM purchased from the MLBPA will not bring in the revenue BAM had foreseen when it reached that deal. In this, there is a lesson for BAM about the long term health of baseball and the economic prospects of the team owners.

BAM's strategy with fantasy sports appeared to be premised on the notion that there was a static pie of money, and that by allowing the fantasy sports operators a large slice, it were diminishing its own. It is likely that it was such a concern that led BAM to try to control and restrict the fantasy baseball league market. But was this premise correct?

It may be that Major League Baseball's loss in *CBC* will eventually redound to its benefit. Games such as fantasy sports serve to enhance fans' interest in the actual product, which translates into higher attendance and ratings that allow the league to earn more on its lucrative broadcast contracts. The current vibrant fantasy sports community is now free to develop and innovate. The result will likely be a much superior product in the long run than would have occurred if BAM had been more successful in asserting its control. A better product means more players, which means more fans with deeper ties to the game of baseball than ever before.

Not so clear, however, is where the right of publicity is left vis-à-vis the First Amendment. The Eighth Circuit's opinion did not analyze the intersection of the right of publicity and the First Amendment in great depth, spending only a couple of pages on it.[25] In its motion for rehearing, MLBPA raised a number of concerns with the way the court of appeals reached its conclusion. These include the court's apparent willingness to discount the players' claims due to their financial success in playing baseball itself and endorsing products. Those that are not so successful generally do not have to worry about their publicity rights. Therefore, those who need them the most may be able to least avail themselves under the court's logic. Also, as MLBPA pointed out, the *CBC* court failed to address several precedents that reached contrary conclusions of law, albeit from other jurisdictions. Finally, the court concluded that making the distinction urged by MLBPA and BAM of "information" versus "entertainment" was too fine a distinction, but did not explain its rationale for rejecting it. In fact, the Eighth Circuit's short opinion leaves a lot of questions unanswered, and it remains to be seen how far it will actually go towards clarifying where the right of publicity leaves off and where the First Amendment begins.

Unfortunately, these questions are likely to remain unresolved for the time being. The U.S. Court of Appeals

has denied the motion for rehearing and there is no sign that BAM or MLBPA will seek Supreme Court review. Given that there is no split among the circuits, nor a pressing matter of federal law at stake, a certiorari review would likely be futile. Whether the right of publicity will be further scaled back to accommodate First Amendment concerns will therefore be left to another case; but if CBC is any indication, courts may be more sensitive to First Amendment concerns in future right of publicity cases.

Endnotes

1 MLBAM's primary vehicle is its website, MLB.com, which contains news information, video and audio clips of games and baseball news, a shop for baseball related merchandise, and sells subscriptions to audio and video feeds of current and past games. It also links to a constantly streaming web channel with around the clock video programming of discussions and analysis surrounding baseball. Fans can also download baseball-related images onto their computers and cell phones for a fee. Most recently, MLB.com has begun to offer baseball-related video games online.

2 515 F.3d 818 (8th Cir. 2007) *petition for reh'g en banc denied* Nov. 26, 2007 (Nos. 06-3357, 06-3358).

3 A myriad of other issues, including those covering federal copyright and state contract law, were also part of the opinion, but will not be discussed here.

4 Okrent, Daniel, 1984 (Bantam Books).

5 It is unclear how much of this income is derived from league operations versus merely providing fantasy related news, analysis and advice via websites, newsletters, and magazines. There has been no claim that these latter activities of selling information and analysis constitute any sort of infringement, so only the revenues from those companies that actually operate the games themselves are at issue.

6 15 USC §1051 *et seq*.

7 202 F.2d 866 (2d Circ. 1953).

8 Case No. 4:05CV00252MLM ("District Court"). The District Court's opinion also dealt with copyright and contract issues distinct from the right of publicity and first amendment issues. MLBPA and BAM asserted that a provision in the 2002 contract between CBC and MLBPA precluded CBC from asserting its claims. The contract provided that CBC would not have any further rights to the players' information after its expiration after 2005 and included a clause prohibiting CBC from challenging its exclusive rights to license the information to CBC. CBC countered that MLB did not possess the rights it claimed under the 2002 agreement and that the agreement not to use the information after the expiration and the no-challenge clause were in violation of public policy. The Court held that the clauses were indeed void as a violation of "the strong federal public policy favoring the full and free use of ideas in the public domain."

9 District Court at 7.

10 110 S.W.3d 363 (Mo. 2003) (en banc), *cert denied*, 540 U.S. 1106 (2004).

11 District Court at 18.

12 *Id*. at 20.

13 *Id.*

14 Such analysis seems to violate the notion that a court should dispense with cases on non-constitutional grounds where possible. Given the ambiguous nature of the law of publicity, however, one can argue that the court was silently applying another doctrine of judicial decision-making and interpreting a statute in a manner to comport with the Constitution. Such analysis would of course require the court to undertake the constitutional analysis.

15 95 F. 3d 959, 972 (10th Circ. 1996).

16 433 US 562 (1977).

17 District Court at 30-31 (quoting *Zacchini)*.

18 Although the court affirmed 2-1, the dissent was based on the contractual issue rather than the right of publicity and the application of the First Amendment. On those issues, the dissent stated it was in accord with the majority.

19 Appeals Court at 6.

20 Accordingly, the court did not consider CBC's alternative defense that the players' assertion of rights of publicity were preempted by federal copyright law. Given the traditional doctrine of avoiding constitutional questions when possible, it is unclear whether the court should have not first considered this question.

21 Appeals decision page 7.

22 94 Cal. App. 4th 400 (1991).

23 *Id*. at 411.

24 The court also dealt with the contractual issue specific to the agreement between MLBPA and CBC. In its 2002 agreement, CBC had acknowledged MLBPA's rights to its players' information and had promised not to litigate them. MLBPA had warranted that it was the sole and exclusive holder of the players' rights. Because it did not (for the reasons stated by the court in its decision), MPBPA breached its warranty, releasing CBC from being bound by the contract, according to the majority. This issue was the sole basis of the dissent, which argued that the provision was an agreement between the parties that MLBPA had those rights—not a warranty. The dissent would have reversed the district court on the basis of the previous contract between CBC and the MLBPA.

25 The entire court of appeals decision is only thirteen pages: covering the facts, citing the procedural stance, and disposing of the copyright and contract issues, in addition to the publicity and First Amendment issues. In contrast, the district court's opinion is forty-seven pages.

International Law & National Security

Keeping the Courthouse Door Open For International Law Claims Against Corporations: Rethinking *Sosa*

*By Julian Ku**

In its 2004 decision *Sosa v. Alvarez-Machain*,[1] the Supreme Court seemed to resolve the long-standing academic and judicial debate over the propriety of international law litigation under the Alien Tort Statute (ATS).[2] A six-member court majority rejected the U.S. government's argument that the ATS, enacted in 1789, is a jurisdictional provision that cannot be the basis for an independent cause of action under customary international law. On the other hand, the majority held that federal courts must act with great caution when recognizing causes of action under international law, for a variety of prudential and constitutional separation of powers reasons.

Sosa thus appeared to strike a careful compromise between rejecting outright all litigation alleging violations of international law, particularly international human rights law, and flooding federal courts with speculative and undeveloped theories of international law violations. The Court's modest and cautionary language was hailed by some of *Sosa*'s most prominent academic critics as vindication of a limited and restricted view of the scope of litigation under the ATS.[3]

Recent trends in ATS litigation, however, have not borne out this sanguine view. Rather than impose restraints on the federal courts, leaving the door "ajar," *Sosa* has kept the courthouse door wide open for enormously expensive lawsuits based on speculative and undeveloped theories of customary international law against a broad array of multinational corporations. Indeed, because both the U.S. and foreign governments are generally afforded immunity from ATS litigation, lawsuits against multinational corporations already comprise the vast majority of ATS lawsuits.

In this short article, I will first discuss the supposed limitations that the Supreme Court created in *Sosa* on ATS litigation. I will then argue that lower federal court development of international law standards after *Sosa* have actually exposed multinational corporations to potentially enormous liability for overseas cooperation and business dealings with foreign governments. Such judicial development of important but highly debatable standards of liability under international law, I argue, undermines the idea that *Sosa* represents any meaningful limitation on the ability of plaintiffs to pursue wide-ranging expensive litigation against a broad array of multinational corporations.

I. The Supreme Court and the Alien Tort Statute

The Supreme Court offered its first definitive consideration of the use of ATS in 2004. Prior to *Sosa*, the ATS had become a popular vehicle for international human rights advocates to litigate cases alleging violations of customary international law in U.S. courts. Critics had resisted such lawsuits, arguing that the ATS was merely a jurisdictional statute that did not itself create a cause of action for private plaintiffs. More broadly, academic critics argued that ATS litigation threatened to unduly expand the power of federal courts by allocating a broad common law power to develop new and powerful theories of international law liability.

The U.S. government eventually accepted many of these criticisms, and challenged ATS litigation in *Sosa v. Alvarez-Machain*. This case involved an ATS lawsuit against U.S. Drug Enforcement Agency officials and their foreign agents (which included Sosa) for detaining a Mexican national, Alvarez-Machain, in Mexico and bringing him to the United States for prosecution. The U.S. government, along with Sosa, argued that Alvarez-Machain's lawsuit under the ATS, like all such lawsuits, should be dismissed because the ATS does not create an independent cause of action for private enforcement of customary international law.

The Supreme Court accepted the premise of the U.S. government's argument and ruled that the ATS is merely a jurisidictional statute. However, it went on to reject the U.S. government's view that all ATS lawsuits must therefore be dismissed. Rather, it held that federal courts should retain, under the ATS, a federal common-lawmaking power to recognize certain well-accepted and specific violations of customary international law that are "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms…."[4]

There has been some confusion over exactly how this standard is supposed to be applied. In general, the Court seems to say that federal courts must determine whether an ATS plaintiff's claim is sufficiently "specific, universal, and obligatory" under international law and as well-accepted as certain causes of action at the time of the ATS enactment in 1789 to both sustain jurisdiction and provide a cause of action under the ATS. There is some debate over whether the inquiry into international law is required for both the substantive international law violation, and for the existence of the cause of action. But in either case the key inquiry for the federal court is whether customary international law can sustain the legal theory offered by the plaintiff in the particular case. The Court went on to find that no such violation of international law could be shown in Alvarez-Machain's detention, and dismissed the case.

In the concurrence, Justice Scalia pointed out that, despite its cautionary language, *Sosa* would unleash federal courts to consider and develop new causes of action for violations of customary international law, *even when the executive branch and Congress opposed the creation of such causes of action*. *Sosa's* decision to continue to allow federal courts to themselves determine the

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content of customary international law, and the proper remedies for violations of it, would, in Justice Scalia's words, lead "lower courts right down that perilous path" of defying the views and positions of the President and Congress.[5]

Despite their disagreements, it is fair to say that both the majority and concurrence were concerned with the same problem: when and how should federal courts get to recognize and incorporate norms of customary international law into the U.S. legal system? The concurrence argued that they should never get to do so; the majority argued that they should only get to do so in a few very limited circumstances. Both seemed to accept that unconstrained federal court lawmaking would undermine the basic structure of the U.S. Constitution, which allocates primary lawmaking and foreign policy activity to the Congress and the President.

Thus, the majority opinion's analysis of the ATS is heavily focused on the "modest"[6] set of claims originally recognized under the statute in 1789 and the various reasons for "great caution in adapting" customary international law to private rights.[7] Such cautionary language might have been understood as a warning to lower federal courts. For the most part, Justice Scalia's predictions on how lower courts would interpret customary international law under the ATS have proven far-sighted. Based on my own research, only one post-*Sosa* court has dismissed an ATS plaintiff because of an insufficiently well-established customary international law violation or cause of action.[8] ATS defendants have won dismissals on other grounds, but the *Sosa* "limitations" on the use of customary international law under the ATS have proven largely illusory. As I will argue, the judicial development of theories to impose liability on corporations for violations of customary international law does just that.

II. Corporate Liability under the ATS

Justice Scalia's warnings about unbridled federal court lawmaking are best illustrated by the relative success of lawsuits intended to impose liability on corporate defendants for "aiding and abetting" violations of international law under the ATS. No appellate court has rejected the "aiding and abetting" theory of corporate liability, yet this is exactly the type of federal court development of new and speculative theories of international law that *Sosa* was supposed to prevent.

In general, ATS lawsuits against multinational corporations allege that such corporations "aid and abet" governments in their violations of serious international law crimes. Corporate defendants are not usually accused of committing acts that would violate international law directly. Rather, they are accused of assisting the commission of these international law violations through a variety of activities that would not otherwise constitute a violation of international law.

For instance, in a series of lawsuits brought in New York federal court, plaintiffs from South Africa have alleged that about fifty leading multinational corporations "aided and abetted" in the South African government's maintenance of a repressive apartheid society. Corporate activities which are the basis of imposing liability range from doing business in South Africa, and thus benefiting from the apartheid-system's artificially cheap labor, to supplying "resources, such as technology, money, and oil, to the South African government or to entities controlled by the government."[9] There is no allegation that any corporate defendant directly violated an international law prohibition against a system of racial apartheid and discrimination. Rather, the claim of damages is based wholly on the assistance that multinational corporations provided to the apartheid-era government. Almost every major lawsuit against multinational corporations under the ATS has relied on this aiding and abetting theory to survive motions to dismiss for lack of jurisdiction.

Invoking aiding and abetting liability against corporate defendants represents a novel and innovative application of customary international law for at least two reasons. First, aiding and abetting liability generally has been invoked only in the context of criminal prosecutions of individuals accused of violating the most serious kinds of international crimes. Indeed, the only judicial precedent cited for the principle of aiding and abetting liability is drawn from trials at the International Criminal Tribunal for the former Yugoslavia.[10] Because tort liability for international crimes of the sort provided by the ATS is unique to the United States, it is unsurprising that there is no judicial precedent developing aiding and abetting liability standards in a private tort action.

The lack of clear international standards for aiding and abetting liability for international tort claims may be part of the reason why several U.S. courts have decided to simply apply U.S. common law standards to ATS claims. Indeed, both of the leading circuit court decisions on corporate liability for the ATS contain disagreements as to whether to apply international or federal law standards for aiding and abetting liability.

Even those courts which have decided to use international standards for aiding and abetting liability have struggled to find a universally accepted statement of the elements of such liability. For instance, the Second Circuit's recent decision relied on the aiding and abetting standard set forth in the Rome Statute of the International Criminal Court. In that statute, aiding and abetting liability requires establishing that an individual assisted the perpetrator "with the knowledge of the intention of the group to commit the crime."[11] In contrast, the Ninth Circuit held that the proper standard required merely "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[12] There is a very large difference between these two standards--since the former would require a corporation to know that it was assisting in a crime, whereas the Ninth Circuit standard requires simply assistance that has an effect on the crime. Both courts cite well-respected sources of international precedent, but there is little prospect for a clear resolution of this dispute based on international sources alone.

The aiding and abetting liability theory depends on yet another innovative and controversial rule of customary international law: that corporations are just like natural persons for purposes of liability in ATS litigation. Indeed, the idea that corporate defendants can be held liable in the same way as natural persons is so well-accepted that it is rarely challenged, or even raised by corporate defendants, in many ATS cases.

But it is far from obvious that the norm of corporate liability for all kinds of CIL violations is a norm that is "specific, universal, and obligatory" for the purposes of sustaining jurisdiction under the ATS. Traditionally, corporations, like individuals, were not deemed to have a status under international law. In recent years, nations have, through treaties and international conventions, imposed duties and liabilities on corporations for certain types of international law obligations. But despite some claims to the contrary, there is simply no consistent or universal rule treating corporations and natural persons as exactly the same for all purposes.

Interestingly, none of the precedents cited by plaintiffs in ATS lawsuits can support the imposition of liability for serious international crimes on corporations. All of these sources—Nuremberg and its associated trials, the ICTY, the ICTR, etc.—imposed liability on individual natural persons only. There were no trials of corporations at Nuremberg. Rather, the individuals and officers of those corporations were tried, and in some cases convicted, for their activities. Similarly, the Rome Statute creating the International Criminal Court (ICC) specifically limits the ICC's jurisdiction to natural persons.

This was not merely an oversight. Imposing criminal liability on corporations was then, and continues to be, a relatively new concept in international law. Indeed, imposing criminal liability on corporations has been a relatively new concept in domestic laws as well, with the United States taking the lead, and other countries reluctantly following this trend.

III. The Courthouse Door is Wide Open

As Justice Scalia warned in his concurrence, federal courts have not been severely constrained by *Sosa* to recognize only limited and universally-accepted norms of customary international law. Rather than acting with great caution, federal courts have eagerly waded into corporate ATS litigation to create and develop standards for holding corporations liable for aiding and abetting liability.

The lack of international consensus behind any norm of aiding and abetting for ATS purposes is reflected by the inability of circuit courts, even particular panels of circuit courts, to agree on the proper standard for determining aiding and abetting liability. Corporations seeking to avoid or limit exposure to future ATS lawsuits cannot be sure whether they will be held to a standard of "knowing" or "purposeful" assistance. Moreover, as the South Africa litigation itself illustrates, the potential future exposure for simply doing business abroad is currently unpredictable because of the court-led development of aiding and abetting standards. Indeed, the very fact that corporations now can be treated exactly the same as a natural person for all international law purposes is itself a U.S. innovation for which there is little international consensus.

One might still argue that multinational corporations should be held accountable in some way for their overseas activities. Indeed, many of the allegations against corporations have been shocking and disturbing. But the Supreme Court in *Sosa* recognized that federal courts have "no congressional mandate to seek out and define new and debatable violations of the law of nations."[13] Congress has the lead role in determining how and whether to permit private enforcement of international law violations in U.S. courts, not the federal courts. Indeed, Congress has taken this role, most notably, in the Torture Victim Protection Act of 1991, which explicitly established statutory standards for determining tort liability.[14]

Like many other questions, the problem of holding corporations liable for violations of egregious human rights abuses is a complex decision, implicating not just U.S. foreign policy, but also broader policy considerations. In my view, these are the types of decisions that should be left to Congress--not the purview of federal courts supposedly exercising "great caution" and invoking modest and limited lawmaking powers under the ATS.

Endnotes

1 542 U.S. 692 (2004).

2 28 U.S.C. § 1350. The provision reads in full, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

3 Curtis Bradley, Jack Goldsmith & David Moore, *Sosa, Customary International Law, and the Continuing Relevance of* Erie, 120 Harv. L. Rev. 869 (2007) (arguing that *Sosa* supports a restrictive approach for federal courts in ATS litigation). For a more critical view of *Sosa*, see Julian Ku and John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 Sup. Ct. Rev. 153.

4 Sosa, 542 U.S. at 725.

5 *Id*. at 749.

6 *Id*. at 720.

7 *Id*. at 728.

8 *See* Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2007).

9 *See* In re South African Apartheid Litigation, 346 F. Supp.2d 538, 544-45 (S.D.N.Y. 2004).

10 For instance, plaintiffs regularly cite, and courts regularly accept, two key decisions from the ICTY. *See, e.g., Furundzija,* Trial Chamber Judgment, ¶¶ 249, 275; Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶¶ 689-92, 730, 735, 738 (May 7, 1997). Although plaintiffs and courts also cite the Nuremberg War Crimes Trials, none of the tribunals at Nuremberg and other post-World War II military tribunals analyzed or developed standards for aiding and abetting in judicial decisions.

11 Khulumani v. Barclay National Bank, 504 F.3d 254, 275 (2d Cir. 2007) (citing Rome Statute, July 17, 1998, 2187 U.N.T.S. 90 art. 25(3)(c) (d)).

12 Doe I v. Unocal, 395 F.3d 932, 951 (9th Cir. 2002) (citing Prosecutor v. Furundzija, IT-95-17/1 T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

13 *Sosa*, 542 U.S. at 728.

14 28 U.S.C. §1350.

Finding Terrorist Needles: The Automated Targeting System

*By Seth M.M. Stodder**

On any given day, U.S. Customs and Border Protection (CBP), the agency within the Department of Homeland Security (DHS) in charge of the nation's borders, processes almost a quarter-million people seeking to enter the United States through international airports like JFK in New York.[1] Most are like us—people going about their business, seeking to enter the country legally, living ordinary lives. They are U.S. citizens, lawful permanent resident aliens, aliens possessing non-immigrant visas (such as student or work visas), or individuals traveling under the Visa Waiver Program. Some are refugees or asylum seekers. But regardless of their legal status, most mean no harm, and bring significant benefits to our country. Indeed, this massive flow of people across international boundaries—not just the U.S. border—is perhaps *the* essential lifeblood of the U.S. and global economy. Our prosperity, and the global integration of economies and societies, depends on the unhindered ability of people to move and conduct business around the world, and access, deploy, and nurture talent anywhere.

But, of course, within this vast haystack of people moving through the international travel system there are needles. One such needle was Ra'ed Mansour al-Banna. Like most needles hiding within a vast haystack, al-Banna did not look like a needle. Rather, he looked and seemed like everyone else. Born in Jordan, al-Banna was a lawyer who had worked for the United Nations High Commissioner for Refugees and, for a couple of years after the September 11, 2001 terrorist attacks, had even lived in the United States on a valid visa.[2] To all who knew him, al-Banna seemed a happy, normal individual, not someone who harbored ill feelings toward the United States.[3]

On February 28, 2005, however, al-Banna blew himself up—and at least 125 others—outside a health clinic in Hilla, Iraq, in one of the Iraq War's worst suicide bombings.[4] Al-Qaeda in Iraq took credit for the attack, announcing in a statement that "a lion from our martyrdom brigade plunged into a gathering of apostates in front of a police and National Guard registration center, blowing up his loaded car and killing 125 apostates."[5]

For all the horror of the 2005 Hilla massacre, however, it is of particular interest what al-Banna *did not* do in 2003. On June 14, 2003, al-Banna was denied entry into the United States at Chicago's O'Hare International Airport by CBP inspectors.[6] He was denied entry, despite having a legitimate passport and a valid visa authorizing him to work in the United States, despite not appearing on any watchlist, and despite the fact that he had actually lived legally in the United States since 2001.[7] What led to CBP denying entry to al-Banna?

In part it was because CBP's Automated Targeting System (ATS), a computer system used by CBP to identify international air passengers warranting further scrutiny, flagged al-Banna as an individual requiring additional questioning.[8] During that "secondary" examination, CBP inspectors concluded that something was amiss about his story and denied him entry.[9] Al-Banna then returned to Jordan, ending his life in Hilla less than two years later.

This should be a vivid reminder of how important it is that we secure our borders, and make sure our border officers have all the tools and information they need to do the job. It is not the only reminder, though. CBP and its predecessor agencies (the U.S. Customs Service and the Immigration and Naturalization Service (INS)), have stopped a number of real-life terrorists from entering the country—including Millennium Bomber Ahmed Ressam, who tried to enter across the U.S.-Canada border in 1999,[10] and so-called "20th hijacker" Mohammed al-Qahtani, who was excluded from the country by an alert INS inspector at Orlando Airport on August 4, 2001.[11] The 9/11 Commission reported that none other than Mohammed Atta was waiting to pick him up at the airport that day.[12] Al-Qahtani was subsequently apprehended by U.S. forces in Afghanistan, and on February 11, 2008, the U.S. government formally charged him under the Military Commissions Act as a co-conspirator in the 9/11 attacks, along with Khalid Sheikh Mohammed.[13]

These stories, and the 9/11 catastrophe itself, highlight a key issue facing the post-9/11 world: how to thwart what the 9/11 Commission has called "terrorist travel."[14] To carry out attacks, obtain funds, recruit operatives, and train operatives, al-Qaeda and other terrorist organizations must move their people around the world, and inside target countries. The 9/11 plot perfectly demonstrates this point, as each of the terrorist operatives received visas from U.S. consular posts abroad, and then hid in plain sight. For some terrorists, the process was even easier, as citizens from certain countries are able to travel under the Visa Waiver Program ("VWP"), and without any prior consular visa interviews. Shoebomber Richard Reid, a citizen of the United Kingdom, and Zacarias Moussaoui, a citizen of France, were able to travel to the U.S. under the VWP.[15]

It follows, therefore, that, as the 9/11 Commission has stated, "[t]he challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected,"[16] and generally to "constrain terrorist mobility."[17]

This challenge has not dissipated. Last year's *National Intelligence Estimate on the Terrorist Threat to the U.S. Homeland* assessed that al-Qaeda has "protected or regenerated key elements of its Homeland attack capability" through its safehaven in Pakistan, and that it will now "intensify its efforts to put operatives here."[18] In February 2008, Director of National Intelligence Michael McConnell re-emphasized this point, reporting to Congress that al-Qaeda is now "improving the last key aspect of its ability to attack the US: the identification,

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training, and positioning of operatives for an attack in the Homeland."[19] In other words, al-Qaeda is back in business, its terrorists are on the move, and they are seeking to come to the United States to carry out more 9/11-style attacks against Americans.

Despite this reality, some commentators have sharply criticized the way CBP attempts to sift out terrorist needles from the vast haystack of international travel, and, indeed, have tried to force CBP to scuttle some of the very programs—like the Automated Targeting System for Passengers ("ATS-P"), or the collection of advance information on air travelers—essential to carrying out CBP's mission of "prevent[ing] the very few people who may pose overwhelming risks from entering or remaining in the United States undetected[.]"[20] Some critics, for instance, have asserted that the ATS-P system violates congressional bans on certain risk assessment programs.[21] Others assert that the system and CBP's process of traveler screening violates other legal principles including the Privacy Act,[22] is "undemocratic,"[23] or is just simply ineffective in identifying people presenting an additional risk of terrorism.[24]

This article addresses these criticisms, and more broadly places the dispute over ATS-P in the context of how we prevent terrorists like Ra'ed Mansour al-Banna from entering our country through our international airports and by means of the international aviation system.

I. Finding the Needles and Reducing the Size of the Haystack

With millions of people seeking to enter the United States every year through our international airports, it stands to reason that CBP cannot give close scrutiny to every single individual. Such an approach would bring global trade and the global economy to its knees. With thousands of people moving through international airports every day, were CBP to apply the equivalent of secondary screening to every single person—including searching every single person's luggage thoroughly—it might take *days* for any individual to get through an airport like New York's JFK. The global travel system would collapse—and with it, the global economy.

One might ask why CBP cannot screen every person equally, as the Transportation Security Administration (TSA) does at airports. But, even assuming that this approach to aviation security is the right one (a debatable point beyond the scope of this article), the task of securing aviation is far simpler than securing the nation's borders. In the aviation security context, the core mission is determining whether individuals are threats to aviation, based on actual or potential weapons they might possess or attempt to smuggle on board. Technological screening devices can detect most actual or potential weapons (although this is imperfect), so every person and piece of luggage is sent through screening. The CBP mission at the border is far more complex, however. Before admitting any person into the United States, CBP must determine—among many other things—whether the person is a U.S. citizen; if not, whether the alien is inadmissible for any of the myriad reasons aliens might be inadmissible under the Immigration and Nationality Act; whether the person is smuggling any contraband (including weapons, but also potentially other things like drugs, child pornography, etc.); or if the person is violating any other U.S. law. The admissibility determination is often subjective—a person with the intention of carrying out a terrorist attack in the United States sometime in the future (like Mohammed al-Qahtani and possibly Ra'ed Mansour al-Banna) is inadmissible under the Immigration and Nationality Act. But no simple screening device can uncover such an individual by divining his or her intentions. So, CBP must sift the vast haystack of millions seeking entry through our international airports every year to find the needles—all those we want to keep out of the United States. It must figure out whether any particular individual, who may or may not be carrying anything specifically incriminating, could present a danger to the American people. How can CBP do this?

A. Stopping People on Watchlists

One obvious way is if the person's name is on a watchlist. In the terrorism context, CBP is for the most part dependent upon the Intelligence Community or the Federal Bureau of Investigation (FBI) to tell it who the U.S. Government thinks might be a terrorist. Currently, this is done through the FBI-led Terrorist Screening Center (TSC), which compiles the terrorist watchlist accessed by all the relevant agencies (such as CBP, TSA via the "No-Fly" and "Selectee" lists, and others), based on information provided to it by the National Counter Terrorism Center (NCTC); which falls under the purview of the Director of National Intelligence ("DNI"), and the FBI.[25]

The use of watchlists by the U.S. government has been controversial and much debated, because of concerns that not all known terrorists are on the terrorist watchlist—due to imperfect information sharing among federal agencies—and that too many innocent people are on the watchlist, with inadequate means of redress. The first problem is demonstrated most tragically by the CIA's failure to inform the FBI and border agencies about two known Al Qaeda operatives (Khalid al-Midhdar and Nawaf al-Hazmi) who entered the country before 9/11.[26] The creation of the NCTC and the TSC was meant to address this "failure to connect the dots." The flip-side has proven to be more intractable, as recent congressional testimony has revealed that there are 860,000 name records on the terrorist watchlist[27]—and, intuitively we know that there are not even close to 860,000 known terrorists out there. While there are redress mechanisms for individuals on the watchlist, these mechanisms are slow-moving and leave individuals on the list for long periods of time, with potentially adverse consequences.

The complex issues concerning the use of watchlists are beyond the scope of this article, but suffice it to say the best way for CBP to catch a terrorist at the border is for CBP to be told that a particular person is a suspected terrorist via a watchlist.

B. Most Terrorists Are Not On Watchlists— What Do We Do?

But the world is not so simple. Most terrorist operatives are likely not known to the Intelligence Community or the FBI. Ra'ed Mansour al-Banna, Mohammed al-Qahtani, Richard Reid, Zacarias Moussaoui, Mohammed Atta, and Ahmed Ressam were not on any terrorist watchlist. Indeed, it the rare exception that a terrorist operative is *known*. Most are

actually *unknown*. Given this, how can CBP find the needles in the haystack?

i. Finding the Needles—Analog

Traditionally, CBP has found the needles through questioning and searching individuals seeking entry, using the uniquely broad legal authorities employed by CBP inspectors at our borders. As the Supreme Court has repeatedly stated, "the Government's interest in preventing the entry of unwanted persons and effects is *at its zenith* at the international border."[28] Thus, as early as 1925, the Supreme Court has held that "travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongs as effects which may be lawfully brought in."[29]

This is consistent with the longstanding "plenary power" doctrine, whereby the Supreme Court has "without exception... sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'"[30] Accordingly, both the immigration and customs laws provide CBP inspectors with extraordinarily broad powers to question, search, and arrest individuals seeking entry into the United States. This is reflected in six key principles:

First, any person seeking entry into the United States must present him or herself to an immigration (*i.e.*, CBP) inspector at an officially designated Port of Entry into the United States.[31]

Second, under the Immigration and Nationality Act, all persons seeking entry into the United States are *presumed to be aliens*, unless they provide evidence of U.S. citizenship—generally a passport.[32]

Third, the burden of proving admissibility into the United States (or for obtaining a visa, where a visa is required) is squarely with the person seeking admission.[33]

Fourth, CBP inspectors at the Ports of Entry may question any alien, or person believed to be an alien, as to his or her right to be in the United States—without any warrant.[34]

Fifth, CBP inspectors may search any alien or his or her belongings—without any warrant—if the inspector has "reasonable cause to suspect that grounds exist for denial of admission to the United States."[35]

Finally, CBP inspectors may also search—without any warrant, or even any level of suspicion— "all persons, baggage and merchandise arriving in the Customs territory of the United States from places outside thereof[.]"[36] As the Supreme Court recently stated in the *Flores-Montano* decision, "Congress, since the beginning of our Government, 'has granted the Executive plenary authority to conduct routine searches at the border without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."[37]

These authorities all add up to a extraordinarily powerful bottom line—under well-established law, and with very narrow exceptions, CBP inspectors may ask any question of any person (both aliens and U.S. citizens), and search any belongings of any person, to determine if that person is admissible into the United States or carrying contraband into the United States—without any warrant or, generally, any level of suspicion. CBP inspectors may ask anything of any person to determine admissibility, including asking any person to produce documentation establishing citizenship and subjecting any person to reasonable searches, in case the person is smuggling contraband.

CBP inspectors have extraordinarily broad powers to question people seeking admission. But in a busy airport, CBP inspectors cannot send every single person to secondary examination. So, it must *choose* a very small number of individuals who may present risk. For some, this choice is made solely by the CBP inspector at a primary inspection booth, where, in the process of a quick interview taking a minute or so, it is determined that something may be amiss with a person, and that the person should be sent for further examination. At some level, this is a gut call. Each CBP inspector has significant training and may have long experience, but at some level, the nation's security literally rests on the gut feeling of officers at primary inspection booths.

At the land border Ports of Entry, this is the main line of defense, because individual cars show up without any prior notice. A license plate reader checks for wants or warrants, passports are checked, a watchlist check is run, and questions asked. But after all that the main line of defense is the trained inspector; a trained inspector like Diana Dean, who stopped Millennium Bomber Ahmed Ressam at the Port Angeles, Washington Port of Entry, primarily because something just did not seem right with him. On the basis of this gut call, countless lives were saved in Los Angeles.

ii. Finding The Needles 2.0—
International Aviation and ATS-P

That is the land border—where our defenses rely primarily on the training and gut feeling of individual inspectors, watchlists, and "haystack-reducing" devices to speed "trusted travelers" across like NEXUS, so inspectors can focus on the unknowns. At international airports, however, our defenses need not be so thin. We can and do obtain additional information on travelers from the airlines and, because that information is collected in advance, CBP can use sophisticated technology—the ATS-P system—to assist its inspectors in identifying individuals warranting further scrutiny, without creating crippling bottlenecks at the airport.

a. Collection of Advance Information

Under the law, airlines are required to transmit Advance Passenger Information ("API") —essentially the passenger and crew manifests[38]—on international flights to the United States before the flights arrive.[39] Originally, the idea for collecting API—and processing it through the Advance Passenger Information System (APIS) came from the airlines, as a way of speeding travelers through U.S. international airports. Airlines and the U.S. Customs Service (now CBP) oversaw the collection of advance information on international travelers, thereby permitting Customs to perform watchlist and other checks *before* individuals arrive as a way of reducing bottlenecks at airports.

The collection of API was originally voluntary. After 9/11, however, it became clear that national security required the transmission of advance information to Customs, so that Customs could evaluate the risk potentially posed by international air travelers at the earliest possible point. Thus,in the Aviation and Transportation Security Act of 2001 (ATSA)[40] Congress *mandated* the collection of API.[41] Initially, Customs implemented this mandate by requiring airlines to submit API to Customs; then CBP, 15 minutes after a plane departed for the United States.[42] But in the wake of the incident involving the "Shoebomber" Richard Reid as well as the 2006 al-Qaeda threat to transatlantic aviation, it became obvious that security required that CBP receive this information *before* a plane leaves—so that the Richard Reids of the world can be spotted *before* a plane gets into the air. Thus, on August 23, 2007, DHS promulgated a regulation requiring *pre-departure* API transmissions.[43]

In addition to requiring API transmissions, the Aviation and Transportation Security Act also required that the airlines allow CBP access to Passenger Name Record ("PNR") data.[44] As stated in the implementing regulation, PNR is "reservation information contained in an air carrier's electronic reservation system and/or departure control system that sets forth the identity and travel plans of each passenger or group of passengers included under the same reservation record[.]"[45] This information is provided to the airlines by the passengers themselves or on their behalf (*e.g.*, by a travel agent) when their tickets are booked, and could include such things as the date of reservation, frequent flyer information, number of bags, billing address, contact telephone numbers, payment information (including credit card numbers), seat information, and who else is on the same travel reservation record (*e.g.*, if Mohammed Atta and Khalid al-Mihdhar booked a trip together, and if they are sitting together), among many other conceivable data elements.[46] Under the regulations, CBP may access this information "upon request"—and, being reservation information (as opposed to actual flight manifest information), it is available well before a plane departs.

ii. Analysis of Advance Information to Identify Individuals Warranting Further Examination in Secondary—ATS-P

What does CBP do with all of this information? Enter the "ATS-P" system. Run by CBP's National Targeting Center (NTC), ATS-P became operational in 1999, and it works to process and analyze all of the information available to CBP on international air passengers before they arrive in the United States, in order to assess whether they might present a risk or may be of interest, and therefore should be sent for further questioning by CBP officers in secondary examination.[47] The information ATS-P uses is drawn from the API and PNR, plus other caches of information, including that contained within the Treasury Enforcement Communications System (TECS), the terrorist watchlist, and the State Department's visa database, among other things.[48]

ATS-P essentially facilitates or performs three different functions:

First, ATS-P, along with other systems, such as the APIS system, can assist with watchlist-checking mechanisms.[49]

Second, ATS-P performs an automated "link analysis" function. Taking a rudimentary example, assume that a person on the terrorist watchlist is known to have used a particular address or credit card number. Now assume that the PNR data on a particular air traveler indicates that his ticket was purchased using this suspect credit card number. ATS-P provides a mechanism for drawing that linkage, and flagging the passenger for further questioning. In essence, ATS-P permits CBP to "operationalize" tactical intelligence—*i.e.*, specific things we know about persons of interest—and then draw linkages to spot potential additional persons of interest. This is no different than standard gumshoe police work to follow investigative trails, but it is done quickly through databases and data analytics tools, so as not to grind air travel to a halt while CBP inspectors would do this—analog style—while individuals are cooling their heels at the primary inspection booth.

Third, ATS-P operationalizes "strategic" intelligence to compare individual travelers to known or suspected "patterns of suspicious activity identified by analysts based upon past investigations and intelligence."[50] Again, to provide a simple, rudimentary example, if the PNR indicates you purchased your ticket at the last minute in cash and you originally departed from Afghanistan, ATS-P might assess that you are of greater risk, and identify you as a person warranting additional questioning in secondary. Contrary to some public misconceptions, ATS-P does *not* assign a "score" to a person to determine an individual's risk level (unlike in the cargo environment, where the ATS system assigns scores to assess whether a suspect cargo container should be inspected).[51] Rather, ATS-P compares particular sets of facts against recognized patterns of suspicious activity, and if a particular traveler's conduct rhymes with the known suspicious pattern, that passenger is flagged for additional questioning.

Assuming you are flagged by one of these three ATS-P functions, what happens next? Are you immediately sent to Guantanamo? Thrown into the Charleston military brig? No. The only thing that happens is that you are sent to secondary for additional questioning and, potentially, a search (law enforcement actions that CBP inspectors could do anyway). If, on the basis of this questioning and search, additional law enforcement action is required (*e.g.*, exclusion from the country, arrest based on probable cause of a crime, etc.), that may occur. But an ATS-P hit does not lead to that result—only the actual questioning and search in secondary, which is fully consistent with CBP legal powers, may lead there.

In this respect, ATS-P should be viewed simply as a decision support-tool for CBP inspectors faced with literally millions of international air travelers a year who must decide which few should be sent to secondary for additional questioning. It provides an additional level of analytical rigor to the decision presented to a Diana Dean. Perhaps most importantly, it provides an automated way for CBP to operationalize whatever tactical or strategic intelligence exists on known or suspected terrorists, or terrorist travel patterns. More to the point, it works and makes the American people safer. Without ATS-P, it is difficult to know whether Ra'ed Mansour al-Banna would

have been sent to secondary and ultimately excluded from the country. With al-Banna alone, ATS-P likely saved the lives of countless Americans.

II. Answering the Criticisms of ATS-P

The existence of ATS-P has been public knowledge for a while, but it became controversial in November 2006 with the issuance by DHS of a System of Records Notice concerning the system under the Privacy Act. In that Notice, DHS described the program, listed the data elements ATS-P evaluates in performing its analyses, and then justified its legality under the Privacy Act.[52]

The reaction from privacy advocates and some Members of Congress was swift and negative. For example, the Electronic Privacy Information Center (EPIC) asserted, shortly after the Notice issued, that the system was "deeply flawed." David Sobel of the Electronic Frontier Foundation claimed the ATS-P system was "about as Kafkaesque as you can get,"[53] and that it was "probably the most invasive system the government has yet deployed in terms of the number of people affected[.]"[54] Kevin Mitchell of the Business Travel Coalition said that he had "never seen anything as egregious as this."[55] Bennie Thompson, then the incoming Chairman of the House Homeland Security Committee, stated that he was "concerned that some elements of ATS-P may constitute violations of the privacy and civil liberties of U.S. citizens and lawful permanent residents (LPRs)."[56]

In response to these criticisms, DHS revised the System of Records Notice on ATS—reissuing it on August 6, 2007—and tightened some of the ATS-P procedures, to make them more protective of privacy interests.[57] DHS also issued a related Notice of Proposed Rulemaking on ATS, exempting certain records from particular provisions of the Privacy Act, the substance of which will be discussed in further detail below.[58]

These revisions did not satisfy privacy advocates, as comments to the 2007 Notices continued to assert that ATS-P was illegal, violated privacy interests, and should be terminated. The American Civil Liberties Union filed a comment stating simply that "ATS-P is an illegal program which classifies Americans and other travelers entering the country as terrorists based on secret rules and computer analysis. The program violates a clear Congressional mandate and is contrary to good public policy."[59]

A. The Legality of ATS-P

Contrary to such assertions, however, the ATS-P system is not illegal.

First, the collection of the information analyzed by the ATS-P system (primarily API and PNR) was plainly authorized by Congress in the Aviation and Transportation Security Act of 2001 and succeeding statutes,[60] and is subject to regulations issued by DHS.[61]

Second, the collection of this information is within the extraordinarily broad constitutional authority of CBP to ask questions of any individual seeking admission to the United States. As stated by the Supreme Court, "the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border,"[62] and therefore "travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[63] All of the information obtained by CBP via API or PNR transmissions could lawfully be obtained by CBP inspectors asking questions of individual travelers at the primary inspection booths—consistent with these broad border authorities. The fact that the information is transmitted to CBP more efficiently and electronically makes no difference.

Third, even aside from the broad authority given to border agencies, it is well established that an individual has no legally cognizable constitutional privacy interest "in information he voluntarily turns over to third parties."[64] Here, ATS-P draws upon information (API and PNR) held and transmitted by the *airlines*, not by individuals. Individuals provide their travel and billing information to the airlines *voluntarily* when they choose to travel, and under well-established Supreme Court precedent; they have no legitimate expectation of privacy in whatever the airlines subsequently do with that information, including whether that information is passed to the government pursuant to lawfully-enacted statutes or regulations.

Fourth, ATS-P does not violate the Privacy Act. In its August 2007 Notice of Proposed Rulemaking, DHS claimed a number of exemptions from the Privacy Act to protect the information ATS-P utilizes, including the PNR, and its methodologies from disclosure.[65] Specifically, DHS asserted exemptions from such requirements as (1) giving individuals access to the accounting of any disclosure of their records[66] and (2) giving individuals access to records an agency maintains about them,[67] among other requirements. As stated by DHS, these exemptions are required "in order to protect information relating to law enforcement investigations from disclosure to subjects of investigations and others who could interfere with investigatory and law enforcement activities."[68] Specifically, according to DHS, the exemptions are required to "preclude subjects of investigations from frustrating the investigative process; avoid disclosure of investigative techniques; protect the identities and physical safety of confidential informants and of law enforcement personnel; ensure DHS' and other federal agencies' ability to obtain information from third parties and other sources; protect the privacy of third parties; and safeguard sensitive information."[69]

And, of course, these exemptions from disclosure make eminent sense. If a key purpose of ATS-P is to analyze information in order to spot potential linkages to known or suspected terrorists and repeats of known or suspected terrorist travel patterns, it would follow that we would not want to reveal those analyses or methodologies to the known or suspected terrorists. The exemptions to disclosure claimed by DHS with regard to ATS-P are "standard law enforcement exemptions exercised by a large number of federal law enforcement agencies."[70]

Certainly, the privacy advocates disagree and believe DHS's methodologies for drawing linkages to known or suspected terrorists or assessing risk should be completely open to the light of day.[71] But nothing in federal law requires a law enforcement agency, such as CBP, to provide complete openness with regard to how it analyzes information it has lawfully collected, and that relates to ongoing law enforcement or national security activity.

Moreover, DHS has instituted a redress program for travelers who complain of being unfairly targeted and want the chance to access PNR data in the system and correct any inaccuracies. The DHS Traveler Redress Inquiry Program ("TRIP") permits precisely such a mechanism.[72] Under DHS TRIP, travelers who have been delayed or subjected to secondary examination may petition DHS if they believe the information possessed by the U.S. government about them (such as PNR) is inaccurate, or if they believe that they have been discriminated against on the basis of race, ethnicity, gender, or other factors.[73] This system is, of course, bureaucratic, recently established, and could be improved; but fundamentally it provides redress for people who believe that they have been unfairly targeted or subjected to secondary screening.

Again, nothing in federal law requires a system like DHS TRIP to also allow individuals to gain access to, for instance, the potentially-classified tactical or strategic intelligence that may form the basis for the ATS-P methodologies for determining who or what types of travel patterns might warrant additional screening in secondary. Nor does federal law allow individuals access to the methodologies used by law enforcement agencies to synthesize information—some public or "open source," and some classified or law enforcement sensitive—in order to determine who or what might warrant additional scrutiny. And, given that at the border, no standard of proof is required for questioning any particular individual—*i.e.*, neither probable cause nor reasonable suspicion—there would be no legal cause for doing so. An individual has no right to sue CBP to determine whether a CBP inspector, or the ATS-P system, had probable cause or reasonable suspicion before sending the individual to secondary for additional questioning. Thus, the Privacy Act objections to the ATS-P system and how it analyzes information that CBP has lawfully collected are specious.

Fifth, Congress simply has *not* banned the ATS-P system. Some have asserted that ATS-P violates the restriction Congress has placed in its yearly DHS appropriations bills on the TSA Secure Flight Program, providing that "[n]one of the funds provided in this or previous appropriations Acts may be utilized to develop or test algorithms assigning risk to passengers whose names are not on Government watch lists."[74] But, reading the entirety of Section 513 of the 2008 Department of Homeland Security Appropriations Act, it is clear that this section relates exclusively to the TSA Secure Flight Program—the successor to the extremely controversial TSA "CAPPS II" program killed by Congress—and not to any other DHS system aimed at securing the border, such as ATS. Moreover, the language in the provision relates to "assigning risk to *passengers*," not to performing link analysis or comparing individual travel patterns to known or suspected terrorist travel patterns to determine whether individuals should be questioned further before permitting *admission into the United States*. ATS-P has nothing to do with "assigning risk to passengers." Rather, it is a decision support tool assisting CBP inspectors in determining—consistent with their extraordinarily broad legal authorities at the border—who to question further before permitting admission into the United States. ATS-P is not barred by this provision of the appropriations legislation, and Congress has never sought to clarify its language to do so.

B. ATS-P Is Effective and Does Not Intrude Upon Privacy

For all the reasons discussed above, the ATS-P system is evidently legal as a means of permitting CBP to process and analyze the information Congress has expressly authorized it to collect. ATS-P is also an extremely effective tool for CBP. Of course, it could be improved as technology improves, but the al-Banna story demonstrates its effectiveness. There are other similar stories, and not just in the realm of anti-terrorism. As the 9/11 Commission stated, "[t]he small terrorist travel intelligence collection and analysis program currently in place [*i.e.*, ATS-P] has produced disproportionately useful results."[75] In the 9/11 Commission's view, the program "should be expanded," and CBP should do so by working "closely with intelligence officials."[76]

Some have disagreed with the 9/11 Commission's assessment of ATS-P's effectiveness in assisting CBP, and have asserted that ATS-P is simply ineffective. Jeff Jonas and Jim Harper of the Cato Institute have asserted that, in general, "[t]hough data mining has many valuable uses, it is not well suited to the terrorist discovery problem," because of the purported absence of "terrorism patterns" which to draw strategic intelligence.[77] During a panel at the Center for Strategic and International Studies (CSIS), Jim Harper applied this analysis to ATS-P as well.[78] But Jonas and Harper do not appear to understand all of ATS-P's functions—including its link analysis function, operationalizing specific tactical intelligence by drawing linkages between known facts (*e.g.*, a credit card number used by a known terrorist) and travelers seeking admission to the United States (*e.g.*, if the PNR on a traveler indicates that traveler used that same credit card number to purchase his ticket). To the extent this conclusion also is pointed at ATS-P, Jonas and Harper may be uninformed. Indeed, the ultimate testimony to ATS-P's effectiveness is not al-Banna, but its continued use by CBP and CBP's ongoing efforts to improve it.

Nor does ATS-P present an unwarranted invasion of personal privacy. As discussed above, ATS-P is fully consistent with the law and, while the DHS TRIP redress mechanism can be improved, it adequately provides individuals with the opportunity to challenge the grounds for being referred to secondary screening and correct inaccurate data in the system. Given that all of the information ATS-P draws upon comes from existing data held by the U.S. government or API and PNR—*i.e.*, information voluntarily provided to the airlines by passengers seeking to come to the United States—it is hard to see how ATS-P constitutes any particular invasion of privacy.

Indeed, ATS-P is not like some of the U.S. government efforts post-9/11 which have garnered controversy. It is not like the now-defunct "Total Information Awareness" program directed by Admiral John Poindexter, which would have mined the information trails of individuals in society, including their credit card transactions, banking activities, email, among other things.[79] Nor is it like the now-defunct "Computer Assisted Passenger Pre-screening System II" ("CAPPS II") of TSA, which would have checked the identity of air travelers by sending traveler data to third party commercial data services that would have checked that data against other personal records to confirm identity.[80]

ATS-P does no such thing, and does not review anyone's personal records. Rather, its analysis is limited to the data lawfully collected from the airlines (API and PNR) and other information already possessed by the U.S. government, including watchlist information. In short, ATS-P does not invade any conceivable privacy interests. Its analysis is entirely founded upon information travelers voluntarily provide to the airlines, and information that CBP could ask individual travelers anyway, consistent with the broad legal authorities CBP wields at the border. There is no intrusion on any conceivable privacy interest, as a matter of law or policy.

Endnotes

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30 Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)).

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32 8 U.S.C. § 1184(b).

33 8 U.S.C. § 1361. *See also* 8 C.F.R. § 235.1(f) (burden of showing admissibility is on the alien).

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35 8 U.S.C. § 1357(c).

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37 *Flores-Montano*, 541 U.S. at 153 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

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59 *See ACLU Comments Regarding the Proposed Automated Targeting System, DHS 2007-0043* (Sept. 5, 2007).

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The Matrix of Human Rights Governance Networks

*By James P. Kelly, III**

Twenty years ago, no reasonable person could have successfully argued that it was possible for the United Nations to globally govern economic and social affairs. More recently, however, a combination of events has given rise to UN global governance ambitions and activities. These factors include the increased global awareness of economic disparities among nations, enhanced global communications capabilities, greater availability of research and information, and the growing international human rights movement.

At the beginning of this century, the United Nations examined the manner in which a networks approach could be used to address pressing global problems. The organization focused on what it referred to as "global public-policy networks," consisting of cooperative arrangements among three groups: governments, businesses, and civil society. Today, there exists a matrix of ten human rights governance networks in which UN global governance of economic and social affairs occurs.

While some people who desire expanded UN global governance over economic and social affairs welcome these developments, others are concerned that, by forming external global governance partnerships with civil society and transnational businesses, the UN is exceeding its mandate and undermining the authority and sovereignty of its Member States.

This article describes the UN's study of global public-policy networks; considers the proposals for global governance contained in the report of the Panel of Eminent Persons on United Nations-Civil Society Relations; examines how the UN has applied the global public-policy networks approach to create a matrix of human rights networks for the governance of economic and social affairs; explains how the UN is using the matrix to globally govern in the area of the right to health; and concludes that the UN's creation, promotion, and management of a matrix of human rights governance networks without formally adopted UN reforms or Member State approval undermines the intergovernmental, multilateral nature of the UN.

UN Study of Global Public Policy Networks

At the end of the twentieth century, UN officials, social and political scientists, and international policy-makers concluded that new arrangements were needed to allow governments, public and private organizations, and individuals around the world to work together to address pressing global problems. Surveying the existing arrangements, the UN specifically focused on the global public-policy networks ("GPP Networks") that had "developed in the shadow of traditional multilateralism."[1] UN officials realized that governments, businesses, and civil society (*i.e.,* non-governmental organizations and individuals) were creating "trisectoral" GPP Networks 1) to provide the information, knowledge, and tools needed for policy-makers and public institutions to respond to complex global policy issues, and 2) to ensure the participation of the general public or the affected stakeholders in addressing those issues.

In short, UN officials recognized that, to secure their desired leadership position in the growing global governance movement, they needed to shed the limitations of their intergovernmental multilateralism and partner with the GPP Network participants who had begun to assemble a potential global governance system.

In 1999, in an effort to secure for itself a central role in the global governance movement, the UN instituted its Vision Project on Global Public Policy Networks. In 2000, in cooperation with the UN Vision Project on GPP Networks, the International Development Research Centre published *Critical Choices*, a report on the study of GPP Networks. The study was funded by the Better World Fund, a sister organization to the United Nations Foundation founded by Ted Turner. From the outset, the authors of the study explained that:

> A typical network combines the voluntary energy and legitimacy of the civil-society sector with the financial muscle and interest of business and the enforcement and rule-making power and coordination and capacity-building of states and international organizations.[2]

Critical Choices presented practical advice on the design, implementation, and promotion of GPP Networks and explored how GPP Networks could help address the risks and opportunities presented by globalization.

The report highlighted six important functions for GPP Networks in which the UN could play a vital role:

1. Create and discuss a global policy agenda;

2. Negotiate and set global standards;

3. Develop and disseminate knowledge to address transnational challenges;

4. Create new markets or strengthen markets that are failing to produce public goods (*e.g.,* medicines);

5. Implement ideas and decisions, especially those contained in traditional intergovernmental treaties and agreements; and,

6. Create inclusive processes that build trust and social capital in the global public space.

Additionally, *Critical Choices* detailed the following specific roles that UN agencies could play in the development of GPP Networks:

1. Convene and educate key stakeholders to create the necessary conditions for consensual knowledge-building;

2. Provide a platform and neutral place for network building;

3. Promote social entrepreneurs who are adept at creating GPP Networks and promoting inclusion, effectiveness, and results once they are operational;

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4. Serve as norm entrepreneurs by using GPP Networks as platforms to advance norms in such areas as sustainable development and human rights;

5. Manage GPP Networks at all levels of engagement (*i.e.,* coordinate program activities; consolidate "change coalitions" at the national level; provide technical resources; provide financial resources); and,

6. Serve as capacity builders to enable people and organizations to participate in a network to strengthen their ability to live up to their commitments.

The UN study of GPP Networks and the publication of *Critical Choices* was an important first step for the promoters of global governance. However, UN officials and global governance advocates recognized that they would need to secure the support of independent experts who were not a formal part of the nascent global governance movement.

Networked Governance: The Cardoso Report on UN - Civil Society Relations

In spring 2003, the UN Secretary-General, Kofi Annan, established a panel to review the relationship between the United Nations and civil society and offer practical recommendations for improved modalities and interaction.[3] In June 2004, the Panel of Eminent Persons on United Nations-Civil Society Relations, chaired by former Brazilian President Fernando Henrique Cardoso, released its report "We the Peoples: Civil Society, The United Nations and Global Governance" (the "Cardoso Report").[4]

The Cardoso Report contains the following proposals on how the UN can use its convening role to foster multi-constituency processes to advance global governance:

1. In exercising its convening power, the United Nations should emphasize the inclusion of all constituencies relevant to the issue, recognize that the key actors are different for different issues, and foster multi-stakeholder partnerships to pioneer solutions and empower a range of global policy networks to innovate and build momentum on policy options. Member States need opportunities for collective decision-making, but they should signal their preparedness to engage other actors in deliberative processes.

2. The United Nations should embrace an array of forums, each designed to achieve a specific outcome, with participation determined accordingly. The cycle of global debate on an issue should include:

- Interactive high-level round tables to survey the framework of issues
- Global conferences to define norms and targets
- Multi-stakeholder partnerships to put the new norms and targets into practice
- Multi-stakeholder hearings to monitor compliance, review experience and revise strategies.

2. The Secretariat should innovate with networked governance, bringing people from diverse backgrounds together to identify possible policy breakthroughs on emerging global priorities. It should experiment with a global Internet agora to survey public opinion and raise awareness on emerging issues. The Secretary-General should initiate multi-stakeholder advisory forums on selected emerging issues and feed their conclusions to appropriate intergovernmental forums.

3. The United Nations should retain the global conference mechanism, but use it sparingly, to address major emerging policy issues that need concerted global action, enhanced public understanding, and resonance with global public opinion. The participation of civil society and other constituencies should be planned in collaboration with their networks.

4. The Secretariat should foster multi-constituency processes as new conduits for discussion of United Nations priorities, redirecting resources now used for single-constituency forums covering multiple issues. The Secretariat, together with other relevant bodies of the United Nations system, should convene public hearings to review progress in meeting globally agreed commitments. Being technical and concerned with implementation rather than the formulation of new global policies, such hearings could be convened by the Secretary-General on his own authority. Proceedings should be transmitted through the Secretary-General to the relevant intergovernmental forums.

5. The General Assembly should permit the carefully planned participation of actors besides central governments in its processes. In particular, the Assembly should regularly invite contributions to its committees and special sessions by those offering high-quality independent input. The participation arrangements should be made in collaboration with the relevant constituency networks. The Secretariat should help to plan innovative and interactive sessions linked to but outside the formal meetings.

Some critics from civil society expressed concern that the Cardoso Report proposals call for too large a role for transnational corporations ("TNCs") in global governance, while minimizing the role of civil society. They also expressed concern about the less-than-desired "very cautious formulation" taken for the participation of civil society at formal UN General Assembly meetings.[5]

While the UN Secretariat, TNCs, and members of civil society supported the enhanced multi-stakeholder "partnerships" contemplated by the Cardoso Report, in response to inquiries made by the President of the 60th UN General Assembly, Member States expressed the following concerns:

1. Member States strongly affirmed that the United Nations must maintain the integrity of its intergovernmental nature, whereby Member States are the sole decision-makers.

2. Many Member States pointed out that they engage non-governmental organizations at the national level and include them on their delegations to United Nations conferences. Some felt that an active consultation at the national level should reduce the need for engagement at the international level.

3. Many considered that United Nations meetings are too pressed for time and space to allow for interventions from

numerous non-governmental organizations and that the sheer number of non-governmental organizations attending United Nations meetings may create a chaotic environment.

4. Some had reservations regarding the participation of organizations that are culturally insensitive, politically motivated, in particular in the context of human rights, or that represent a small interest group.

5. Many Member States were deeply concerned about the predominance of non-governmental organizations based in the developed world. Noting that these organizations represent a biased perspective, they stressed the need to redress this imbalance by involving more equitably non-governmental organizations from developing countries.

6. Regarding the presence of non-governmental organizations in the meeting rooms during intergovernmental negotiations, certain delegations were not opposed to that, provided that the organizations have been scrutinized and that there is a transparent process for determining how they can observe. Others deemed the presence of non-governmental organizations to be unacceptable and inhibiting, especially in negotiating situations. They would prefer to channel non-governmental organization views exclusively through mechanisms that do not interfere with the intergovernmental process.[6]

Ultimately, the Cardoso Report left the following questions unanswered:

1. Who decides which issues of global concern the UN should address through its global governance processes?

2. Who decides which constituencies and key actors are relevant to an issue of global concern?

3. To what extent should the UN and its "multi-stakeholder partnerships" with business and civil society be involved in putting "new norms and targets into practice" in sovereign Member States?

4. How does the UN Secretariat resist the temptation to unilaterally decide "policy breakthroughs on emerging global priorities" and then shape the participation of compliant civil society and business partners to achieve the desired outcomes?

5. How can the UN "permit the carefully planned participation of actors besides central Governments in its processes" without violating its organizational charter or diluting the importance of the deliberations and outcomes of its formal inter-governmental meetings?

6. How can the citizens of UN Member States hold UN officials, businesses and civil society accountable for their global governance activities that occur outside formal UN intergovernmental processes?

Regardless of the concerns expressed by UN Member States and the unanswered questions regarding GPP Networks and the Cardoso Report proposals, the UN Secretariat and its civil society and TNC "partners" pressed forward with their global governance ambitions, especially in the areas of economic and social affairs.

The Matrix of Human Rights Governance Networks

At the heart of the networked governance approach contemplated by the Cardoso Report is the proposal for a "cycle of global debate" on issues. Over the course of its existence, the UN has exhibited a capacity for convening meetings on a regional and global basis. Thus, to the supporters of global governance, the UN appears to be uniquely suited for convening a cycle of global debates to frame an issue, define norms and targets, put the norms and targets into practice, and monitor compliance, review experience, and revise strategies.

It is in the area of economic and social human rights that the UN has been most successful in implementing its vision for a cycle of global debate and networked global governance. The UN Office of the High Commissioner for Human Rights (the "UNOHCHR") and the Social and Human Sciences Sector of the UN Educational, Scientific and Cultural Organization ("UNESCO") play an instrumental role in developing and facilitating networks for the promotion and protection of certain economic and social human rights contained in the International Covenant on Economic, Social and Cultural Rights (the "ICESCR").

On December 16, 1966, following almost twenty years of drafting debates, the UN General Assembly adopted the ICESCR and opened it for signature, ratification, and accession by States. On January 3, 1976, the ICESCR gained the force of law. As of April 12, 1996, 133 States had ratified the ICESCR, thereby voluntarily undertaking to implement its norms and provisions. Although U.S. President Jimmy Carter signed the ICESCR in 1977, the U.S. Senate has not ratified it.

The economic, social, and cultural rights contained in the ICESCR include, but are not limited to, the right to work; the right to the enjoyment of just and favorable conditions of work; the right to social security; the right to an adequate standard of living, including adequate food, clothing and housing; the right to the enjoyment of the highest attainable standard of physical and mental health; the right to education; and the right to enjoy the benefits of scientific progress and its applications.

The UN Economic and Social Council created the Committee on Economic, Social and Cultural Rights (the "Committee") to monitor compliance by States parties with their obligations under the ICESCR. Drawing on the legal and practical expertise of its eighteen independent expert members, the Committee also seeks to assist governments in fulfilling their obligations under the ICESCR by issuing specific legislative, policy, and other suggestions and recommendations.

The Committee decided in 1988 to begin preparing General Comments on the rights and provisions contained in the ICESCR with a view to assisting States parties in fulfilling their reporting obligations, and to provide greater interpretative clarity as to the intent, meaning and content of the ICESCR. In the opinion of the UNOHCHR, general comments are a crucial means of generating jurisprudence, providing a method by which members of the Committee may come to an agreement by consensus regarding the interpretation of norms embodied in the ICESCR.

UN global governance of the economic and social rights contained in the ICESCR occurs within a matrix of human

rights governance networks (the "Matrix"). The Geneva-based UNOHCHR is the architect of the Matrix. In its role as the architect of the Matrix, the UNOHCHR encourages and facilitates the work of the agents who manage the human rights networks comprising the Matrix (the "Agents"). Within the Matrix, the Agents cooperate to promote and protect a human rights code designed to globally govern economic and social affairs (the "Code"). The Agents also monitor the conduct of TNCs and States to determine whether their economic and social activities are in line with the Code. If they are not, the Agents attempt to eliminate the offending conduct through peer pressure (*i.e.,* naming and shaming), public pressure (*i.e.,* boycotts), or administrative and legal proceedings. Those TNCs and States who are willing to trade a certain degree of their freedom or sovereignty in exchange for the ambiguous protection offered to them by the Matrix energize the UN human rights system through their financial contributions and compliance.

As formulated by the author of this article, the ten human rights governance networks comprising the Matrix include:

1. Advocacy networks: The networks of international human rights activists that articulate and advocate for human rights, including so-called "emerging" economic and social human rights.

2. Research networks: The networks of social scientists and academics that conduct research on how the lack of human rights protection negatively impacts individuals and society.

3. Policy networks: The networks of government officials and other policy makers that discuss and formulate human rights policies.

4. Standards-setting networks: The networks of multilateral international organizations that meet to adopt treaties or declarations containing or expressing human rights norms or standards.

5. Interpretive networks: The networks of human rights treaty body committees and UN-sanctioned expert committees that interpret the norms and standards contained in human rights treaties and declarations.

6. Explanatory networks: The networks of UN agency field staff that explain the human rights interpretations to members of civil society at the local, national, and regional levels.

7. Implementation networks: The networks of national legislatures that, upon the recommendation of the human rights experts, adopt laws promoting and protecting human rights.

8. Assessment networks: The networks of non-governmental organizations that encourage the use of human rights impact assessments by legislatures and businesses to measure the potential human rights impact of proposed legislation or products.

9. Enforcement networks: The networks of local, regional, and national courts that decide cases involving human rights.

10. Funding networks: The networks of governments, TNCs, and private foundations that fund the promotion and protection of human rights by supporting one or more of the other human rights governance networks.

The ten human rights governance networks comprising the Matrix work in successive stages. The advocacy networks generate the idea for an emerging economic or social human right; the research networks conduct the research necessary to support the right; the policy networks design the policy that embodies the right; the standards-setting networks publicly adopt or declare the right as a norm or standard; the interpretive networks determine the nature and scope of the right; the explanatory networks explain the right to the affected parties and their supporters in civil society; the implementation networks adopt the legislation that promotes or protects the right; the assessment networks encourage government and business respect for the right; the enforcement networks penalize those who violate the right; and the funding networks help sustain one or more of the human rights governance networks comprising the Matrix.

Inside the Matrix: UN Global Governance of the Right to Health

UN officials and non-governmental human rights organizations are relying upon the matrix of human rights governance networks to advance what is commonly referred to as the right to health. The right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights states: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services." The ICESCR provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the ICESCR, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties... to achieve the full realization of this right." To promote the right to health, UN officials and NGOs are using the Matrix in the following manner.

First, from the perspective of *advocacy networks*, in October 2004, the U.S.-based Center for Economic and Social Rights published a report, funded by the Ford Foundation and the John D. and Catherine T. MacArthur Foundation, calling upon U.S. health care and government officials to embrace the right to health.[7] After setting forth the legal framework for the right to health, examining the current U.S. health care system, and applying the international standards in the U.S. context, the report recommended that all Americans have full access to health care as a matter of right; that the U.S. health care system be simplified; that health care be universally available and accessible at government expense; and that the federal government take responsibility for ensuring that health care is of good quality, non-discriminatory, and respectful of cultural differences.

Once advocacy networks articulate a vision for the right to health, *research networks* support that vision with research evidencing how the failure to realize the right to health negatively impacts individuals and society. For instance, in March 2005,

the World Health Organization established the Commission on Social Determinants of Health (the "CSDH"). The CSDH brings together leading scientists and practitioners to provide evidence on policies that improve health by addressing the underlying determinants of health, such as access to safe and potable water and adequate sanitation; an adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information. The CSDH collaborates with countries to support policy change and monitor results.

The CSDH established nine research-oriented "knowledge networks" to synthesize knowledge to inform the CSDH of opportunities to improve action on social determinants of health by fostering the leadership, policy, action, and advocacy needed to create change. The CSDH knowledge networks include: Early Child Development, Employment Conditions, Globalization, Health Systems, Measurement and Evidence, Priority Public Health Conditions, Social Exclusion, Urban Settings, Women and Gender Equity.

In October 2007, the Measurement and Evidence Knowledge Network presented its final report to the CSDH.[8] The report examines a series of over-arching principles and issues relating to monitoring and evaluation in the social determinants of health, and outlines a framework for developing, implementing, monitoring, and evaluating policy.

Next, there is a link between research networks and the *policy networks* that rely on research to formulate health care policies. UNESCO is taking concrete measures to establish the social science research-policy linkage on a regional basis. In February 2006, officials from the UNESCO Management of Social Transformations (MOST) program convened an International Forum on the Social Science-Policy Nexus in Argentina and Uruguay. The objective of the International Forum on the Social Science Policy Nexus (the "IFSSPN Conference") was to explore the different regional and thematic dimensions of the nexus between public policy and social science research, and to suggest ways to overcome the existing gap between these two areas. Approximately 2000 participants from eighty countries took part in ninety-nine workshops, five high-level round tables and two technical consultation meetings. Social development and education ministers from Africa, Asia, and Latin America participated in the IFSSPN Conference.

UNESCO is further institutionalizing the social science research-policy linkage through the MOST Program's Fora of Ministers for Social Development. The objective of the regional fora is to develop links between policy-making national ministers for social development and regional research networks. UNESCO has convened fora of Ministers for Social Development in various regions, including Latin America, South Africa, West Africa, South Asia, and the Middle East. The goal is to establish a Permanent Forum and Secretariat in regions around the world to coordinate social science research and policy in thematic areas such as combating poverty, social development, and human security.

Once policy networks adopt right to health policies, *standards-setting networks* negotiate and adopt intergovernmental instruments establishing norms or declaring standards that eventually evolve into norms. For instance, in 2005, the UNESCO Member States adopted the Universal Declaration on Bioethics and Human Rights, Article 14 of which declares that "progress in science and technology should advance access to quality health care and essential medicines."

It is the task of *interpretative networks* to determine the nature and scope of the various aspects of the right to health contained in standards-setting instruments. For instance, in 2000, the UN Committee on Economic, Social and Cultural Rights produced its General Comment 14 containing a detailed description of the various dimensions of the right to the highest attainable standard of health. Similarly, in 2007, the UNESCO International Bioethics Committee Working Group on Social Responsibility and Health produced a Preliminary Draft Report discussing the meaning of Article 14 of the Universal Declaration on Bioethics and Human Rights. Also, in 2007, Paul Hunt, the UN Special Rapporteur on the Highest Attainable Standard of Physical and Mental Health, issued Draft Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines.

After the interpretative networks define the various aspects of the right to health, *explanatory networks* explain the right to health to local, national, and regional audiences in civil society. For instance, the UNESCO Assisting Bioethics Committees (ABC) Project supports the establishment and operation of bioethics committees in UNESCO Member States. UNESCO regional field office staff help educate interested parties in the nature and scope of the Declaration on Bioethics and Human Rights, with special emphasis on Article 14 calling for social responsibility in health care. They encourage local activists and experts to establish bioethics committees to promote bioethics and human rights.

Next, representatives of the explanatory networks educate and encourage *implementation networks*, consisting of national legislatures, to adopt legislation that implements the right to health. The UNESCO Global Ethics Observatory is establishing a collection of legislative activities and documents, such as laws, regulations and guidelines that facilitate the implementation of the Universal Declaration on Bioethics and Human Rights.

After implementation networks have adopted legislation promoting and protecting the right to health, *assessment networks* promote the use of human rights impact assessments to measure the human rights impact of government programs and corporate activities. Measuring human rights impacts has become an issue of growing interest to policy makers, non-governmental organizations, and academics. In 2006, UNESCO commissioned UN Special Rapporteur Paul Hunt to produce a case study on the need for governments and corporations to conduct human rights impact assessments ("HRIA") to promote and protect the right to health. Also, the Human Rights Impact Resource Centre is an online database that brings together a wide range of information and documentation on the use of HRIAs.

As the assessment networks generate evidence of those governments or corporations that are not measuring up to right to health norms or standards, *enforcement networks*, consisting of national and regional courts, are called upon to enforce the right to health through legal action. Regardless of the ambiguous and evolving nature of the right to health in its various forms,

human rights activists are promoting the justiciability of the right to health. For instance, in June 2006, the UNOHCHR convened a Colloquium and Workshop for Judges and Lawyers on the Justiciability of Economic, Social and Cultural Rights in the Pacific Region. Such regional conferences of the judges and lawyers comprising the enforcement networks help promote a welcoming environment for groundbreaking legal claims for alleged violations of the emerging right to health.

Finally, *funding networks*, consisting of TNCs, private foundations, and governments, provide financial support for many of the human rights governance networks comprising the Matrix. The UN Global Compact plays a leading role in encouraging TNCs to philosophically, practically, and financially support the mission and activities of the international human rights movement. Also, the U.S. government pays 22% of the UN's and UNESCO's annual assessed budget.

Transforming the UN and UNESCO to Facilitate a Networks Approach to Human Rights Governance

By relying on a matrix of human rights governance networks to globally govern economic and social rights, UN and UNESCO officials find themselves in a difficult position. On the one hand, the organizational charters of the two organizations clearly emphasize their multilateral, intergovernmental nature, with Member States having ultimate authority. On the other hand, the business and civil society participants that are essential to the effective operation of the Matrix expect to be full partners with the UN and UNESCO in the governance of economic and social rights. This was the implicit message of the Cardoso Report's call for the full engagement of business and civil society.

During the October 2007 UNESCO General Conference, representatives from some Member States of UNESCO, along with representatives of the business community and civil society, convened an International Forum of Civil Society-UNESCO's Partners. The Outcome Document from the Forum calls for:

> UNESCO to continue to act as an interface between the various spheres of civil society and to create the necessary forums for dialogue with a view to promoting multi-stakeholder partnerships at the international, national and regional levels through its field offices and in liaison with the National Commissions for UNESCO.[9]

In a nod to potential Member State concerns regarding the dilution of their power, the Outcome Document highlighted the fact that Article XI.4 of the Constitution of UNESCO stipulates that UNESCO "may make suitable arrangements for consultation and cooperation with non-governmental international organizations concerned with matters within its competence."[10] This raises the important legal and political question of the degree to which UNESCO officials, absent the specific approval of Member States, can institutionalize a matrix of human rights governance networks to coordinate the global governance of economic and social rights with its business and civil society partners. In spite of the far-reaching impact that formal UNESCO-civil society "multi-stakeholder partnerships" would have on the nature and operation of UNESCO, UNESCO officials did not present the Outcome Document to the Member States for their consideration at the General Conference.

CONCLUSION

During the past decade, the UN, UNOHCHR, and UNESCO have studied and adopted a networks approach to global governance. The author has identified a matrix of ten human rights governance networks that the UN and its agencies are using to globally govern economic and social affairs. The UN has been most aggressive in its governance of the right to the highest attainable standard of physical and mental health. In order to successfully implement a networks approach to human rights governance, UN officials are taking steps toward transforming the UN and UNESCO from multilateral, intergovernmental organizations controlled by their Member States into multi-stakeholder partnership organizations in which Member States, transnational corporations, and civil society share power under the management of UN and UNESCO officials. In doing so, these officials face significant legal and political hurdles. Nevertheless, without receiving the formal approval of their Member States, the UN and UNESCO are poised to continue their use of a matrix of human rights governance networks to create justiciable economic and social rights, the exact nature and scope of which are yet to be determined.

Endnotes

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Labor and Employment Law

Organized Labor's International Law Project? Transforming Workplace Rights Into Human Rights

** Matthew C. Muggeridge*

For more than half a century, large U.S. labor unions, alone or in concert with other labor organization federations, have regularly filed complaints with the International Labour Organization (ILO) against the U.S. Government. This article analyzes the significance of organized labor's forays into international law through the ILO process.

I. Organized Labor Makes its Case to the ILO's Committee on Freedom of Association

The first ILO complaint before the ILO's Committee on Freedom of Association (CFA) was filed in 1950 by the World Federation of Trade Unions. The CFA's decision (properly called a recommendation) stated:

> The complainant has not, in point of fact, made any effort to substantiate these four allegations by concrete examples. No evidence is presented to justify them. Under these circumstances the Committee considers that these four allegations are too vague to permit of consideration of the case on its merits, and, therefore, recommends the Governing Body to decide that they should be dismissed.[1]

In April 2003, the American Federation of Government Employees (AFGE) union filed an ILO complaint concerning the U.S. Government's refusal to grant organizing and collective bargaining rights to employees of the Transportation Security Administration (TSA).[2] In November 2006, the ILO recommendation on that complaint expressed concern for the U.S. Government's attempts to exclude the TSA workers from collective bargaining rights on national security grounds. The Committee encouraged the Government to

> [C]arefully review, in consultation with the workers' organizations concerned, the matters covered within the overall terms and conditions of employment of federal airport screeners which are not directly related to national security issues and to engage in collective bargaining on these matters with the screeners' freely chosen representative.[3]

On December 7, 2005, the United Electrical, Radio and Machine Workers of America (UE) and UE Local 150 filed a complaint with the ILO's Committee on Freedom of Association. The complaint against the United States alleged that North Carolina's statutory prohibition of public employee collective bargaining violated the U.S.'s commitments to international labor standards.[4]

On April 3, 2007, the ILO ruled on the 2005 UE complaint. To the delight of labor union organizers in North Carolina and throughout the country, the CFA agreed with complainants that the North Carolina law violated the United States' international commitments and that the Federal Government should "take steps" to overturn North Carolina's law:

> The Committee requests the Government to promote the establishment of a collective bargaining framework in the public sector in North Carolina—with the participation of representatives of the state and local administration and public employees' trade unions, and the technical assistance of the Office if so desired—and to take steps aimed at bringing the state legislation, in particular, through the repeal of NCGS §95-98, into conformity with freedom of association principles, thus ensuring effective recognition of the right of collective bargaining throughout the country's territory. The Committee requests to be kept informed of developments in this respect.[5]

The most recent ILO complaint against the U.S. Government was filed on October 25, 2007 by the AFL-CIO. This complaint did not address a specific statute or action but rather "the sustained assault on workers' rights in the United States by the National Labor Relations Board (NLRB) over the last several years."[6] Of all the complaints examined, the AFL-CIO's latest is the most general. Using NLRB decisions as evidence, the complaint attempts to show that the agency's majority is biased against unions and, therefore, the agency itself is a violation of international law.

The AFL-CIO's recent complaint concludes by affirming that the U.S. Government is bound by the underlying principles of two ILO Conventions which have not been ratified:

> The Bush Board's decisions demonstrate that the U.S. Government has failed to lived [sic] up to its obligations to abide by the fundamental principles of freedom of association and collective bargaining that bind all members and which underlie Conventions 87 and 98. We ask the Committee to direct the United States to take all necessary steps to restore, in law and in practice, the rights of workers to have full freedom of association and engage in effective collective bargaining.[7]

We can see from this quick overview of a half-century of complaints how the ILO's Committee on Freedom of Association went from a blunt dismissal of a complaint as unsubstantiated and "vague" in 1950, to requesting wholesale federal and state legislative action in 2007. There is no reason to suppose that the CFA will hesitate in recommending that the "Bush Board's decisions" be condemned as well, as a violation of international law and the commitments entered into by the United States.

What happened over these fifty years to make U.S. labor law so unacceptable to the international labor oversight body? Evidently, over fifty complaints during the span of nearly sixty years have convinced the ILO that the U.S. is not living up to its commitments. What are those commitments? The U.S. has signed no relevant new ILO Convention in that time span. Any development of labor law since 1950 has worked to grant U.S. workers greater employment and organizing protection. Domestic labor and employment law provides U.S. workers

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with many more protections today than it did half a century ago and more than what they would enjoy in many other countries today.

This article examines organized labor's use of the ILO process. It shows how U.S. engagement with the ILO and other international processes, coupled with apparent official support of ILO and its goals by successive U.S. administrations has created a framework of commitments which has grown up around and eventually superseded U.S. formal "signatory" commitment to various ILO Conventions.

With each ILO complaint filed by organized labor, each trade agreement containing labor provisions, and each adverse recommendation issued by the CFA or some other supra-national body, it becomes more difficult for the U.S. Government to argue any distinction between its formal and informal obligations under the ILO standards. Organized labor has effectively argued that labor rights ought to be considered not as mere elements of economic policy, but as international human rights proclaimed and monitored by international bodies. Although the ILO has not acquired any new enforcement power for its recommendations, its "moral" authority is strong enough to be used as an effective lobbying tool to attempt to bring about legislative or juridical change on the domestic front. This article addresses that concern.

The analysis in this article attempts to determine (1) whether organized labor's use of the international rulings to date has brought about change in U.S. domestic labor law or is likely to do so; and 2) to what extent the federal government should continue its participation in the ILO's legal process. Phrased in another way: is U.S. engagement in international labor law a dangerous threat to sovereign law-making, an expensive lobbying effort by organized labor, a waste of government resources, or a worthwhile (albeit frustrating) multilateral political endeavor?

The first section provides a brief history and explanation of the ILO.[8] That section is followed by a general discussion on some aspects of international law, particularly international labor law. The third section analyzes some of the complainants' arguments from recent cases as well as the U.S. government's rebuttal arguments. The fourth section draws conclusions on the impact of organized labor's international project and suggests various policy approaches.

II. The ILO: History, Structure, Mission

A. High Ideals Arise out of Global Conflict

The ILO was founded in 1919, as part of the Treaty of Versailles ending World War I. Since then it has been one of the most durable international organizations, surviving the demise of the League of Nations, the political upheaval and realignment of world powers after the Second World War, and constant threats to its own credibility and relevance.[9]

Samuel Gompers, then President of the American Federation of Labor, headed the commission that created the ILO. From its inception, the organization was meant to be an international forum where governments, business, and labor interests would be fairly represented. To that end the ILO adopted its "tripartite" structure in which national governments, business leaders, and labor union leaders all have representation.

As with the United Nations itself, born in the aftermath of World War II, the ILO came into being immediately following a great global conflict. Inspired by heady ideals and determined to preempt future global crises, the ILO's originators conceived the organization as an instrument to promote permanent peace and harmony between what were then seen as the two great, implacable political and social antagonists: capital and labor. The ILO would achieve enduring reconciliation between these forces with its unique deliberative processes eliminating the perceived root cause of disharmony: injustice in the workplace.[10]

The organization aimed at the improvement in the lives and working conditions of the downtrodden workers of the world not by Marxist revolution but by the creation of international standards that Member States would be somehow encouraged or pressured into observing. The ILO's areas of focus constitute a comprehensive list of policies that today seem permanent fixtures in the edifice of workplace regulation. They include

> regulation of the hours of work including the establishment of a maximum working day and week; regulation of labour supply, prevention of unemployment and provision of an adequate living wage; protection of the worker against sickness, disease and injury arising out of his employment; protection of children, young persons and women; provision for old age and injury, protection of the interests of workers when employed in countries other than their own; recognition of the principle of equal remuneration for work of equal value; and recognition of the principle of freedom of association.[11]

The ILO's main function is to create and then monitor the observance of international labor standards and their implementation through domestic legislation. The standards are enunciated through ILO Conventions and Recommendations and encompass what the ILO refers to as (significantly, as will become evident) "basic labor rights," including freedom of association, the right to organize, collective bargaining, abolition of forced labor, equality of opportunity and treatment and "other standards addressing conditions across the entire spectrum of work-related issues."[12]

As of January 2008, there were 188 ILO Conventions and 199 Recommendations, not including the specific recommendations which arise out of complaints to the Committee on Freedom of Association. When a Member State ratifies a Convention the member is bound to incorporate the principles of the Convention into its domestic law. Recommendations, by contrast, are non-binding guidelines which come into being either through the ILO's legislative process or as the outcome of formal complaints made to an ILO Committee.

Although a Member State's obligations differ according to which Conventions it has ratified, the ILO will still monitor that Member State's actions with respect to *all* Conventions, ratified or unratified. With the North Carolina statutory prohibition on public sector collective bargaining case, for example, an ILO constituent (*e.g.,* a labor organization) brought a complaint against a Member State (the United States) based on that State's failure to uphold an international labor standard (Convention

151). The CFA found that the statutory prohibition was, in fact, not in accord with the international standard, and recommended that the member do something about it. Whether or not the Member State has ratified Convention 151 is immaterial: it is still subject to ILO monitoring on the subject.

In this way, the ILO becomes a general international watchdog for the labor practices of all ILO members. The universal overseer prerogative is based on the ILO's understanding that the sum of ILO Conventions and Recommendations represents the universal standard or floor of labor rights. The ILO defines these standards (*i.e.,* Conventions and Recommendations) as "universal instruments adopted by the international community and reflecting common values and principles on work-related issues." In this way, a Member State may still be "invited," "encouraged," "urged" or otherwise exhorted to promote the principles of a given convention, although unratified. The ILO refers to this process as "keep[ing] track of developments in all countries, whether or not they have ratified [a convention]."

If a Member State has not ratified a Convention in question, the ILO complaint and recommendation process does not bind the Member to implement any change in domestic law. Nevertheless, membership does require the member to explain why it has refrained from incorporating into domestic law the principles promoted by a particular Convention or Recommendation. The complaint/recommendation/report procedure tends to blur the lines delineating a Member State's cognizable legal responsibilities, at least in the public perception.

The resulting confusion may be useful to the "prevailing" party in a CFA complaint but it is not an enforceable decision. The responding government does not "lose" the case in the same way a party in a civil suit loses a case. Because the ILO considers comprehensive ratification of conventions and recommendations as the minimum standard of compliance with international labor standards derived from broad international agreement, unless the government in question has ratified all 188 Conventions and 199 Recommendations and incorporated them explicitly into domestic law, it could "lose" any case brought against it.

In other words, "losing" an ILO case means having to be told by the ILO how one's laws are not in compliance with the universal legal standards governing labor, urged to change the offending legal framework, and admonished to report back on all efforts made.

B. The United States and the ILO

The United States joined the ILO in 1934. Over the years, successive administrations have stayed consistently reluctant to ratify most of the ILO's major conventions. In 1977, the reluctance turned into outright rejection when the U.S. withdrew from the ILO altogether to protest a perceived bias in the ILO's reporting and censuring of Member States within the Communist bloc as well as a perceived bias against Israel. In 1980, the U.S. rejoined the organization. Since that time, the U.S. has attempted to influence the ILO to become more transparent and impartial in the creation and monitoring of standards. Despite increased participation in the process, however, to date the U.S. has ratified only fourteen of the ILO's 188 Conventions, and only twelve of the fourteen are currently in force. It would seem the policy of non-ratification remains generally popular across the domestic political spectrum.[13]

There are three key ILO conventions which the U.S. has never ratified: Conventions 87, 98, and 151. In large measure, the "legal" basis for the complaints outlined above—denial of organizing and collective bargaining rights to the TSA workers, North Carolina's statutory prohibition of collective bargaining rights for public sector workers, and the global complaint concerning the "Bush Board's" purported assault on workers' rights through the NLRB—are all based on the U.S. Government's "non-compliance" with these three conventions, none of which it has ratified. For example, the UE North Carolina complaint describes U.S. breach of the unratified Conventions as a "failure by the United States to uphold its obligations arising from its membership in the ILO to protect the fundamental rights which are the subjects of Conventions 87, 98, and 151."[14]

Briefly, the three conventions deal with the right of public and private sector workers to organize for purposes of collective bargaining.

> Convention 87 is the "Freedom of Association and Protection of the Right to Organise Convention." This convention came into force in 1950 and has 148 signatories among Member States. The self-evident purpose of Convention 87 is to grant workers the right to form labor organizations without interference or restriction by the State.
>
> Convention 98 is the "Right to Organise and Collective Bargaining Convention," adopted in 1951 and ratified by 158 members. Article 6 of Convention 98 commits the signatory to a guarantee that: "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."[15]
>
> Convention 151 is the "Labour Relations (Public Service) Convention," which entered into force in 1981 and has 44 ratifications among Member States. This convention guarantees public sector workers the right to form unions and collective bargaining.

The U.S. approach to observing international labor standards has always been to commit only so far as its own domestic law permits and to promote informally all of the ILO's goals. Preeminent among U.S non-binding or informal endorsement of ILO standards is the Philadelphia Declaration.[16] Successive administrations have therefore sought to remain in compliance with the "black letter" of ratified conventions' mandates. By not ratifying Conventions 87, 98 and 151, the U.S. intended to refrain from making commitments it was unwilling to keep and was not constitutionally able to keep, given the federalist system of government. As will be explained later, such an approach does not work in assessing the extent of the U.S. "liability" with regard to international standards where the law is created by consensus rather than known by "black letter" provisions.

C. How a Broad General Principle Becomes a Binding Commitment

International law is a layered and complex body of law. Some question whether it is "law" at all, because it lacks, among other things, a sovereign to promulgate and enforce it.[17]

For the limited purposes of this article, profound questions of political and legal philosophy as well as constitutional considerations ought to be set aside in favor of a pragmatic acknowledgement of the "fact" of international law in general as applied in its machinery. Simply stated, the ILO exists and the U.S. is an active member in the ILO's processes. The ILO generates standards and monitors compliance, according to defined procedures. The U.S. duly reports to the ILO concerning its own observance and compliance with the standards, and according to the prescribed procedures.

As a legal entity, the ILO promulgates "laws" in the form of standards, declarations, policy goals, recommendations, etc., and these acts have some kind of effect on parties who have willingly subjected themselves to the ILO's jurisdiction, *i.e.*, constituent Member States. The U.S. is a voluntary member, and could withdraw its membership at any time. In this sense the U.S. voluntarily submits to the ILO's jurisdiction, as some have analogized to the way an individual voluntarily submits to the legal jurisdiction of the country, state, municipality, or branch of the military under whose authority he or she chooses to live. Apart from the obligations of membership, the U.S. has implicitly sanctioned the exercise of ILO authority by attempting to persuade the ILO to act in one way or another in cases where violations occur in other Member States to which U.S. is not a party. For example, the U.S. justified its withdrawal from the ILO in 1977 by citing the organization's laxity in monitoring observance in Soviet influenced members.[18]

The ILO machinery works by drafting conventions that are then ratified (or not) by the Member States. As discussed above, the convention mechanism is not the only expression of the international "law" concerning labor. As with all international organizations, the ILO has a panoply of other "soft law" instruments such as declarations, strategic objectives, and organizational targets and goals. These instruments do not carry the same legal weight as the conventions and recommendations. But they too, are legal "facts" albeit of a flimsier "exhortational" quality.[19]

The Philadelphia Declaration is the primary example of the ILO's soft law process.[20] In 1944, when the ILO sought to save itself from extinction along with the League of Nations, the organization held its 26th International Conference in Philadelphia. That life-saving event produced the Philadelphia Declaration; generally seen as reaffirming the ILO's Constitution. Although the Declaration is not "binding" in the way the Constitution or conventions are, it is held in high prestige and incorporated by association with the Constitution. In fact, published versions of the ILO Constitution include the Declaration as an annex to the main document.

The Declaration proclaimed four governing principles or ideals: 1) labor is not a commodity; 2) freedom of expression and of association are essential to sustained progress; 3) poverty anywhere constitutes a danger to prosperity everywhere; and 4) the war against want must be carried on through international cooperation between states, and representatives of labor, employers, and governments, freely and democratically with a view to the promotion of the common welfare.[21]

The Declaration also announced several more detailed, but still vague, international policy goals and authorized the ILO to "include in its decisions and recommendations any provisions which it considers appropriate."[22]

However vague, the Philadelphia Declaration does carry legal weight. Declarations of this kind can unexpectedly gain heightened significance when they pass from a mere statement drafted by a state's political representative into a joint conclusion arrived at by many states, as the consensus or "outcome statement" of a multilateral process. In doing so, these declarations acquire legal significance independent of particular commitments such as those embodied in the normal ILO system of conventions.

Finally, the Philadelphia Declaration recognized a long list of policy objectives, the promotion and implementation of which would be the "solemn obligation of the International Labour Organization." This list included, among other things:

> *the effective recognition of the right of collective bargaining*, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.[23]

It concluded with an affirmation that

> the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilized world.[24]

In 1998, a second major ILO Declaration was adopted in Geneva and endorsed by the U.S. Representative which reaffirmed the principles and commitments of the ILO Constitution and the Philadelphia Declaration. Although described as a "promotional instrument,"[25] the 1998 Declaration contained the following significant language:

> [T]he Declaration commits Member States to respect and promote principles and rights in four categories, *whether or not they have ratified the relevant Conventions*. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.
>
> The Declaration makes it clear that *these rights are universal, and that they apply to all people in all States*—regardless of the level of economic development. [26]

Nonetheless, assuming that the U.S. Government's representatives at the 1944 Philadelphia Conference and the negotiation team for the 1998 Declaration fully endorsed all the Declarations' principles and objectives, as generally aligned with their administrations' own policies and principles, why were the corresponding conventions never ratified? Neither President Roosevelt's administration nor that of President Clinton ever

took the next step in committing the country formally by means of the conventions governing issues such as universal collective bargaining rights. Doubtless, ratification of the relevant ILO Conventions was politically inexpedient or impossible, given a voting public suspicious of international authority and the Constitution's system of checks and balances, as applied to the signing of treaties. In theory, then, the Declaration approved in 1944 should be no more binding on successive administrations than any other political statement of a particular administration, such as a State of the Union address or Executive Order.

Nor has the current administration of President George W. Bush attempted to separate itself from the Declarations' commitments. On the contrary, far from downplaying the significance of commitments made in the 1944 and 1998 Declarations, the Government, in its response to the North Carolina public sector case boldly reaffirmed support for the Declarations' principles.[27] So, the question arises: by its original and subsequent endorsements, what lasting commitment, if any, did the U.S. Government make?

No domestic politician or political theorist would seriously argue, for example, that a political endorsement of the Philadelphia Declaration in 1944 bound the U.S. to a national minimum wage, universal health coverage, free movement of labor, or the right to have a job that one likes and can do well. It would be unreasonable, unconstitutional, and undemocratic to determine national economic policy on the basis of statements made in the context of one seemingly unimportant meeting of an international organization more than fifty years ago. So, can the Declaration be used now to bind the U.S. to guarantee the right to collective bargaining?

In the ILO Committee's recommendation in the North Carolina public sector case, the principles endorsed in Philadelphia and Geneva are taken to be generally binding,.[28] The principles of the Declarations are transformed from political rhetoric into something greater: universally recognized, binding international "customary" law. And the international consensus built around the Declarations is seen as binding on all Member States, regardless of the U.S. government's consistent unwillingness to commit to the right to collective bargaining as a specific obligation under Conventions 87 and 98. A 1975 ILO Report on Chile explicitly enunciated this concept: "[Member States are] bound to respect a certain number of general rules which have been established for the common good... [A]mong these principles, freedom of association has become a customary rule above the Conventions."[29]

International law develops differently from statutory or judge-made law, however. The overlapping layers of specific and general commitments (binding or "non-binding"); multilateral "outcome statements" endorsed at the end of some international process, such as a United Nations conference; statements of international consensus, such as the 1998 Geneva Declaration; and membership in a treaty or organization such as the ILO, combined with the laws and practices of other states, eventually reach critical mass and are declared by some adjudicating body to be customary rules. For adherents of this view of international law, a state party can be held answerable even to an unpromulgated, unratified, organically developed law, as happened in the North Carolina case.

The ILO's website explains the process of "[a]pplying conventions when countries have not ratified them."[30] The explanation given makes a distinction between the appropriate means of encouraging compliance. Article 19 of the ILO Constitution created a process that obliges members to report on specific labor standards. The process clearly contemplates that a member may have chosen not to ratify a convention, and therefore not be bound by that convention. The state which has not ratified still is obliged by membership to report and explain its continued non-ratification:

> International labour standards are universal instruments adopted by the international community and reflecting common values and principles on work-related issues. While member States can choose whether or not to ratify any conventions, the ILO considers it important to keep track of developments in all countries, whether or not they have ratified them. Under article 19 of the ILO Constitution, member States are required to report at regular intervals, at the request of the Governing Body, on measures they have taken to give effect to any provision of certain conventions or recommendations, and to indicate any obstacles which have prevented or delayed the ratification of a particular convention.[19]

This unambiguous language regarding a Member State's election not to ratify a convention, and by not ratifying not be bound in the same way as a ratifying member, would seem to settle the matter. Why, then, was U.S. non-ratification of Conventions 87, 98, and 151 insignificant to the ILO Committee in the North Carolina case?

Strengthening the distinction between obligations under a ratified as opposed to a non-ratified convention, the ILO's own description of its processes provides this explanation under the heading "Conventions and Recommendations":

> They are either *conventions*, which are legally binding international treaties that may be ratified by member states, or *recommendations*, which serve as non-binding guidelines. In many cases, a convention lays down the basic principles to be implemented by ratifying countries, while a related recommendation supplements the convention by providing more detailed guidelines on how it could be applied. Recommendations can also be autonomous, i.e. not linked to any convention.[20]

However, the organization goes on to further "clarif[y]" the significance of ratification:

> The ILO's Governing Body has identified eight conventions as "fundamental", covering subjects that are considered as fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.[21]

Under this rubric, an ILO member has to respect "fundamental" conventions even if unratified. Now, the non-ratifying state will no longer be able not to conform to an unratified convention if that convention happens to be one of the "fundamental principles and rights at work."

The Complainants in the North Carolina case argued that, by endorsing the Declarations, the U.S. submitted itself to the ILO's jurisdiction on the relevant issues, in this case the universal right to collective bargaining. The adjudicating committee

claimed that the ILO need not rely on commitments made in the 1998 Declaration. Rather, the ILO assumed authority to rule on the issues in this case because of its broader mandate to safeguard general rights to workers, independent of a country's specific convention obligations.

Employing reasoning from an earlier decision, the adjudicating committee argued

> The Committee recalls, as it had done when examining Case No. 2227 that since its creation in 1951, it has been given the task to examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions. Its mandate is not linked to the 1998 ILO Declaration—which has its own built-in follow-up mechanisms—but rather stems directly from the fundamental aims and purposes set out in the ILO Constitution. The Committee has emphasized in this respect that the function of the International Labour Organization in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association and to protect individuals as one of the primary safeguards of peace and social justice. It is in this spirit that the Committee intends, as it did in Case No. 2227, to pursue its examination of the present complaint which is limited to an examination uniquely of the collective bargaining situation in North Carolina.[31]

In short, determining a member's obligations is not so simple as determining what commitments the member has voluntarily, unilaterally ratified, at least as far as the ILO is concerned. In defending against the UE's complaint, the U.S. government was unsuccessful in arguing that, because it had not ratified the specific ILO convention dealing with the alleged international right to collective bargaining in the workplace, it was not bound to guarantee that right to North Carolina's public sector workers.

III. Case Analysis

A. North Carolina Ban on Public Sector Collective Bargaining

i. Complainants: U.S. International Obligations Go Beyond the Letter of Ratified Conventions

North Carolina General Statute (NCGS) 95-98 expressly prohibits collective bargaining in the public sector as

> against the public policy of the State, illegal, unlawful, void and of no effect, any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government.[32]

In the North Carolina case, the complainants alleged that the U.S. Government had the power to overturn this prohibition, and its failure to guarantee collective bargaining rights to public sector workers in North Carolina breached obligations it held as an ILO member "to protect the fundamental rights which are the subjects of Conventions Nos. 87, 98, and 151."[33] The complainants attempted to refute the Government's basic rebuttal argument that the Congress lacks authority in the federal system to impose contractual obligations on the states.[34]

In referring to the binding nature of the unratified Conventions, the complainants contended that, under the ILO's case law, the North Carolina ban "directly contravenes the basic principles of Convention No. 98," because the Committee on Freedom of Association (the adjudicating body) has expressly recommended that the right to collective bargaining be guaranteed to workers.[35]

The complainants also argued that the U.S. Government's obligation to force states to pass laws that "comport[] with core labour standards" is derived from its endorsement of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.[36]

ii. The Government's Response

Although the government attempted to refute the UE's assertions of fact and conclusions drawn from international law, its principal argument was a constitutional one: there is no protection under the U.S. Constitution of the right to collective bargaining, because there is a crucial distinction between freedom of association and the right to collectively bargain. Therefore, the federal government has no obligation to overturn state laws that forbid bargaining.[37] Although a state cannot deny anyone the right to associate, neither can a state be forced to contract with another party.

Next the Government challenged the complainants' assumption that the collective bargaining process is the only means that workers have to affect their workplace conditions. The Government contended that public sector workers can bring about change through the legislative process and can also form labor organizations to do so more effectively. The Government then sought to refute the claim that the ban on collective bargaining "opens the gates for discrimination, unsafe or unhealthful work, or substandard pay," citing statutory and constitutional protections already in place.[38]

The Government's last argument responded to the allegation that the ban on collective bargaining somehow breaches its commitment to larger human rights principles. Here the Government reaffirmed its endorsement of the ILO Constitution and the Philadelphia Declaration. As noted above, the Philadelphia Declaration affirms the right to collective bargaining. To justify the apparent contradiction between the right the Declaration endorses and the government's toleration of North Carolina's ban, the Government placed responsibility for the ban on the "people of North Carolina, through their elected representatives." This argument's implication is that the U.S. Government neither enacted nor upholds the ban, and that therefore there ought not to be a dispute over the Government's commitment to uphold "fundamental principles upon which ILO membership is based."[39]

iii. CFA Conclusion and Recommendations: North Carolina's Prohibition of Public Sector Collective Bargaining Should Be Overturned

The Committee first asserted its own authority to hear and rule on the case arising out of its general mandate, stemming from the ILO Constitution: to "examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions."[40]

Next the Committee on Freedom of Association

reaffirmed a legal conclusion reached in an earlier case involving public sector collective bargaining; namely, that collective bargaining rights may only be denied to public employees who are "engaged in the administration of the State."[41] This concept was at issue in earlier CFA decisions. A government is not always acting in its role as executive, but rather sometimes merely as employer. As such, prior case law holds that employees in a non-administrative context cannot be denied the right to collectively bargain.[42]

The committee next rebutted the U.S. Government's principal constitutional argument, *i.e.,* that there is no constitutional obligation placed on a public employer and employee representative to contract with one another. It distinguished between obliging two parties to contract and *allowing* them to do so voluntarily if they choose.[43] To the argument that all workers can freely associate, and thus the ban does not dampen union membership, the CFA answered by observing that the main objective of organizing is to achieve a collective bargaining relationship. Banning collective bargaining, the committee asserts, "unavoidably frustrates the main objective and activity for which such unions are set up."[44]

The CFA next refuted the Government's claims that mandatory collective bargaining would illegitimately shift the public responsibility of allocating public resources to a private organization. To avoid this, the CFA posited that the federal government could allow the state to enter bargaining within a "framework" more attuned to budgetary and other public concerns. Such a concession, it asserted, could never compromise the actual freedom of workers' associations to negotiate the terms and conditions of their employment.

Finally, the CFA addressed the niceties of the U.S.'s federal system of government. Here, the committee's language was sympathetic but unequivocal:

> The Committee notes that it always takes account of national circumstances, such as the history of labour relations and the social and economic context, but the freedom of association principles apply uniformly and consistently among countries. Thus, while noting the issues arising from the federal structure of the country, the Committee is bound to observe that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government.

The final recommendation of the CFA stated:

> The Committee requests the Government to promote the establishment of a collective bargaining framework in the public sector in North Carolina—with the participation of representatives of the state and local administration and public employees' trade unions, and the technical assistance of the Office if so desired—and to take steps aimed at bringing the state legislation, in particular, through the repeal of NCGS § 95-98, into conformity with freedom of association principles, thus ensuring effective recognition of the right of collective bargaining throughout the country's territory. The Committee requests to be kept informed of developments in this respect.[45]

B. The Case of Collective Bargaining for TSA Workers: Do National Security Concerns Justify the Restriction of Federal Employees' Collective Bargaining Rights?

i. Complainants: Denying TSA Workers the Right to Collectively Bargain Violates International Law and Cannot Be Justified On National Security Grounds

In August 2003 the American Federation of Government Employees (AFGE) filed an ILO complaint challenging the federal government's restrictions on collective bargaining rights for various groups of federal employees.[46] The complaint sought to address the "ever-growing and increasingly methodical effort to undermine federal employee collective bargaining rights and federal labour unions in the name of American National Security."[47] The complainants challenged abuses by all administrations, dating back to President Carter, of the statutory grant of authority in the Federal Service Labor-Management Relations Statute (FSLMRS), by which the President may exclude federal workers from rights which would they would otherwise have enjoyed under the statute.[48]

The offending statute's relevant provision allows the President to exclude workers from collective bargaining rights if the workers are primarily involved in national security or intelligence. AFGE argued, and the CFA agreed, that although national security is a legitimate reason to limit certain workplace rights, the U.S. government, by executive order and statutes such as the Homeland Security Act of 2002, had unreasonably expanded the category of jobs related to national security in order to strip federal workers of collective bargaining rights.[49]

According to the complainants, the arbitrary removal of collective bargaining rights, apart from lacking any national security justification, also constituted a violation of the government's international obligations. These obligations stem from ILO conventions 87, 98, and 151—not ratified by the U.S.—and also by the Declaration on Fundamental Principles and Rights at Work.

ii. The Government's Response

The Government's response first restated the familiar argument; that, since the U.S. has not ratified the conventions in question, it is not bound by the conventions' provisions.[50] The Government then noted that it was not bound by Convention 151 (public sector collective bargaining rights) because 151 was not one of the "fundamental conventions" which the Declaration on Fundamental Principles and Rights at Work was designed to promote.[51] In effect, the Government argued that it did not have to comply with unratified and non-fundamental conventions, and that, in any case, its "labor laws and practices laws [were] in general conformity with ILO conventions concerning freedom of association."[52]

Next, the Government declared its support for ILO's Declarations guaranteeing fundamental workplace rights, including collective bargaining, but added that the right to collective bargaining for public sector workers was not a fundamental right, and so the Government was not bound to guarantee it.[53]

Lastly, the Government argued that its exclusion of certain workers from collective bargaining rights was in conformity with ILO principles and precedents, because the workers in question performed functions related to national security. The Government noted that the ILO had contemplated such

exclusions for those employed in the administration of a state.[54]

iii. Conclusions and Recommendations: Not Every Federal Employee Can Be Involved In the Administration of the State

The committee limited its conclusion to an expression of "concern" about two aspects of the Government's position. Firstly, it had concern over an "ever-enlarged definition of the type of work connected to national security to exclude employees that are further and further away from the type of employee considered to be "engaged in the administration of the State." Secondly, it was troubled that there was no chance for employees to seek judicial review of their exclusion.

To resolve the first concern, the CFA recommended that the Government bargain on everything and with everyone except when there is a direct connection to national security. There was no explicit recommendation concerning the lack of judicial review, beyond a general exhortation to "effectively guarantee[] in practice' the "organizational rights of these employees."

IV. Assessing the Impact of the Decisions

The foregoing explanation and analysis focuses on how international labor standards are applied to the U.S. Government through the ILO process. The more important inquiry for lawmakers, citizens, employees, and legal practitioners is what impact the process has on U.S. labor law and policy. If the answer is "none" or "not much," then why should the U.S. Government take part in the ILO at all? Alternatively, if there is no threat to sovereign lawmaking from the ILO, where is the harm in a little non-binding multilateralism? From an employee's perspective, moreover, one who may be forced into subsidizing union expenses, including pointless litigation of ILO cases, might wonder how the expense can be justified.

If, on the other hand, ILO recommendations on matters such as collective bargaining rights in North Carolina's public sector actually do have an impact on the development of law, then the ILO's process ought to be taken seriously.

Commenting on the North Carolina case, Cornell Professor Lance Compa, a leading authority on U.S. labor obligations under trade agreements and international law, assessed the worth of labor's international legal efforts: "[R]aising our national labor law problems to an international dimension can be helpful if it's part of a broader campaign strategy."[55] In an earlier article, Compa proposed very broad parameters for such a strategy, including having human rights groups and scholars pay greater attention to perceived labor relations abuses, use of trade agreements and their corresponding oversight bodies to incorporate the language and ideals of the ILO Declarations, and promotion of international cooperation among labor unions.[56] The successful ILO litigation of CFA cases ought to be seen as but one aspect of the broader strategy, an activity more akin to lobbying than to the practice of law.

With the North Carolina case, the lobbying is taking place at the state, federal, international levels. At the state level the United Electrical, Radio and Machine Workers, made extensive lobbying use of the case, before and after the recommendation was issued. All North Carolina General Assembly Members were informed of the ILO's adverse decision.[57] On the heels of the ILO Report, a bill was introduced in North Carolina's General Assembly to repeal G.S. 95-98, North Carolina's public sector collective bargaining ban. The bill did not get out of committee.[58]

Federally, AFGE's general counsel, Mark Roth, claimed the decision in its case would "give[] AFGE the momentum to push Congress' new Democratic leaders and moderate Republicans to take a second look at the Aviation Transportation Security Act and reconsider union rights for screeners."[59]

And on the international level, implementation of the "broader campaign strategy" as envisioned by Compa had the UE following up on its ILO success by filing complaints against U.S. state laws with the Inter-American Commission on Human Rights (IACHR), an agency of the Organization of American States (OAS), and the Government of Mexico, via the UE's Mexican strategic partner union, alleging violation of the North American Agreement on Labor Cooperation (NAALC), which is the NAFTA labor rights side agreement.[60] Like the Philadelphia and Geneva Declarations, the NAALC contains specific provisions ensuring collective bargaining rights.[61]

On the other hand, there has been no change in U.S. or North Carolina labor law as a result of the ILO decisions.

So why spend time on legal analysis of the ILO? What can be learned from this study except that non-binding ILO obligations may be binding but no ILO obligation is enforceable? Is that a useful lesson? Indeed, any effort at legal analysis—such as a law review article—would seem time wasted by author and reader, merely paying unwarranted attention to a process that is best ignored.

This could be called the Slobodan Milosevic approach to international engagement, a la the former Serbian leader's high-profile refusal to participate in his own International Criminal Court trial.[62] According to that approach, the whole regulatory construct of the ILO is illegitimate and insignificant, the processes flawed, and enforcement impossible. Certainly the ILO has faced such criticism from its inception.[63]

On the other hand, a cynical observer might decide that, despite its shortcomings, the process need not be entirely forsaken if there were some advantage to participating. This pragmatic approach was surely the one Secretary of State George Schulz favored in 1985, when he counseled Congress to consider reviewing its long-standing policy of non-ratification.[64] Successive administrations, including the present one, also seemed to prefer that type of engagement, and not because of any groundswell of political support or understanding of the international commitments involved. Using that approach, the Member State is diligent in fulfilling its reporting commitments, warm in its rhetorical support for the policies and ideals of the international entity, yet indifferent to any censure of its behavior by the international body. The pragmatist knows that there is no possibility of enforcement under the ILO; that the process is a glorified lobbying exercise.

In favor of participation, some might make the following arguments. First, participation in a process such as the ILO dovetails with the larger democracy project which is currently a feature of U.S. foreign policy. Second, support for international standards may provide legal cover for U.S. business abroad,

vulnerable to costly litigation from foreign and domestic courts. Third, participation in the process allows the U.S. to request monitoring of other nations' labor laws, where abuse of workers' rights often does constitute grave human rights violations. As an international watch-dog, the ILO, it could be argued, contributes to greater stability in the midst of globalization and economic progress in developing nations.

There are good reasons, however, to favor neither Milosevic's policy of scorched-earth nor Schultz' path of enlightened pragmatism.

First, there is legitimate concern that domestic courts may allow themselves to be influenced by the rulings of international tribunals.[65] In recent years, the U.S. Supreme Court has held that state laws on capital punishment for minors and state laws against homosexual sodomy ought to be overturned on the grounds that an international "consensus" opposed such laws.[66] A similar international consensus on labor rights might convince a federal judge to do the same with North Carolina's law on public sector collective bargaining. The debate over the propriety of U.S. courts' incorporating international rulings into domestic decisions raises important sovereignty questions.[67]

A second consideration is more abstract. As a nation, the United States should stand for a transparent, democratic, and constructive collaboration in the international community. Moreover, there are some international processes which are very important, *e.g.,* the Geneva Conventions, and UN-sponsored nuclear proliferation monitoring, to name two.The pragmatic approach has a hypocritical quality to it inconsistent with the highest ideals of liberal democracy and reduces our international credibility. Although many ILO members ratify ILO conventions, but do not intend to comply with the corresponding commitments or abide by adverse, unenforceable CFA recommendations (and, in fact, do not comply), it does not follow that the U.S. ought to abuse the ILO process in like manner. As with the Kyoto Accords and International Criminal Court, the U.S. might do more to legitimize valuable multilateral bodies or processes in which it participates by remaining outside those that it considers inconsistent with our system of government or unwise, and candidly explaining why, rather than by participating in the latter in a cynical or self-serving way. The brief tenure of John Bolton as US Ambassador to the UN comes to mind as an example of international engagement which steered clear of the extremes of cynical pragmatism or Milosevic-style non-participation.

Several other factors weigh against participation. First, all engagement in international law is also entanglement. If there were an effective argument in support of the distinction between hard and soft ILO commitments, that would be a valuable contribution to international labor law. However, if it is impossible to argue successfully that unratified conventions are non-binding, and that commitment to general statements of principle cannot supersede signed, explicit commitments, then the U.S. will "lose" every case before the CFA. It is difficult to see the point in perennially standing alone on this principle and never prevailing. The Government is merely providing lobbying material to the unions.

Eventually, if it is to continue its participation in the ILO, the U.S. government must come up with a good argument against the principal allegation that its simultaneous endorsement of ILO Declarations has superseded its original signatory commitment to a limited number of conventions. If this situation applied to the U.S. in another area of policy, concerning trade or the military, for example, the situation would be intolerable. Given accepted principles of international law, an effective argument in favor of the distinction between signatory obligations and the obligations derived from customary international law may be impossible. On the other hand, international development and economic expansion has occasioned growing potential liability for the U.S. under host country rules, trade agreement rules, and even domestic tort liability under a statute such as the Alien Tort Claims Act.[68] As a potential litigant in a foreign, domestic or international tribunal, the U.S. would be better able to defend itself if it need only point to fulfillment of its specific signatory commitments under the ILO conventions and compliance with all applicable reporting procedures.

To conclude, non-participation in the ILO process will not prevent international scrutiny of U.S. labor law. Moreover, as international legal machinery goes, the ILO process does not pose as serious a threat to national sovereignty as does the International Criminal Court, for example. Nonetheless, ILO processes are a lobbying tool for organized labor and a potential embarrassment for the United States as long as it participates in them and does not comply with the CFA's interpretations of ILO Conventions that the U.S. has not ratified. Consequently, the U.S. government might well give serious consideration to withdrawing from ILO membership, while candidly explaining its reasons for doing so.

Endnotes

1 2nd Report of the ILO Committee on Freedom of Association, Case No. 33, para. 137. All recommendations from the ILO Committee on Freedom of Association arising from the various complaints made against the United States are contained in the CFA's Reports, *available at* http://www.ilo.org/ilolex/english/newcountryframeE.htm.

2 ILO Committee on Freedom of Association, Case No. 2292.

3 343rd Report of the ILO Committee on Freedom of Association, Case No. 2292, para. 798.

4 344th Report of the ILO Committee on Freedom of Association, Case No. 2460, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb298/pdf/gb-7-1.pdf.

5 *Id.* at para. 999.

6 *Complaint to the ILO Committee on Freedom of Association by the AFL-CIO Concerning the United States Government's Violations of Freedom of Association and Collective Bargaining by Failing to Enforce the National Labor Relations Act*, , Case No. 2608, filed October 25, 2007 (hereinafter the *2007 AFL-CIO ILO Complaint*), *available at* http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/$File/ILOcomplaint.pdf.

7 *Id.* at 41.

8 The official history of the ILO is summarized at http://www.ilo.org/global/About_the_ILO/Origins_and_history/Constitution/lang--en/index.htm.

9 *See generally,* Brett, B. *International Labour in the 21st Century: The ILO, Monument to the Past or Beacon for the Future?,* London: European Policy Institute, 1994.

10 *See* ILO Const., Preamble.

11 *Id.*

12 ILO Mandate, *available at* http://www.ilo.org/public/english/about/mandate.htm.

13 Stephen I. Schlossberg, *United States' Participation in the International Labor Organization: Redefining the Role*, 11 Comp. Lab. L. J. 1, 48-80 (Fall 1989).

14 344th Report of the ILO Committee on Freedom of Association, Case No. 2460, para. 944, page 214, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb298/pdf/gb-7-1.pdf.

15 ILO Convention No. 98, *Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (drafted 1949, adopted 1951), *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098,

16 *Declaration Concerning the Aims and Purposes of the International Labour Organisation*

("Declaration of Philadelphia") (May 10, 1944), Annex to ILO Constitution, *available at* http://www.ilo.org/ilolex/english/constq.htm.

17 *See* J. Austin, The Province of Jurisprudence Determined, in Lloyd's Introduction to Jurisprudence, ed. M.D.A. Freeman, 7th Edition, 253: "And hence, it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected."

18 Linda L. Moy, *The U.S. Legal Role in International Labor Organization Conventions and Recommendations*, The Int'l Lawyer, Vol. 22 No. 3 (Fall 1988), pp. 767-9; *see also* Remarks of then-Secretary of State George P. Schultz appearing before the Senate Committee on Labor and Human Relations' Hearing on Examination of the Relationship Between the United States and the

International Labor Organization, 99th Cong., 1st Sess. 12 (1985) *available at* http://findarticles.com/p/articles/mi_m1079/is_v85/ai_3999589.

19 For general discussion of "soft law" see Gunther F. Handl, et al., *A Hard Look at Soft Law*, 82 Am Soc'y Int'l L. Proc. 371 (1988); *c.f.* R. Blanpain, and M. Colucci, The Globalization of Labour Standards: The Soft Law Track, The Hague: Kluwer Law International, 2004.

20 See *supra* note 16.

21 *Philadelphia Declaration,* Sec. I.

22 *Id*. at Sec. II(e).

23 *Id.* at Sec. III(e) (emphasis added).

24 *Id.* at Sec. V.

25 Monique Cloutier, *ILO Declaration on Principles: A New Instrument To Promote Fundamental Rights (A Workers' Education Guide)*, ILO (2000), *available at* http://www.ilo.org/public/english/dialogue/actrav/publ/declfune.pdf.

26 *About the Declaration*, ILO website, *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN; see also text of *ILO Declaration on Fundamental Principles and Rights at Work* ("Declaration of Geneva") (June 1998), *available at* http://www.ilo.org/public/english/employment/skills/hrdr/instr/decla.htm. (emphasis added)

27 344th Report of the ILO Committee on Freedom of Association, Case No. 2460, at paras. 977, 984, 997 (2007).

28 *Id.* at paras. 998-9.

29 *See*, International Labor Organization, *Fact Finding and Conciliation Commission on Chile*, Geneva, Switzerland (1975), para. 466.

30 ILO website, "Applying Conventions When States Have Not Ratified Them: General Survey (Article 19)", *available at* http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Applyingconventions/index.htm.

31 *See supra* note 4, at para 985.

32 N.C. Gen. Stat. §95-98.

33 Case No. 2460, para. 944.

34 *Id*. at para. 954-955.

35 *Id*. at para. 952.

36 *Id.* at para. 953.

37 *Id*. at para 962.

38 *Id*. at para 967.

39 *Id*. at para. 976.

40 *Id*. at para. 985.

41 *See* Case No. 1557, 284th Report, paras. 758-813.

42 *Id*. at para. 989.

43 Case 2460, para 990.

44 *Id*. at para. 991.

45 *Id*. at para. 999.

46 *See supra* nn.2, 3.

47 Report No. 343, Case 2292, para. 717.

48 *See* 5 U.S.C.A. §7103(b)(1).

49 Case No. 2292 at para. 727..

50 *Id*. at para. 739.

51 *Id*. at para. 740.

52 *Id*. at para. 739.

53 *Id*. at para. 740.

54 *Id.* at para. 741-742.

55 David Moberg, *Solidarity Without Borders:*

Confronted with multinationals and business-friendly trade agreements, unions have begun to act globally, In These Times (Feb. 7, 2007).

56 Lance Compa, *The ILO Core Standards Declaration: Changing the Climate for Changing the Law*, Perspectives on Work, Vol. 7, No. 1, 24-26

57 *See* UE April 13, 2007 press release, *available at* http://www.ueunion.org/uenewsupdates.html?news=308

58 N.C. House Bill 1583 status report, *available at* http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=H1583; and Jim Stegall, *Collective Bargaining Looms as Issue*, Carolina Journal (May 31, 2007) *available at* http://www.carolinajournal.com/exclusives/display_exclusive.html?id=4098.

59 *TSA Under More Pressure To Allow Workers Union Rights*, Federal Times, November 27, 2006.

60 UE Dec. 2, 2007 press release regarding OAS complaint *available at* http://www.ueunion.org/uenewsupdates.html?news=351; and Oct 26, 2006 release regarding NAALC complaint *available at* http://www.ueunion.org/uenewsupdates.html?news=279.

61 *North American Agreement on Labor Cooperation* between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (1993), *available at* http://www.dol.gov/ILAB/regs/naalc/naalc.htm.

62 *See* Human Rights Watch Report, *Weighing the Evidence: Lessons from the Slobodan Milosevic Trial*, Vol. 18, No. 10 (D), December 2006; *available at* http://hrw.org/reports/2006/milosevic1206/5.htm#_Toc153263170.

63 *See, e.g.,* Jenks, C.W., *The Origins of the International Labor Organization*, in Int'l. Labour Rev., Vol. 30, No. 5, pp. 575-581 (1934), discussing the opinion of American legal advisers to the Versailles treaty negotiations that it would be "constitutionally impossible for the United States to give effect to the International Labour Conventions upon matters normally reserved for state legislation", *available at* http://www.ilo.org/public/libdoc/ilo/P/1934/09602(1934-30)575-581.pdf. Criticism of the ILO was manifested

by the U.S. refusal to join during the organization's first fifteen years, until FDR in 1934.

64 Remarks of then-Secretary of State George P. Schultz appearing before the Senate Committee on Labor and Human Relations' Hearing on Examination of the Relationship Between the United States and the

International Labor Organization, 99th Cong., 1st Sess. 12 (1985), *available at* http://findarticles.com/p/articles/mi_m1079/is_v85/ai_3999589.

65 For full treatment of this issue, see Federalist Society Symposium on *American Exceptionalism and the Constitution: Citation of Foreign Law*, Nov. 17, 2007, *available at* http://www.fed-soc.org/publications/pubID.454/pub_detail.asp.

66 *See* Lawrence v. Texas, 539 U.S. 558 (2003); Roper v. Simmons, 543 U.S. 551 (2005).

67 Unfortunately, however, activist judges do not require an adverse ruling of an international tribunal against the U.S. to incorporate foreign authority into a domestic decision. In at least two notorious recent instances of international law playing a part in a Supreme Court decision—*Lawrence v. Texas* and *Roper v. Simmons*—the majority did not rely on a specific ruling of an international body, but looked to laws, customs, and anything else that might have gone into forming the "evolving standards of decency that mark the progress of a maturing society." No action by the U.S. can stop foreign or international standards from evolving or creative judges from basing decisions on them. No participation in or rejection of the ILO could prevent domestic courts from noticing foreign or international authority.

68 Alien Tort Claims Act, 28 U.S.C. §1350.

Litigation

Regulation by Litigation

*By Andrew P. Morriss, Bruce Yandle & Andrew Dorchak**

For over a century, government regulation has largely taken one of two paths. Some agencies publish proposed regulations, take comments on their proposals, and then revise the proposal into a final regulation. Some of these regulations have been issued through the negotiated rulemaking process, in which the initial proposal is crafted in negotiations with interested parties; in most cases, the initial proposal is written by the agency staff. Those dissatisfied with the final regulation can seek review in the courts. Other regulatory agencies decide cases involving alleged violations of statutes through an adjudicatory process, issuing written decisions explaining their reasoning. These decisions then form a common-law-like body of law, which lawyers use to advise their clients about the likely outcome of future cases. Those dissatisfied with the agency's decisions can appeal to the courts. The National Labor Relations Board, for example, has long operated almost entirely through Board decisions rather than through published regulations.[1]

In both instances, the imposition of rules governing future behavior is the result of an agency process that meets the requirements for due process and some political accountability followed by the potential for judicial review. Over the last twenty years a new form of regulation has appeared that does not include these guarantees: regulation by litigation. Regulators, private attorneys, and alliances of regulators and private attorneys have been imposing substantive constraints on private actors' future conduct through lawsuits against the major players in industries from heavy duty diesel engines to tobacco. By suing the major firms in an industry, would-be regulators achieve coverage that is close to the universal coverage provided by a conventional agency regulation. By crafting the regulations as settlements to lawsuits, however, the regulators are able to avoid the checks and balances imposed by the regulatory process, including putting major obstacles in front of anyone seeking to challenge the regulatory aspects of the settlements. And in many instances regulation by litigation allows regulators to avoid provisions of substantive law that legislators and citizens intended to restrict their activities. Regulation by litigation thus differs significantly from traditional rulemaking, negotiated rulemaking, and agency adjudication. It frees regulators from restrictions imposed by legislatures, and reduces opportunities for challenges to their behavior in the courts. This phenomenon should worry any lawyer engaged in regulatory practice and concerned with limited government.

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I. Regulation

Regulation occurs when agencies (or private actors) compel firms and individuals to change their future behavior by threatening them with sanctions for non-compliance. It is thus *forward-looking*, rather than a backward-looking attempt to obtain compensation for a past harm or punishment for past actions. Of course, having to pay compensatory damage awards or fines may alter someone's future behavior out of a desire to avoid paying damages or fines in the future. But the incentive effects of damage awards or fines differ from the impact of substantive restrictions on future behavior in three ways. First, regulations cover many firms and individuals who may not be parties to the controversy that inspired the regulations; damage awards and fines are awarded against individual firms or persons. Second, regulations address future behavior regardless of the actor's past conduct; fines and damage awards are based only on past behavior, regardless of future conduct. Third, a fine or damage award can be imposed only when there is a recognized duty and breach; a regulation can be imposed governing behavior that was previously seen as legal.

When governments regulate, they displace the mixture of markets and tort and contract law that would otherwise govern the relationships between private individuals. The results of regulation are systematically different from unregulated outcomes. In particular, unregulated outcomes are more heterogeneous than regulated ones, as local knowledge and diverse individual preferences will lead different individuals and firms to different solutions to the same problem.

At least in theory, regulation occurs because those private law institutions have failed for one reason or another. However, regulation is problematic for many reasons. A key reason is that there is no a priori assurance that regulatory solutions will be welfare-increasing, an assurance we possess for private transactions. Because contracts are voluntary, for example, we know that they leave the parties to the contract at least as well off as not entering into the contract would have. Regulators, however, act when the benefits to them exceed their costs, not society's benefits and costs. We thus have no guarantee that regulators will act in the public interest. We do have reason to suspect that they will not. As James Madison noted in *Federalist* No. 10, the problem of faction is endemic to political life, and faction is the root of special interest regulation. Public choice theory has since expanded on Madison's insight to give us many additional reasons to be skeptical of regulators' actions. For example, we frequently observe regulators behaving in ways that advance the interests of organized interest groups at the expense of the general public.

Madison also offered a solution to the ills of factions: he insisted that our governing institutions make it difficult for political actors to serve the interests of factions at the expense of the nation as a whole.

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed....[2]

Today we know that the institutional barriers to special interest capture of regulatory agencies are not as strong as Madison must have hoped they would be. From protectionist measures to environmental regulations, the economics of regulation literature has documented the limitations of our institutional constraints on the use of regulation by special interests. Yet we have some protection from rent-seeking by special interests within the political process, and through judicial review of agency regulatory measures. This is not the case with regulation by litigation.

II. Litigation as a Means of Regulation

Regulation by litigation differs significantly from regulation through rulemaking or regulation by negotiation because there is no rulemaking attached to it. Rather than issue a proposed rule or invite the affected parties to negotiate a rule, the regulator sues one or more regulated entities, charging them with violation of an existing statute, regulation or common law rule. By threatening catastrophic consequences (more about this below), the regulator persuades (or coerces) the regulated entities to agree to a final outcome that looks like the outcome of regulation-by-negotiation or regulation-by-rulemaking: a set of detailed rules that constrain future behavior.

This is not the same as an enforcement action by a regulator, which aims to bring a firm or individual into compliance with existing regulations. To see the distinction, consider a disagreement between an auto maker and EPA over the meaning of a particular Clean Air Act provision. If General Motors disagrees with EPA, and that disagreement is resolved through an enforcement action by EPA against GM, there has not been regulation-by-litigation. However, if EPA disagrees with GM, Ford, Chrysler, Honda, Toyota, Hyundai, Volkswagen, and BMW, and sues all of them to force them to accept a new interpretation that will require them to behave differently next year from how they behaved this year, it is more likely that regulation is occurring through the litigation. Crucially, these new substantive provisions must apply to enough of the regulated industry's participants to be an effective substitute for regulation. Regulation by litigation can thus occur only when almost all of an industry can be included in the underlying lawsuits by the agency. If market participants are left out of the settlement and the settlement imposes costly measures on those who agree to it, the firms and individuals not covered will have a cost advantage over those who do participate.

Finally, regulation by litigation is most likely to occur when the regulators can persuade the regulated to agree to a settlement. When a lawsuit is contested, agencies are less likely to be able to exceed their authority because the regulated will have an incentive to vigorously contest in court the agency's arguments for its authority. Courts give less scrutiny to settlements than they do to contested litigation because they prefer settlements, and because there is no one in the court room to provide the court with a critical appraisal of the settlement's provisions. As we discuss below, this reduced scrutiny makes settlements the ideal vehicle for imposing regulatory measures that exceed the regulators' authority.

III. The Benefits and Costs of Regulation by Litigation

There are no public benefits to imposing regulation through litigation. Any regulatory measures achieved in a settlement could be obtained through conventional rulemaking or legislation. Which regulator will have to act may be different, but the outcome could be achieved without litigation. For example, the tobacco Master Settlement Agreement effectively imposed a tax on future sales of cigarettes in all fifty states through settlement of litigation between the major U.S. tobacco companies and a coalition of state attorneys general and private lawyers. The state legislatures could have passed tax increases, as could Congress, which would have had the same effect, but the attorneys general and private lawyers could not have. No state attorney general, and no private attorney, has the authority under any state constitution to tax tobacco (or anything else). The key to the attractiveness of regulation by litigation is exactly this—that it enables regulators to assume powers that they otherwise lack. It should be seen as a negative, not a positive, attribute of regulation by litigation that it enables government and private actors to evade constitutional restraints on their powers.

Further, regulations imposed by litigation are less comprehensive than regulations imposed by rulemaking. New rules apply to everyone; settlement provisions apply only to the parties. Not only could existing firms and individuals be excluded from a regulation by litigation settlement but the costs of compliance create incentives to enter the industry and undercut participants' prices. This is exactly what has happened in the cigarette industry, where new firms that are not parties to the Master Settlement Agreement have entered and taken market share from the parties. If a regulation is a good thing, it surely should be applied to everyone equally.

For all its flaws, regulation through rulemaking has several advantages over regulation by litigation. Perhaps most importantly, regulators are constrained by the constitutional requirements of the due process clauses and by statutory restrictions in general procedural statutes such as the federal Administrative Procedure Act (APA) as well as by specific provisions in substantive regulatory statutes. As Prof. William Funk notes, the APA is "designed to constrain the discretion of agencies through procedural regularity and judicial oversight."[3]

Traditional forms of regulation also must go through a process that offers opportunities to hold the regulator politically accountable. Regulators are ultimately accountable to politicians both in the executive and legislative branches, and politicians

are accountable to voters. The chain of accountability is weak, but at least in some egregious cases regulators have been forced to back off from over-reaching (*e.g.,* OSHA's attempted ergonomics regulation)[4] and political pressures have led to some restrictions on regulators' actions (*e.g.,* Congress' successful efforts at blocking many of the Clinton Administrations' efforts to undercut the General Mining Law of 1872).[5] And the potential of political backlash restrains regulators. Imperfect accountability is better than a lack of accountability.

Even more importantly, regulators' authority and judgment can be tested in the courts by any one affected by their actions. Regulators are well aware that their actions may be challenged in court and so behave more carefully than they would if their decisions were not reviewable. Again, the check is imperfect, particularly given the deference courts often grant agency interpretations of statutory authority, but the ability to challenge regulatory measures in courts remains a key restraint on agency action.[6]

Just as regulators' decisions whether to regulate or not are suspect because the decisions ultimately depend on the costs and benefits of action to regulators, so too the regulators' decisions about *how* to regulate are equally suspect. Regulators can choose among traditional rulemaking, negotiated rulemaking, and regulation by litigation as the means to impose constraints on private actors.[7]

IV. Case Studies

Using case studies of the Environmental Protection Agency's regulation of heavy duty diesel engines and the private 'dust litigation' over silica and asbestos from the 1930s to the present, we can see how regulators use litigation to evade the institutional restrictions used by lawmakers and constitution writers to attempt to limit regulators' power over private interests.[8]

A. Heavy Duty Diesel Engines

Federal regulation of air pollution sources is built on the combination of national air quality standards and specific source regulation. EPA sets National Ambient Air Quality Standards (NAAQS) that establish the levels of various pollutants acceptable to the agency. To meet the NAAQS, the agency and states together set various requirements for specific stationary sources and for categories of mobile sources. Most mobile source regulation is conducted by EPA; states have authority only over limited aspects of mobile source emissions.[9] If a state is not in compliance with a NAAQS, it must reduce emissions to meet the NAAQS, which means it must reduce emissions from stationary sources in most instances.

When the federal government began addressing mobile source air pollution with the 1970 Clean Air Act Amendments, heavy duty diesel trucks were a tiny fraction of the nation's fleet. Only 1.75% of total particulates, 0.02% of carbon monoxide, 1.9% of hydrocarbons, 4.8% of nitrogen oxides (NO_X), and 0.4% of sulfur oxides (SO_X) came from heavy-duty diesels in the early 1970s.[10] Not surprisingly, EPA paid correspondingly little attention to heavy duty diesels at first, focusing its mobile source efforts on auto emissions. One early regulatory choice proved significant, however. Because heavy duty diesel engines are sold separately from truck bodies (and in many cases are made by separate manufacturers), EPA opted to test engines outside of the truck bodies to reduce the number of separate certifications necessary. Heavy duty engines are thus tested in the laboratory, rather than on the road, using a test protocol that specifies exactly how the engine is to be operated during the test. The protocol makes a major difference in engines' emissions during testing—the European Union and the United States use different test protocols, and engines score differently on the two tests.[11] EPA began with a steady state test protocol, but switched in 1979 to a test protocol that attempted to simulate a variety of driving conditions, using "a second-by-second listing of prorated speeds and torques, through which the engine must be exercised within statistically acceptable limits."[12] Again demonstrating the importance of the specification, the agency found little correlation between engines' results on the two tests.[13] Crucially, the federal emissions standards are specified in terms of this protocol, not in more general terms—what matters is whether an engine performs to the test protocol in the lab, not how much it emits when operated on the highway under actual road conditions. EPA tests new engines annually and issues certifications that new model engines meet the current standards, allowing them to be sold in the U.S. market.

When Congress amended the Clean Air Act in 1977, it tightened the standards for heavy duty diesel engines. In doing so, Congress also added a provision that required that each new set of heavy duty engine standards apply to at least three model years, giving engine manufacturers time to recover the costs of meeting one set of standards before having to develop new technology to meet the next set.[14]

EPA's mobile source standards have been technology-forcing, regularly requiring mobile source manufacturers to develop new technologies to meet them.[15] As EPA progressively tightened emissions standards from the late 1970s into the 1980s, heavy duty diesel engine manufacturers began integrating electronic engine controllers into their engine designs.[16] (Automobile manufacturers did as well.)[17] These controllers gave the engine manufacturers greater control over combustion, allowing them to both increase engines' efficiency and to reduce emissions. But, because different emissions problems result from incomplete combustion (*e.g.,* particulates) and more complete combustion (*e.g.,* NO_X), the manufacturers soon ran into a number of tradeoffs in their designs. If they improved engines and boosted mileage by increasing combustion efficiency, the engines also produced fewer particulates but more NO_X. If they focused on NO_X reduction, however, their engines' mileage suffered and the engines produced more particulates.[18] (The engine manufacturers' customers were more interested in improved mileage than emissions reductions, of course.)

The combination of these tradeoffs, customer demands for increased mileage, test protocols' specifications, and the increasing sophistication of the electronic engine controllers led manufacturers to develop engines that recognized test conditions and minimized emissions under them, while maximizing mileage under non-test conditions. As a subsequent House Commerce Committee staff report documented, this practice was widely known in the industry, discussed at conferences at which EPA staff were present, and the subject of complaints by California regulators and environmental pressure

groups to EPA for several years, making it clear that the agency knew about it for years.[19]

The final piece of the diesel engine regulation story comes from EPA's reliance on computer modeling in regulating air pollution. Rather than measure air quality to determine how regulatory measures work, EPA has long used an assortment of computer models to estimate air quality and to determine the impact of emissions control measures.[20] Modeling can be a useful tool but carries with it some important risks, several of which combined to put EPA in a difficult position in the late 1990s. First, the model may fail to accurately forecast emissions because it oversimplifies. For example, early versions of EPA's MOBILE model simply estimated heavy duty truck traffic as a percentage of automobile traffic, and so failed to capture the significant changes in demand for truck-based shipping that accompanied the deregulation of trucking in the 1980s.[21] Second, the model may inaccurately capture the impact of control techniques, biasing regulators toward measures that earn credits in the model but do not actually reduce emissions. For example, the model hardwires in a preference for centralized inspection and maintenance programs over decentralized programs. This gives the former twice the emissions reduction credits it awards the latter, despite a lack of hard evidence that centralized ones produce twice the emissions reductions.[22]

Partly as a result of such decisions, EPA found itself in the 1990s with a growing NO_X and particulate emissions problems.[23] In particular, NO_X contributes (in some cases) to ozone level depletions and there were large areas out of attainment with EPA's ozone standard.[24] EPA therefore needed to reduce NO_X emissions. This problem was due in part to underestimates of truck emissions that resulted from both EPA's failure to accurately forecast truck traffic and EPA's incorrect emissions predictions per truck (because it did not accurately count off-test-cycle emissions). EPA found itself under increasing pressure from the states with ozone non-attainment areas to find ways to reduce NO_X emissions, and from states with particulate non-attainment areas to reduce particulate emissions. Unfortunately for EPA, it had recently changed the heavy duty truck standards, and so was precluded by the Clean Air Act's lead time rule from changing those standards again for several years.

In 1998 EPA's enforcement staff found a solution: sue the heavy-duty diesel engine makers for using "defeat devices" (*i.e.,* the engine controllers) to violate the Clean Air Act emissions standards. The problem with this theory was that the regulations themselves said nothing about off-test-cycle emissions, and EPA had previously tacitly acknowledged the legitimacy of the controller's programming by approving engines with off-cycle emissions substantially above their test-cycle emissions. How could EPA find a way around this?

The solution to this problem was to raise the stakes to the point where the engine companies could not afford to take a chance on the outcome. EPA filed suit in 1998 against all of the companies making heavy duty diesel engines in the United States, alleging that the engine controllers constituted "defeat devices" under the Clean Air Act.[25] The agency further announced that it would not certify any engines for the forthcoming model year that had the disputed controller programming in them. This put the engine manufacturers in a bind. If they could not use the controller technique, their engines would operate much less efficiently.[26] Since diesel engines' primary selling point was their efficiency, this would be a significant blow. Moreover, if any company did not settle the litigation with EPA and its competitors did, the non-settling company would be cut out of the U.S. market.

Although the diesel engine makers believed they had an excellent chance of winning the underlying litigation with EPA, they also recognized that they had no real option but to settle. EPA demanded significant financial penalties (totaling more than $190 million for all six companies).[27] Even more importantly, the agency also insisted that the companies agree to "pull ahead" the model year 2004 standards to October 1, 2002, applying them before the lead time provision would have allowed EPA to directly impose a new standard.

Heavy duty diesel engines are complex machines. The requirement to meet the 2004 standards fifteen months early left the engine manufacturers scrambling.[28] Part of the problem was that to meet the 2004 standards required more than a simple tweak of the engine controller. And changing the engine often required changing the truck body itself. For example, some of the new engines ran so hot that test models melted the drivers' shoes. Trucking companies were not interested in untested technology that promised to be more expensive to operate (lower mileage), and which offered no new benefits for them. *Fleet Owner* quoted an anonymous vice president for maintenance and equipment at "one of the nation's largest tank-truck carriers" in favor of avoiding the post-October 2002 engines: "The way we figure it... the '02 engines will add about $4,000 to the cost of the trucks. Then we'll lose another $4,000 to $5,000 on decreased fuel efficiency. That puts us $10,000 in the hole. And that's without figuring in the uncertainty of engine performance. Yes, those engines will be under warranty. But any downtime they pile up won't."[29] In response to the October 1, 2002 deadline, they opted to buy more trucks before the new standards went into effect, and fewer afterwards. This led to what one industry observer termed "one of the biggest boom and bust scenarios for the diesel engine manufacturer."[30] As a result of this "pre-buy," trucking fleet acquired more of the pre-October 1 engines than they would have done otherwise and fewer of the post-October 1 engines. This bulge is still working its way through fleets, as many heavy duty engines operate for ten years or more.[31] Thus, if EPA was right about the benefits of the new standards, its litigation had the opposite effect from what the agency intended, increasing the number of "dirty" trucks on the road for years.

Why did EPA opt to litigate? After all, just a few years earlier the agency had joined with the California state air quality regulators and the engine manufacturers to negotiate a "Statement of Principles" intended to provide a cooperative framework for regulation for the coming decade.[32] What moved the agency from cooperation with industry to confrontation?

The settlement helped EPA with its ozone and particulate NAAQS problem by cutting NO_X and particulate emissions. Almost none of the settlements' provisions were something EPA could have imposed directly through regulation, although some were relatively straightforward mitigation measures that

EPA could have bought with incentives. Every ton of NO_X and particulates removed from the atmosphere through these various programs, if captured by EPA's models, helped reduce the NO_X and particulate overloads that were causing problems without requiring states to impose additional costly controls on stationary sources. To gain such reductions without the litigation, EPA would have had to offer something of value to the engine manufacturers and, other than relaxing other limits, EPA had little to put on the table. Of course EPA could have funded such projects directly, but that would have required convincing Congress to appropriate funds for it. By using regulation by litigation, EPA shifted those costs to the industry and so got that appropriation for free.[33]

The settlement process also eliminated the industry challenges that could have been made in rulemaking. Because EPA had not only the threat of the litigation over the previous years' engines' use of the alleged defeat devices, but also the ability to reject the certifications of the next model year's engines for using controllers in ways of which EPA disapproved, the agency had a big stick with which to threaten the engine manufacturers. Unlike in the lawsuit over past practices, EPA's past knowledge of controller use and tacit acceptance of it would not be as powerful a weapon for the engine manufacturers if they were forced to sue the agency over a decision to not certify their engines. Moreover, it would be difficult for the group to maintain a common strategy with respect to future certifications, since any company that broke ranks and complied with EPA's demands and received a certification for its new engines would gain an immense competitive advantage over the other companies.

The settlement process increased the agency's authority relative to the environmental pressure groups, and others who might object to proposed rules, since the changes would be reviewed as part of the settlement process rather than in a challenge to a rulemaking proceeding.[34] As EPA noted in seeking approval of the settlements, the complaints of many of the outside interest group commentators on the settlements was that the government had not sought public input.[35] EPA was thus able to gain from choosing regulation by litigation. The agency obtained faster gains in NO_X and particulate reductions from heavy-duty engines than it could have from rulemaking; the ability to circumvent the Clean Air Act's lead time provisions; limits on environmental pressure groups' participation; and a public relations coup. EPA staff also locked in the regulatory changes imposed through the settlements. Regulatory changes made at the end of an administration are vulnerable to changes by the incoming administration; litigation is generally considered politically untouchable. All of these advantages of regulation by litigation were valuable to EPA and explain why litigation was an attractive option for the agency in 1998.

Moreover, agencies are not monoliths. EPA's enforcement staff is separated internally from its program offices, and has different incentives. For example, the program offices have reason to value their relationships with affected industries highly, because they must work with them in repeated interactions, cooperate in the production and evaluation of data, and share information that informs the agency's estimates of how far technology can be pushed. The enforcement office's incentives are focused on winning discrete victories. If the controller issue went from being framed internally as a problem to be solved looking forward to one framed as a need to punish bad past behavior, the top agency decision makers would choose different actions as appropriate. Off-the-record descriptions of the agency meetings with industry provided to us by a number of participants suggest that just such a shift occurred.

EPA's regulation of heavy duty diesel engines by litigation provides an important lesson for policymakers. The agency resorted to regulation by litigation to solve a problem created in part by the imposition of an important constraint on agency regulatory authority by Congress: the lead time provision of the Clean Air Act. Choosing litigation rather than rulemaking freed the agency to do something Congress had explicitly forbidden it to do. Regulation by litigation thus offers regulators an alternate means of achieving their goals, freed from constraints imposed on rulemaking.

B. Dust Litigation

Private parties, not just public agencies, can regulate through litigation. Almost a century of litigation over dust in the workplace shows how private lawsuits can sometimes evolve into regulatory efforts.

Dusty workplaces have been linked to occupational disease for centuries. A sixteenth century treatise, *De Re Metallica,* noted the hazards of dusts in mines for miners. It was not until the invention of power tools such as the pneumatic hammer drill and techniques such as sand blasting at the turn of the twentieth century that dust became a widespread problem in the workplace.[36] The new tools and techniques meant there were more, finer dust particles in the air in more workplaces. Although there are no systematic records of dust levels, some studies from the 1910s found levels more than 100 times the modern Occupational Safety and Health Administration regulations' permissible levels of silica dust.[37] At the same time as dust was becoming more prevalent, medical technology was advancing and providing new techniques for diagnosing lung conditions. The invention and widespread dissemination of radiographic technology, for example, allowed doctors the ability to see into lungs and observe the impact of breathing silica dust.[38]

The first decades of the twentieth century also saw the rise of new legal theories for dealing with occupational illnesses. Rising accident rates, another consequence of the new power machinery, led labor groups to successfully lobby for workers' compensation statutes based on the German model, transforming workplace injury litigation into social insurance schemes.[39] Occupational diseases were not initially included within the new legislation, but they offered a model for resolution of a workplace problem. Businesses accepted workers' compensation in return for elimination of tort litigation over accidents.

Dust exposure's chronic health impacts took decades to appear and it was not until the 1920s and early 1930s that widespread incidence of dust-related occupational lung diseases began to appear. At first there was little litigation over it, as the booming economy of the 1920s meant that workers in dusty trades who came down with illnesses could readily

find employment elsewhere. But with the onset of the Great Depression, occupational disease litigation offered many a potential lifeline and the number of cases soared.[40] More than a billion dollars of silicosis suits were pending in 1934, the equivalent of over $14 billion of claims in today's dollars.[41] Insurers reported that they faced "the most serious claim problem ever encountered" as a result of silicosis suits.[42]

While some of these suits involved genuinely injured individuals who had suffered real damages and properly sought compensation through the tort system, others did not. Silicosis suits brought with them bitter clashes over allegations of fraudulent claims such as those detailed in articles like "The Dust Hazard Racket" in legal publications, as well as causing disputes between insurance companies and their insured over coverage.[43] Some experts felt that too many doctors were willing to support doubtful claims based on unskilled readings of radiographs.[44] Other observers blamed differences in state laws. As one observer in the 1930s complained, people without injuries took advantage of some states' looser standards to bring fraudulent claims. One account declared that "Missouri is a paradise for this type of racketeering," alleging that while "[a]t first" lawyers restricted themselves "to cases where some disability existed… [m]ore lately solicitation has been carried on among workers still engaged in active work, who have no more outward appearance of disability than the dust on their clothes and some outward appearance of age.[45] A large part of the problem was that the tort system was not able to easily distinguish real claims from fraudulent ones. Medical technology had advanced in the past forty years, but it was still unable to offer definitive diagnoses in many cases in the 1930s.

The dust disease issue took on national significance when an ambitious Republican congressman from New York City, Vito Marcantonio, held hearings on an industrial disaster in West Virginia where tunnel workers had bored through a vein of almost pure quartz and many then died from acute silicosis.[46] With employers and insurers under pressure from Marcantonio's hearings, and fearing another of FDR's "alphabet agencies" would be established, and unions anxious to preserve workplace safety as an issue for themselves, all three groups quickly negotiated inclusion of silicosis and industrial diseases into the workers' compensation system.[47]

Dust diseases received little attention for several decades until the discovery of asbestos dust lung diseases in the late 1960s and 1970s.[48] The earlier success in bringing industrial diseases into workers' compensations systems was now an obstacle to the trial bar's recovery of damages. With sympathetic facts, including the federal government's concealment of asbestos' dangers during World War II to increase ship production, the trial bar was anxious to get tort damages in place of the more limited payments available under workers' compensation systems. When the federal Fifth Circuit Court of Appeals allowed suits against asbestos manufacturers to proceed in 1973 with its decision in *Borel v. Fibreboard Corp.*,[49] it opened the floodgates for what became "the longest running mass tort in U.S. history."[50] Asbestos litigation quickly spread far beyond its original confines, now involving defendants in seventy-five of the eighty-three "Standard Industrial Classification" (SIC) two digit codes used to classify the American economy.[51] The scale of its economic impact dwarfs natural disasters or even the most sweeping rulemakings. Former Attorney General Griffin Bell contends that estimates of asbestos litigation's costs to the economy are greater than the estimates of the costs of "all Superfund cleanup sites combined, Hurricane Andrew, or the September 11 terrorist attacks."[52] The RAND Corporation's most recent study of asbestos litigation estimated that $70 billion had been spent on compensation and litigation costs through 2002.[53] Reasonable estimates of the total costs of asbestos litigation now range from $200 to $265 billion.[54]

Just as with EPA's suits against the heavy duty diesel engine makers, the key to success for the asbestos plaintiffs' bar was the innovation by several law firms of "massing up" claims. This made the risk of trial too great for the defendants to bear. By filing thousands of claims against a defendant, the plaintiffs' bar was able to overwhelm the court system's mechanisms for screening out illegitimate claims. Law firms hired screeners to locate and refer potential plaintiffs and then filed claims in sympathetic jurisdictions such as Mississippi, New York, Ohio, Texas, and West Virginia. Although the first wave of asbestos suits involved plaintiffs suffering from a form of cancer closely linked to asbestos exposure, the dominant claims today are from non-malignant claimants.[55] Prof. George Priest aptly summarized the situation by writing that "we see today, in asbestos litigation, cases that would have been inconceivable thirty years ago and cases that are still inconceivable in any context other than asbestos."[56] Prof. Frances McGovern, who has both studied asbestos litigation as an academic and served as a special master for courts handling asbestos cases, argues that

> [a]sbestos litigation is virtually unique in its high degree of elasticity. There is elasticity in the sense of a nearly inexhaustible pool of plaintiffs and defendants. There is also elasticity in the procedural and substantive law to allow rapid processing of claims, thereby modifying the economics of tort recovery and accelerating the demand for new filings.[57]

By the late 1980s, asbestos claims had become big business.

Claims also became concentrated in a few plaintiffs' firms over time. The top ten firms had a quarter of annual filings in 1985; in 1992, the top ten firms accounted for half of the new cases, and the share of the top ten firms remained at least that high through the end of the decade.[58] This concentration made the firms that controlled large numbers of claims powerful. It enhanced their negotiating position with defendants, gave them significant voices on the creditors' committees for the defendants in bankruptcy, and provided them with substantial economic rewards. These firms became a significant interest group with the tools to defend themselves. As the plaintiffs' bar moved away from simply representing individuals to running businesses that stretched from plaintiff-identification through mass screenings to dominating the bankruptcy proceedings of some defendants and threatening others with insolvency, the litigation became regulation.

Three key features distinguish asbestos litigation from the mass of ordinary tort suits. First, the staggering number of cases means asbestos cases rarely go to trial.[59] The "nearly inexhaustible pool of plaintiffs and defendants" quickly

overwhelmed the court system, making trials impossible. For example, in the early 1980s a judge with a case load of 126 asbestos cases was thought to have a heavy load; twenty years later, "maybe 126,000 might get [courts'] attention."[60] As federal Seventh Circuit Judge Richard Posner noted, such volumes "exert a well-nigh irresistible pressure to bend the normal rules."[61] Instead of trials, quasi-administrative proceedings emerged to handle claims in bulk.[62] Those procedures made it possible to keep cases moving toward settlement, but they also meant that the checks imposed by the adversarial nature of the litigation process were absent.

Second, because the vast majority of cases were (and are) handled by just a few plaintiffs' firms, and featured the same defendants over and over, the adversarial process changed from what economists call a "one time" game into what they term a "repeat player" game, *i.e.,* from a situation in which parties had no reason to expect to see one another again to a situation where the lawyers on both sides knew they would be dealing with the same opposing counsel on future cases for years to come. Repeated interactions can lead to beneficial cooperation, but also undermine institutional constraints that rely on an adversarial relationship. This is particularly true where repeat players find themselves on the same side of a contest. Not surprisingly, in the asbestos cases the result was "standing settlement agreements" between the plaintiffs' bar and the major defendants.[63] Not only did these agreements lower costs for the existing players, they constituted a significant barrier to entry, helping to maintain the concentration of cases in a small number of firms.

This concentration of claims meant that asbestos cases became a highly profitable business for the law firms involved: the Dallas law firm of Baron & Budd alone reportedly had grossed more than $800 million from asbestos cases by 1998.[64] This business was dominated by a small group of firms with the intellectual capital in methods of locating plaintiffs, developing and filing cases, and settling them in short order. The result was the creation of a powerful economic interest: the asbestos plaintiffs' bar.

These firms became significant actors both in the political process and in bankruptcy proceedings involving defendants.[65] Further, given the firms' considerable investments in developing expertise in asbestos-related matters, they naturally sought to increase the return on their investment by expanding the range of claims, claimants, and defendants.[66] This dynamic can be seen in the expansion of claims to include non-malignancy and asymptomatic claims, the aggressive search for claimants, and the extraordinary expansion of activities that led firms to be sued in asbestos litigation.[67] As we will discuss below, it also led some plaintiffs' firms to invest in expanding into silica litigation. And the asbestos plaintiffs' bar became the source of the main lawyers involved in the state attorneys general litigation against tobacco companies in the 1990s.[68]

Viewing the history of asbestos litigation in retrospect, it becomes clear that the plaintiffs' bar had an incentive to invest in developing evidence and legal theories, since both could be used in multiple cases. They had the incentive to search for the most favorable jurisdictions for asbestos suits, ones with rules that eased procedural problems. Moreover, asbestos defendants did not have the usual incentives to vigorously defend themselves against the claims. Rather, their main incentive was to find an accommodation with the plaintiffs' bar that enabled the firms to manage their liabilities so that they could survive.[69]

The structure of asbestos litigation gives the plaintiffs' bar significant advantages. By overwhelming the courts, plaintiffs' attorneys are freed from the close supervision of their fees and settlement practices that courts normally use to control potentially abusive practices.[70] The volume then creates a demand by the courts for innovative means of processing cases to reduce costs. These innovations then lower the cost of litigation, in turn attracting additional cases.[71] And the defense bar is unable to adopt vigorous tactics because it is overwhelmed by the volume. Moreover, the small number of major asbestos law firms on the plaintiffs' side of the litigation acquired substantial resources, which can be deployed to influence courts and legislators to protect the steady income stream these cases provide.[72] The massive numbers and indefinite nature of many of the claims also meant that individual plaintiffs have little control over their attorneys, putting the lawyers in charge.[73] In sum, converting the process into a repeat player game weakens the check on plaintiffs' counsel provided by the adversarial system.[74]

Not satisfied with their asbestos winnings, the asbestos bar next turned to silica dust claims. Silica exposures increased in the oil industry in the 1970s, particularly in Texas where the state's tort law allowed suits for breach of an affirmative duty to warn against manufacturers of hazardous products. As had been the case with asbestos cases, the lawyers quickly began "massing up" claims against defendants, again using mass screenings done by third party firms to generate referrals. For example, U.S. Silica, a major supplier of industrial sand, reported that pending claims against it grew from 3,505 in 2002 to 22,000 by June 30, 2003.[75]

The silica claims explosion had an unexpected side effect, however. 11,000 or so cases (the exact number proved elusive even for the court) were consolidated through the Multidistrict Litigation Panel in the courtroom of a former nurse and now federal district judge, Janis Graham Jack. In part due to her medical background, Judge Jack was suspicious of the huge volume of silica claims that had suddenly materialized. She allowed discovery on the medical basis for the claims, leading to the finding that just twelve physicians had diagnosed the approximately 9,000 plaintiffs who filed the required information concerning their medical records, although more than 8,000 doctors had seen the plaintiffs for other conditions. "In virtually every case, these doctors were not the Plaintiffs' treating physicians, did not work in the same city or even state as the Plaintiffs, and did not otherwise have any obvious connection to the Plaintiffs. Rather than being connected to the Plaintiffs, these doctors instead were affiliated with a handful of law firms and mobile x-ray screening companies."[76] When some of these doctors were deposed, the defendants discovered that several did not admit to having made any such diagnosis. And the plaintiffs' records showed that many had been diagnosed by the same physician with both silicosis and asbestosis in different cases, diseases which produce dramatically different patterns on radiographs. A congressional investigation uncovered additional

evidence of fraudulent claims.[77]

Asbestos led to regulation by litigation; silica did not. What can this tell us about regulation by litigation? The first lesson is that it is much harder for private litigation to create an effective substitute for regulation than it is for public entities to do so through litigation. The asbestos suits only became truly regulatory when the volume of claims began to force otherwise healthy companies into bankruptcy, giving the plaintiffs' bar an effective lever with which to force acceptance of their interests by the companies. In both silica examples, however, the litigation did not develop into anything approaching regulation. It is not impossible for private litigation to evolve into regulation by litigation, however, and so we need to worry about the conditions under which this can occur.

The second lesson is that when private interests do acquire quasi-regulatory power through litigation it can be much more damaging than when public regulators do so. The interests of the asbestos plaintiffs' bar have almost no connection to the public interest at large. Even if we expand the definition of their self-interest to include concern for their clients' well-being, the plaintiffs' bar has no reason to take into account the needs of others: the employees and customers of the defendants, the larger social interest in economic success, or even the proper functioning of the deterrent function of tort law. Asbestos litigation has proven costly in each of these areas. By forcing companies into bankruptcy, for example, the asbestos suits have reduced investment into productive activity and employment.[78] By stretching causation well beyond its normal bounds, asbestos litigation has significantly reduced the deterrence tort awards are intended to provide.

The third lesson is the crucial role that ignorance plays in creating the opportunities for private litigation to mushroom out of control. As the Rand Corp. survey of asbestos litigation noted, there is almost no information on the extent of asbestos injuries.[79] Similarly, data on the extent of silica exposure or silicosis is mostly based on estimates and conjectures. Even the extent of the current silica litigation is not well documented. Indeed, it was only the accident that so many cases from Mississippi ended up in the Texas MDL proceeding that sparked a judge's interest in exploring why there was such a great difference between Mississippi and the rest of the nation in silicosis. And it was only the fortuitous decision by the judge in that case to require the "Fact Sheets" with information on physicians that revealed the underlying pattern of flawed diagnoses before the decision to remand them to Mississippi was made.

CONCLUSION

Does regulation-by-litigation have a future? Unfortunately, we think so. Once agencies and entrepreneurial private attorneys discover the rewards of using litigation to regulate, it is hard to see why they would abandon the tool. It is possible to imagine stopping it only under limited conditions, however.

First, the defendants must be a concentrated group to make regulation effective without the transactions costs of the multiple lawsuits making the effort too expensive. Small numbers of firms produced the entire domestic heavy-duty diesel engine supply sold in the United States. Asbestos suppliers, the initial target of those suits, were also a small group. Second, the would-be regulator by litigation must be able to coerce a settlement by threatening a catastrophic outcome, which we observed in both our case studies. Third, the ultimate deal must protect the settling firms against new entrants who undercut the settling firms on price because they are not bound by the regulation imposed through litigation.

This last condition offers the one hope for undercutting regulation by litigation. Regulatory outcomes can be imposed on the regulated with little benefit to them, as in the heavy duty diesel case or be pure rent-seeking, as in asbestos and the second wave of silica suits. In every case, however, the deals would be less attractive to the regulated if new entrants can seize market share from regulated by litigation. Legislatures and courts can prevent the evolution of enforcement and tort suits into regulation by refusing to approve settlement provisions designed to prevent entry into markets.

The three of us may not have The Solution to regulation by litigation's flaws, but we are confident that an important aspect of the solution is to promote greater discussion of the phenomenon. We are optimistic that a thoughtful conversation about regulation by litigation among those who agree that it is problematic and those who do not will contribute toward developing measures that address the features that are most troublesome.

Endnotes

1 *See, e.g.,* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

2 Federalist No. 10.

3 William Funk, *Bargaining,* 46 Duke L. J. 1351, 1379 (1997).

4 *See* Eugene Scalia, *OSHA's Ergonomics Litigation Record: Three Strikes and It's Out,* Cato Institute Policy Analysis, *available at* http://www.cato.org/pub_display.php?pub_id=1229.

5 *See* Andrew P. Morriss, Roger E. Meiners, & Andrew Dorchak, *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations, and Mining*, 55 Admin. L. Rev. 551 (2003) (discussing midnight regulations issue).

6 *See, e.g.,* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

7 We discuss this in detail in Andrew P. Morriss, Bruce Yandle, & Andrew Dorchak, *Choosing How to Regulate*, 29 Harv. Env't L. Rev. 179 (2005).

8 Our book includes an additional case study of the state attorneys general litigation over cigarettes in the 1990s. We also discuss the tobacco case study in Bruce Yandle, Joseph Rotondi, Andrew P. Morriss, and Andrew Dorchak, *Bootleggers, Baptists, & Televangelists: Regulating Tobacco by Litigation,* U. Ill. L. Rev. (forthcoming 2008) available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010695.

9 Andrew P. Morriss, "The Politics of the Clean Air Act" in Political Environmentalism: Going behind the green curtain 263, 282-292 (ed. Terry L. Anderson, 2000) (describing allocation of authority in Clean Air Act).

10 N.A. Henein, *Diesel engines combustion and emissions* in Engine emissions: pollutant formation & measurement 211, 211 (eds. George S. Springer and Donald J. Patterson) (1973).

11 *See* Association des Constructeurs Européens d'Autombiles g.i.e., *Test Cycle to measure Emission Levels of CV Diesel Engines: An Industry Note* 4, Table 2 (1994) (summarizing differences in emissions).

12 Nigel N. Clark & David L. McKain, A chassis test procedure to mimic the heavy-duty engine transient emissions certification test, 51 J. Air & Waste Mgmt. Assoc.432, 433 (2001).

13 EPA, Summary and Analysis of Comments to the NPRM "1983 and Later Model Year Heavy-Duty Engines Proposed Gaseous Emission Regulations," 14 (December 1979).

14 42 U.S.C. 7521(a)(3)(C).

15 *See, e.g.,* John H. Johnson, Thomas M. Baines, and James C. Clerc, "Preface" in Diesel Particulate Emissions: Measurement Techniques, Fuel Effects and Control Technology (PT-42) i, i (1994) ("The main driving force for control of diesel particulate and NO_x emissions reductions has come from the need for manufacturers to meet the U.S. Environmental Protection Agency (EPA) mobile source on-highway heavy-duty diesel standards for 1994. The 1994 standards were promulgated in 1985 and were technology forcing.").

16 Kenneth Stadder, *Engines with Brains*, Heavy Duty Trucking (February 1994) 54, 54. *See also Integration of Truck Electronics: A Look at the 90's*, Automotive Engineering (Feb. 1988) ("EPA standards are forcing engine manufacturers to use electronics to meet emissions limits for the 1990s."); George D. Hamilton & Scott Henjum, *Electronics: The Wait is Over,* Fleet Owner (June 1985) 50, 51 (engine manufacturers working on electronic fuel controls "since the late 1970s, when the Environmental Protection Agency first threatened to greatly reduce the emissions from heavy-duty diesel trucks.").

17 As Lee Iacoccoa, then president of Ford, put it in 1976: "If we cannot save ourselves from unrealistic government requirements in fuel economy and emissions, our greatest hope in meeting these requirements is through electronics." *Detroit Finally Wakes Up to Electronics*, Business Week 90, 90 (Issue 2453, October 11, 1976).

18 The *Diesel Engine Reference Book* even refers to a "natural tradeoff between particulate emissions and NO_x" as "one of the critical challenges in the design of diesel combustion systems." Diesel Engine Reference Book (Bernard Challen and Rodica Baranescu, eds.) 93 (2nd ed. 1999).

19 U.S. House of Representatives, Committee on Commerce, Asleep at the Wheel: The Environmental Protection Agency's Failure to Enforce Pollution Standards for Heavy-Duty Diesel Trucks (March 2000).

20 *See* Nigel N. Clark, Justin M. Kern, Christopher M. Atkinson, and Ralph D. Nine, *Factors Affecting Heavy-Duty Diesel Vehicle Emissions*, 52 J. Air & Waste Mgt. Assoc. 84, 84 (2002) ("Presently, the heavy-duty diesel emissions inventory is based on emissions factors developed from certification data gained using a stationary engine dynamometer, and there is no sophisticated accounting for the application of that engine in the vehicle or the nature of vehicle behavior.") and 92 ("All present-day truck emissions values used for inventory prediction rely on the certification data, but... certification data will underestimate NO_x emissions in off-cycle operation.... The real NO_x value in this case was 1.8 times higher than the expected value.").

21 David B. Dreher & Robert A. Harley, *A Fuel-Based Inventory for Heavy-Duty Diesel Truck Emissions,* 48 J. Air & Waste Mgt. Assoc. 352, 352 (1998).

22 Joel Schwartz, *An Analysis of USEPA's 50-Percent Discount for Decentralized I/M Programs,* California Inspection and Maintenance Review Committee (1995) at Appendix A.

23 Chris Bowman, *EPA Off On Diesel Rigs' Emissions? Clean-air Goals May Be Tougher to Meet*, Sacramento Bee (October 18, 1997) (noting air pollution control officials finding that it would be 'politically and logistically improbable' to make up lost emissions controls resulting from mobile source over-emissions from cars and businesses.).

24 *See* Linsey C. Marr & Robert A. Harley, *Spectral Analysis of Weekday-Weekend Differences in Ambient Ozone, Nitrogen Oxide, and Non-methane Hydrocarbon Time Series in California*, 36 Atmospheric Environment 2327, 2334 (2002).

25 *Enforcement: $1 Billion Settlement with Engine Makers Includes Largest Civil Penalty Under Air Act*, 29 BNA's Environment Reporter 1285 (October 30, 1998).

26 EPA estimated that the practice improved fuel economy by 4-8%. *Enforcement: $1 Billion Settlement with Engine Makers Includes Largest Civil Penalty Under Air Act*, 29 BNA's Environment Reporter 1285 (October 30, 1998).

27 Jeff Johnson, *EPA fines engine makers*, Transport Topics no. 3300 (Oct. 1998) 26:1;120.

28 Jim Mele, *Integrating Vehicle Electronics: Plugging into the network*, 92 Fleet Owner 60, 64 (June 1997) (Faced with new heavy-duty diesel emissions standards in 2004, "we're going to need new ECMs by 2003, and it takes about three years for a development program....").

29 David Cullen, *The '02 Engine Decision: High Stakes at Risk*, Fleet Owner 20, 22 (April 2002). As this article on the new engines in April 2002 *Fleet Owner* summarized the problem:

> The negatives already associated with the '02 engines—even before they hit the market—are considerable. First, it's expected that the new technology engine makers will deploy to get down to the requisite EPA emissions limits will add $3,000 to $5,000 to the cost of a new vehicle. What's more, engine makers concede fuel efficiency will likely be compromised and maintenance schedules may have to be modified. Bad as that news is, what is most disconcerting to new truck buyers is the simple fact that they don't know how these new engines will perform, that is, how much they will break down.

Id. at 21.

30 Rhein Associates, Inc. 2006. The future of diesel engines. 11th ed. 37 (2006).

31 Timothy V. Johnson, "Diesel Emission Control in Review," *in* Diesel Exhaust Emissions Control: Developments in Regulation and Catalytic Systems (SP-1581) 23, 29 (2001). *See also* Health Effects Institute, Diesel Exhaust: A Critical Analysis of Emissions, Exposure, and Health Effects 5 (1995) ("reductions in exposure will be gradual because of the long life of existing heavy-duty diesel engines and the extent to which emission reductions will be offset by growth in vehicle use.").

32 *Control of Air Pollution from Heavy-Duty Engines; Proposed Rule,* Appendix: Statement of Principles, 60 Fed.Reg. 45580, 45602-45604 (August 31, 1995).

33 EPA also essentially paid Congress not to object by directing the fines into the federal treasury. As the state of New York, which objected to the consent decrees, noted, those fines could have been allocated for additional NO_x reductions, but EPA chose not to do so. EPA (1999, 87).

34 A comparison of EPA's responses to the comments opposing portions of the settlements with EPA's responses to comments in rulemaking proceedings shows EPA's reduced concern over potential challenges. The responses in the former are shorter and less detailed than EPA's responses to significant comments in rulemakings.

35 U.S. EPA., Memorandum of Law of the United States of America in support of motion to enter Consent Decree and response to public comments, United States of America v. Caterpillar, Inc., Civil Action 1:98CV02544 April 30, 1999 at 38.

36 *See* David Rosner & Gerald Markowitz, Deadly Dust: Silicosis and the Politics of Occupational Disease in Twentieth-Century America 38, 41 (1991) and Alan Derickson, Workers' Health, Workers' Democracy: The Western Miners' Struggle, 1891-1925 40 (1988).

37 Derickson, *supra* note 36, at 42.

38 *See* Joel D. Howell, Technology in the Hospital: Transforming Patient Care in the Early Twentieth Century 104, 108-109, 118-119 (1995).

39 *See* Peter S. Barth, Workers' Compensation and Work-Related Illnesses and Diseases 61 (1980).

40 Rosner & Markowitz, *supra* note 36, at 5.

41 George G. Davis, Ella M. Salmonsen & Joseph L. Earlywine, The Pneumonokonioses (Silicosis) Literature and Laws of 1934 75 (1935).

42 Davis, Salmonsen, & Earlywine, *supra* note 41, at 79 (quoting Employer's Mutual's twenty-fifth annual report).

43 Davis, Salmonsen, & Earlywine, *supra* note 41, at 52; Frederick Snow Kellog, *Silicosis claims—a new problem in the insurance field,* N.J. L. J. (July 25, 1935) at 1; Rosner & Markowitz, *supra* note 36, at 70.

44 Christopher C. Sellers, Hazards of the Job: From Industrial Disease to Environmental Health Science 204 (1997).

45 Davis, Salmonsen, & Earlywine, *supra* note 41, at 33.

46 Alan Schaffer, Vito Marcantonio, Radical in Congress 1 (1966);

Village of Living Dead, Literary Digest 6 (Jan. 25, 1936).

47 Carlton Skinner, *Silicosis Deaths to Hasten Legislation Controlling Occupational Diseases*, Wall Street J., Feb. 29, 1936.

48 *See* Andrew P. Morriss & Susan E. Dudley, *Defining What to Regulate: Silica & the Problem of Regulatory Categorization*, 58 Admin. L. Rev. 269, 313-322 (2006).

49 Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973).

50 Stephen J. Carroll, et al., *Asbestos Litigation* v (2005).

51 Carroll, et al., *supra* note 50, at 49, 85.

52 Quoted in Victor E. Schwartz, Mark A. Behrens, & Rochelle M. Tedesco, *Congress Should Act to Resolve the National Asbestos Crisis: The Basis in Law and Public Policy for Meaningful Progress*, 44 S. Tex. L. Rev. 839, 862 (2003).

53 Carroll, et al., *supra* note 50, at 92.

54 Carroll, et al., *supra* note 50, at, vii. Asbestos litigation has costs well beyond the payments by individual defendants. Estimates of job losses from the financial weakening of the defendants range from 128,000 to 423,000 and billions in lost investment capital. *Id*. at 73-74.

55 Carroll, et al., *supra* note 50, at vii.

56 George L. Priest, *The Cumulative Sources of the Asbestos Liability Phenomenon*, 31 Pepp. L. Rev. 261, 268 (2003).

57 Francis E. McGovern, *The Tragedy of the Asbestos Commons,* 88 Va. L. Rev. 1721, 1721 (2002).

58 Carroll, et al., *supra* note 50, at 23-24.

59 Carroll, et al., *supra* note 50, at 56.

60 Francis E. McGovern, *Regulation through Litigation,* 71 Miss. L. J. 613, 618 (2001).

61 In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1034 (7th Cir. 1995).

62 John C. Coffee, Jr., *Class Wars: The Dilemma of Mass Tort Class Action,* 95 Colum. L. R. 1343, 1356 (1995). The practice of grouping together claims of people with different symptoms facilitated this approach:

> Through this grouping of claims, the defendants are essentially held hostage. The defendants do not want to risk going to trial on a mesothelioma claim. They do not want the dying person on the stand, with a sympathetic jury and possible liability for punitive damages. So you get the bouquet approach: one rose, a few carnations, and all of the baby's breath settled at once.

Jennifer L. Biggs, *The Scope and Impact of Asbestos Litigation*, 44 S. Tex. L. Rev. 1045, 1053 (2003).

63 Carroll, et al., *supra* note 50, at 30.

64 Christine Biederman, Thomas Korosec, Julie Lyons, and Patrick Williams, *Toxic Justice*, Dallas Observer. *1 (Aug. 13, 1998). Transactions costs have consumed more than half of the spending on asbestos claims, with the majority going to plaintiffs' attorneys' firms. Carroll, et al., *supra* note 50, at, vii.

65 With respect to the bankruptcy process,

> a small subset of the plaintiffs' bar has come to dominate trust operations. These lawyers handle a huge percentage of pending claims; this is critical in light of the §524(g) requirement that a 75% supermajority of claimants must approve any plan. This provides key members of the asbestos plaintiffs' bar with huge leverage in the bankruptcy process, which, in turn, allows them to insist on trust procedures that will ensure their dominance over trust operations.

James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L.:223, 264-265.

66 Carroll, et al., *supra* note 50, at 47-48.

67 Carroll, et al., *supra* note 50, at 45, 49.

68 McGovern, *supra* note 60, at 616.

69 Coffee, *supra* note 64, at 1365.

70 Coffee, *supra* note 64, at 1350.

71 Schwartz, Behrens, & Tedesco, *supra* note 52, at 867.

72 Lester Brickman, *An Analysis of the Financial Impact of S. 852: the Fairness in Asbestos Injury Resolution Act of 2005*, 27 Cardozo L. Rev. 991. Prof. McGovern commented that

> over the last twenty-five years what we've seen is plaintiff's lawyers [who]... used to get $15 thousand for a wrongful death case. Now what is it? Twenty-five million dollars for a minimal asbestos case. You've got a big pot of money that lawyers have put together, and those lawyers, what are they going to do with it? I used to look at the Silicon Valley folks and I said well, what's the difference between the gazillionaires in Silicon Valley and the tobacco lawyers? And it's pretty much the same. People tend to invest their money in what they know. And so we've seen a lot of lawyers who made a lot of money through tobacco and through asbestos reinvesting that money in HMO cases, in handgun cases, in genetically-modified plants, holocaust, you name it. So we saw an evolution in the plaintiff's bar of slowly but surely putting together the resources where the plaintiff's bar can go toe-to-toe on a financial basis with the biggest corporations.

McGovern, *supra* note 60, at 616.

73 Coffee, *supra* note 64, at 1346.

74 Carroll, et al., *supra* note 50, at 23.

75 Melissa Shapiro, *Is Silica the Next Asbestos?* 32 Pepp. L. Rev. 983, 985 (2005).

76 *In re* Silica Products Litigation, 398 F.Supp.2d 563, 580 (S.D. Tex. 2005).

77 U.S. House. Committee on Energy and Commerce, The Silicosis Story: Mass Screening and the Public Health: Hearings before the Subcommittee on Oversight and Investigations (109th Cong., 2d sess. 2006).

78 Carroll, et al., *supra* note 50, at 122-123.

79 Carroll, et al., *supra* note 50, at. xix.

When *Marks* Misses the Mark: A Proposed Filler for the "Logical Subset" Vacuum

*By Damien M. Schiff**

The discernment of the holding, or *ratio decidendi*, of a case can be exceedingly difficult to master.[1] The task is hard enough when the relevant holding is to be found in a single judicial opinion. Thus, if lawyers find it challenging consistently and accurately to infer the legal rule from one opinion, it stands to reason that, *a fortiori,* they will be helpless to distill one rule of decision from multiple opinions. Yet that daunting task is precisely what lawyers must attempt frequently with the so-called "split decisions" of appellate courts, *i.e.*, decisions in which a majority of the court's voting members agree on a particular disposition, but cannot agree on a single rationale supporting that disposition. In the U.S. Supreme Court, the rule for several decades has been that

> [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[2]

This is known as the *Marks* rule, from the eponymous case.

The *Marks* rule is useful when a decision's "narrowest grounds" can be identified. When a decision produces many opinions of judges concurring in the judgment, under *Marks* the controlling opinion is that which (1) supports the result in the actual case, but (2) would reach that same result, in factually similar cases, in *fewer* instances than any other concurring opinion. Point (1) derives from *Marks*'s "concurring in the judgment" requirement, whereas point (2) comes from the rule's "narrowest grounds" condition.

Courts have interpreted the "narrowest grounds" requirement as mandating a "logical subset" analysis,[3] meaning that a given rule and rationale is a decision's narrowest grounds if the rule and rationale would produce the same results (or "outcome set")—*e.g.*, "constitutional" or "unconstitutional," "jurisdictional" or "not jurisdictional"—as the rule and rationale in another opinion concurring in the judgment, *but in a smaller set of cases*.[4] An instructive example of the logical subset theory can be found within the context of constitutional scrutiny analysis. Assume that the Court upholds the constitutionality of a statute on competing grounds: one group of justices on rational basis, another on strict scrutiny. Because the "constitutional" outcome set of a strict scrutiny rule is wholly contained with the same outcome set of a rational basis rule (because every statute that passes strict scrutiny passes rational basis, but the converse is not true), strict scrutiny would comprise the *Marks* narrowest grounds for a decision upholding a statute's constitutionality on competing strict scrutiny/rational basis reasons.

But what happens when *none* of the outcome sets of competing rationales is a logical subset of any other—if the competing outcome sets only *partially overlap*, such that one cannot say that a finding of constitutionality under Opinion X will necessarily lead to a finding of constitutionality under Opinion Y, or the converse?

The courts have developed several *Marks* supplements. One approach, which I term the "shifting majority" rule, looks to the opinions of *all* the judges on the court, including those in dissent, and affords binding authority to any proposition enjoying a majority of the judges' votes, regardless of their position in the majority-dissent breakdown.[5] Another approach, which I term the "fact-bound" rule, limits the holding of the decision to the precise facts (or nearly so) of the decision.[6] Both of these supplements are unsatisfactory, and this article will demonstrate why those algorithms should be rejected, proposing in their stead a better *Marks* supplement, which I term the "majority of the majority" rule:

When the Supreme Court issues a decision and judgment in which no opinion garners a majority of the Justices' votes, and in which no opinion authored by a Justice concurring in the judgment is a logical subset of any other opinion authored by a Justice concurring in the judgment, then the controlling opinion in such a case is that opinion concurring in the Court's judgment joined by the greatest number of Justices.

This rule would offer clarity and ease of application, as well as consistency with the constitutional limits of the federal judiciary.

Most legal scholarship on split opinions takes one of two approaches. Addressing the issue descriptively, many writers identify reasons for *why* courts produce split opinions, and consider the value of split decisions, and their demerits.[7] Others, addressing the issue prescriptively, offer *Marks* substitutes.[8] This article proceeds along a different path. The point here is not to provide a *substitute* for the *Marks* analysis, but rather a *supplement* for when the *Marks* analysis is inapt. The Supreme Court has never addressed the issue, and there is no consistent answer supplied by the inferior federal courts.

Part I below provides a brief discussion of *Marks* and explains its application in the paradigmatic case of the logical subset opinion, while explaining that *Marks*, by its own terms, cannot be universal. Part II continues the argument by describing existing *Marks* supplements and explains why those supplements should be rejected. Finally, Part III sets forth the "majority of the majority" rule and defends it as the best available *Marks* supplement.

I. The *Marks* Rule and its Limits

As the Supreme Court stated in *Marks*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[9] The Court's opinion in *Marks* drew from language in *Gregg v. Georgia*, where the Court examined *Furman v. Georgia*, a case presenting a constitutional challenge to a Georgia death penalty statute.[10]

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A. An Explication of the Marks Rule

In *Furman*, five justices joined in the judgment of the Court and concluded that the death penalty as administered in Georgia was unconstitutional. The Court, however, split on the legal rule to support its conclusion. The two concurring justices contended that capital punishment is unconstitutional in all cases, whereas the remaining justices in the majority concluded only that the particular death penalty law at issue was unconstitutional—leaving open the possibility that other death penalty laws may pass constitutional muster. In *Gregg*, the Court anticipated the *Marks* rule through its reading of *Furman*:

> Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....[11]

In *Marks* itself, the Court was presented with the question of whether certain materials determined to be obscene by the lower courts enjoyed First Amendment protection. The Court concluded that the pertinent legal rule was to be found in its split decision in *Memoirs v. Attorney General of the Commonwealth of Massachusetts*, in which six justices reversed a lower court's judgment that a novel deemed obscene was not protected under the First Amendment.[12] Three justices in the *Memoirs* majority agreed with the lower court that obscene materials are not constitutionally protected; yet the same justices rejected as too lax the lower court's standard for constitutionally unprotected obscenity.[13] Two other justices in the *Memoirs* majority joined in the judgment on the grounds that, because the First Amendment protects obscenity however defined, the novel in question was constitutionally protected.[14] A sixth justice concurred on the grounds that all forms of obscenity, save hardcore pornography, are protected under the First Amendment.[15] The *Marks* Court concluded that the *Memoirs* three-justice rule—which imposes a heightened standard for regulation of obscenity—was the decision's narrowest grounds and therefore the controlling rule of law.

B. The Limits of the Marks Rule and Marks Substitute/Supplements

The *Marks* rule works only where at least one opinion concurring in the judgment functions as a subset of the relevant outcomes of all other opinions concurring in the judgment.[16] As the D.C. Circuit in *King v. Palmer* explained,

> *Marks* is workable—one opinion can be meaningfully regarded as "narrower" than anotherConly when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.
>
> ...When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.[17]

King therefore recognized two related shortcomings with the *Marks* rule when applied in circumstances lacking a logical subset. First, the rule demands that one presume the other majority justices to agree, *pro tanto*, with the "narrowest grounds" opinion—which is unlikely if that narrower opinion would produce a result in a different case with which the remaining members of the majority would disagree. Second, and related, the rule would seem to produce anti-majoritarian results, where the views of one justice in the majority prevail in a subsequent case, even where the remainder of the Court in the original case would disagree with that justice's rationale. *King* resolved the issue by disregarding *Marks* and limiting the relevant split decision analysis to the result reached.[18]

1. From the Cases

Other courts, however, have found that the "fact-bound" rule, discussed in greater detail below, is unsatisfying. Those courts have adopted the aforementioned "shifting majority" rule, whereby the holding of a split decision is any proposition expressly or impliedly supported by a majority of the justices participating in the split decision. A recent decision to adopt that approach is *United States v. Johnson*, in which the First Circuit interpreted the Supreme Court's split decision in *Rapanos v. United States*. In *Johnson*, the court was asked to decide which test for Clean Water Act jurisdiction under *Rapanos* is controlling: the test contained within the plurality opinion authored by Justice Scalia, or the test contained within the concurring opinion of Justice Kennedy? The *Johnson* court concluded that *Rapanos* is not susceptible to a *Marks* "logical subset" analysis, principally because Justice Kennedy's jurisdictional test does not, purportedly, operate as a subset of the plurality's test.[19] The *Johnson* court went on to analyze the three principal *Rapanos* opinions—the plurality, concurrence, and dissent—concluding that, because the dissent would support Clean Water Act jurisdiction in every instance in which either the plurality or Justice Kennedy would find jurisdiction, a majority of Justices (although shifting) would support either test. Thus, *Johnson* held that both *Rapanos* majority tests are valid.[20]

A similar approach was employed by the Third Circuit in *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories*,[21] in interpreting the Supreme Court's split decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*.[22] In that case, the High Court held that enhancements to the lodestar for attorneys' fees under the Clean Air Act, for assuming the risk of non-payment, were improper. A plurality of four Justices contended that such enhancements are always improper, whereas Justice O'Connor, concurring separately, argued that such enhancements are not always improper, but that they were in the case under review.[23] The Third Circuit, applying *Delaware Valley*, concluded that, because the dissent in that case would have approved of enhancements generally—and because O'Connor approved of enhancements under certain circumstances—therefore a majority of *Delaware Valley* would hold that enhancements are proper if Justice O'Connor's standards are met.[24]

The Third Circuit's approach is somewhat more controversial than *Johnson*'s, because in *Johnson* the First Circuit found the *Marks* inquiry to be unhelpful, whereas

in *Student Public Interest Research Group* the Third Circuit never discussed *Marks*, although it was arguably applicable. Under *Marks*, the "narrowest grounds" of *Delaware* would be Justice O'Connor's opinion, *but only* for the proposition that, under the circumstances present in the case, enhancements are improper. Importantly, *Marks* would not authorize a rule from the other side of the *Delaware* coin, *i.e.*, a rule that would affirmatively *approve* of enhancements where Justice O'Connor's conditions are met. That conclusion is a function of *Marks*'s mandate that the interpreting court look to the opinions of the justices concurring in the judgment. Given that the judgment in *Delaware* was a reversal of the Court of Appeals's authorization of enhancements under that case's circumstances, a rule upholding enhancements under other circumstances, not before the Court, would be *obiter dicta*. Thus, the "shifting majority" rule produces on occasion the odd result of converting dicta into holding.

As noted above, another method that the courts have employed to interpret split decisions not readily susceptible to *Marks* is the "fact-bound" rule. Under that rule, the holding of the Court is the result reached.[25] Like *Marks*, the "fact-bound" rule is more easily stated than applied. What is a case's result? What are the relevant variables to the majority's algorithm? What are the constants? A worthwhile case study of the "fact-bound" rule can be found among the appellate cases interpreting the Supreme Court's decision in *Eastern Enterprises v. Apfel*.[26] In *Eastern Enterprises*, the Court held that the retroactive application of the Coal Industry Retiree Health Benefit Act to Eastern Enterprises was unconstitutional. A plurality of justices, in an opinion authored by Justice O'Connor, held that the Act effected a taking, and reached that conclusion by applying the multi-factor regulatory takings test set forth in *Penn Central Transportation Co. v. City of New York*.[27] Justice Kennedy, concurring separately, agreed that the Act was unconstitutional as applied, but contended that the result flowed from a due process, not a takings, analysis.[28] Thus, the case presents a *Marks* supplement opportunity: *Marks* is not applicable because neither the plurality's takings test, nor Justice Kennedy's substantive due process test, is a logical subset of the other. Of the courts that have interpreted *Eastern Enterprises*, at least two have adopted a somewhat generous version of the "fact-bound" rule.[29] Others have adopted a more cramped interpretation.[30] No circuit court has adopted what one might term a "full" version of the rule, which in the context of *Eastern Enterprises* would mean that a statute is unconstitutional if it fails both the plurality's and Justice Kennedy's test.[31]

The principal shortcoming of the "fact-bound" rule is that it reduces the Supreme Court to a case-by-case adjudicator, and deprives its opinions of the sweeping character that is fitting for a court of last resort. Another demerit to the rule is that it encourages fractiousness. It is not surprising, then, that few commentators, to whose views we now turn, have found that substitute satisfying.

2. From the Commentaries

A number of commentators have offered *Marks* substitutes. Prominent among them is the "legitimacy model" offered by Ken Kimura.[32] Kimura's model operates on the convergence of two distinct characteristics to every split decision: the internal rule and the "majority" rule.[33] The internal rule is essentially *Marks*'s narrowest grounds rule,[34] but where identification of a decision's narrowest grounds would end the analysis under *Marks*, Kimura would also require that the narrowest grounds (or internal rule) rule, before deemed a holding, must coincide with the "majority" rule, which Kimura defines as that rule which enjoys the assent of a majority of the Justices.[35]

Kimura uses *Boos v. Barry* to illustrate his model.[36] In *Boos* the plaintiff challenged a District of Columbia ordinance that restricted the right to protest within 500 feet of a foreign embassy.[37] The Court held that the ordinance violated the First Amendment as an impermissible content-based speech restriction, with the plurality contending that the exception for secondary-effects speech restrictions articulated in *Renton v. Playtime Theatres, Inc.*,[38] did not apply,[39] and the concurrence contending that the *Renton* exception is never available for political speech restrictions.[40] The dissent contended that the ordinance passed strict scrutiny, but did not discuss the *Renton* exception.[41]

Kimura argues that the legitimate holding of the case is that the *Renton* exception does not apply to political speech. That rule is consistent with the result reached in *Boos* (because if the exception were applicable to political speech then arguably the result would have been different, which in fact qualifies the rule as an "internal rule") and enjoys the assent of a majority of justices in the *Boos* decision, the concurrence as well as the dissent.[42] And, as implied from the foregoing, Kimura rejects the majority of the majority principle, in part because it requires that dissenting opinions be ignored.[43]

Mark Thurmon advocates what he terms "The Hybrid Approach," a method which in fact is quite similar to Kimura's.[44] Thurmon differentiates between "persuasive" and "imperative" authority—(the latter is any point necessary to the result reached in a particular case that was assented to by a majority of the voting justices).[45] He makes clear that the votes of dissenting justices can count.[46] Persuasive authority is any other point, not supported by a majority of Justices; the persuasiveness of that authority is a function of the number of justices supporting the point, and whether they agreed with the judgment reached.[47] The significance of persuasive authority for Thurmon is that, in the absence of contrary imperative authority, a point supported by persuasive authority becomes binding, even though (by definition) it is not a point supported by a majority of the Court.[48]

Linda Novak, in her analysis of the split decision problem, highlights the difficulties in ascertaining a decision's logical subset, but nevertheless adheres generally to the *Marks* framework.[49] Novak identifies the same disjunction as Kimura between a decision's internal and majority rules,[50] and finds the majority of the majority rule unconvincing because it converts the views of a "minority" of the Court into a holding.[51] She does, however, acknowledge the "results" rule, whereby subsequent parties in substantially the same relation as parties to a split decision are bound by the result of that earlier decision.[52]

At least one commentator has argued for a return to the practice of *seriatim* decisions,[53] commonly issued in the years prior to Chief Justice Marshall's ascendency,[54] whereas another has advocated for an emphasis on "process values" to reduce the

likelihood of split decisions.[55] Still other commentators argue simply to make the best of a bad situation, and extract from the current *Marks* disarray various benefits, such as the virtue of "percolation" of Supreme Court plurality opinions in the lower courts.[56] Justice Stevens's answer, most recently expressed in *Rapanos*, has found support in the academic literature, too[57]: that any proposition garnering a majority of the votes of *all* participating justices (be they in the majority or the dissent), is binding on the lower courts.[58]

But as far as I have been able to determine, only one commentator has advocated what I consider to be the only satisfying test, at least as a supplement to *Marks*: the "majority of the majority" rule.[59]

II. A *Marks* Supplement: The Majority of the Majority

One shortcoming of the *Marks* alternatives discussed above is just that: that they are offered as replacements to *Marks*'s logical subset rule, rather than as supplements for the courts to apply when a logical subset opinion (or point) cannot be identified. Thus, the modesty of a majority of the majority rule is a significant plus. Another clear advantage of the rule is its consistency with the constitutional requirements of Article III, a benefit which many of the competing *Marks* tests, including Kimura's and Thurmon's, lack.

Before we address the constitutional implications of interpretive theories that rely upon the views of dissenting justices, however, it bears mention that, in order for any rule to operate as a valid supplement, it ought to be consistent with *Marks* itself, as well as Article III. Where this point arises is in the fact that *Marks* requires the split decision analysis to turn upon the views of the justices concurring in the judgment; obviously, the views of dissenting justices would not so qualify.[60] Thus, the fact that the majority of the majority rule, by definition, looks only to the views of justices concurring in the judgment means that it can operate as an authentic *Marks* supplement, and not a substitute.

As for the constitutional limitation, the views of dissenting Justices can play no legitimate interpretive role in split decision analysis. The reason for this prohibition derives from Article III's case or controversy requirement: federal courts are authorized to "speak the law" (jus dicere) only to the extent that the opinions they issue are tied to a judgment that resolves an actual "Case or Controversy."[61] Given that dissenting justices can have no influence on the Court's disposition of an actual case or controversy, it follows that their opinions as to the controlling rule of law are without binding power.[62]

I concede that this view is not unanimously held, certainly not among the commentators, and not (apparently) among Supreme Court justices.[63] But that latter criticism, if it be such, is really adventitious; what governs ultimately is the Constitution itself, not the occasional aberrant practices of some justices.

Constitutional legitimacy and *Marks* consistency are not the only virtues of the rule. The majority of the majority rule also has the happy result of incentivizing judicial clarity without sacrificing judicial creativity.

> The key to any solution [to the split decision problem] therefore is to motivate judges to compromise by joining in a majority statement of the law, while stating their private feelings in separate opinions. Courts can achieve this result by adopting the rule that whenever a court is unable to write an opinion that a majority will support, the plurality opinion—the opinion that the most nondissenting judges vote for—shall become the official opinion of the court and shall be binding precedent for all lower courts until the ruling court declares otherwise.[64]

The complaint so frequently heard—that the justice "concurring in the judgment" is able to make his opinion the law of the land, even though he is the only one on the Court to espouse that opinion—would effectively be answered.[65] For, under the majority of the majority rule a potential "concurring in the judgment" justice would have little or no reason to write separately, if his views were to have no binding (or even persuasive) effect on the law. At most, such a justice would have no more reason for writing separately than would one dissenting.[66]

CONCLUSION

Some decades ago, Judge Walter Gewin of the Fifth Circuit offered a tongue-in-cheek typology of concurring opinions which categorized them as "(a) excusable, (b) justifiable, or (c) reprehensible."[67] I have argued that, for constitutional, precedential, and instrumental reasons, the majority of the majority rule should be adopted as the go-to split decision hermeneutic when the *Marks* rule cannot be applied. Although "excusable" and "justifiable" concurrences will likely be with us until the end of the Republic, a *Marks* rule fortified by a majority of the majority supplement will likely rid us at least of Judge Gewin's (c).

Endnotes

1 *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 956, 958 (2005) (obseving "the absence of a shared conceptual foundation for analyzing even modestly complex cases" and "the absence of any single governing source or universal agreement on how to define dicta"). For traditional explanations of how to divine a case's holding, *see* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930); Henry Campbell Black, Handbook on the Law of Judicial Precedents 37-53 (1912); Eugene Wambaugh, The Study of Cases 3-30 (1894).

2 Marks v. United States, 430 U.S. 188, 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

3 *See* United States v. Johnson, 467 F.3d 56, 63-64 (1st Cir. 2006) (pending on remand) (citing King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

4 *Cf.* Ken Kimura (Note), *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992).

5 *See, e.g.*, *Johnson*, 467 F.3d at 65-66; United States v. Cundiff, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007). Interestingly, *Johnson* did not consider the distinct possibility that the plurality's outcome set may be a subset of Justice Kennedy's outcome set. *Cf. Johnson*, 467 F.3d at 63-64.

6 *See, e.g.*, Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999) (citing Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998)).

7 *See* Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation after* Rapanos (manuscript), *available at* http://ssrn.com/abstract=1017992 (forthcoming in Va. J. Soc. Pol=y & L.); John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59; G.P.J. McGinley, *The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate*

Courts, 11 Adel. L. Rev. 203 (1987); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. Davis L. Rev. 777 (1990).

8 *See* Adam S. Hochschild (Note), *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 Wash. U.J.L. & Pol'y 261 (2000); Kimura, *supra* note 4; Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419 (1992); Linda Novak (Note), *The Preceential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980); Douglas J. Whaley, *A Suggestion for the Prevention of No-Clear-Majority Judicial Decisions*, 46 Tex. L. Rev. 370 (1967).

9 *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

10 408 U.S. 238 (1972).

11 *Gregg*, 428 U.S. at 169 n.15.

12 383 U.S. 413 (1966).

13 *See id*. at 418-19 (opinion of Brennan, J., joined by Warren, C.J., and Fortas, J.).

14 *See Memoirs*, 383 U.S. at 421 (Black, J., concurring on grounds stated in Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting) (First Amendment forbids any regulation of obscenity), and Mishkin v. New York, 383 U.S. 502, 515-16 (1966) (Black, J., dissenting) (same)); *id*. at 433 (Douglas, J., concurring).

15 *See Memoirs*, 383 U.S. at 421 (Stewart, J., concurring on grounds stated in Ginzburg v. United States, 383 U.S. 463, 499 (1966) (Stewart, J., dissenting) ("hardcore pornography" beyond First Amendment), and Mishkin v. New York, 383 U.S. 502, 518 (1966) (Stewart, J., dissenting) (same)).

16 *See supra* Introduction. Professor Stearns contends that the *Marks* test is applicable to the vast majority of plurality decisions. *See* Maxwell L. Stearns, Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making 105 (2000), *cited in* Joseph M. Cacace (Note), *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *doctrine after* Rapanos v. United States, 41 Suffolk U.L. Rev. 97, 113-14 n.137 (2007).

17 950 F.2d 771, 781-82 (D.C. Cir. 1991) (en banc). *See Johnson*, 467 F.3d at 64.

18 *King*, 950 F.2d at 784-85.

19 *See Johnson*, 467 F.3d at 64. The court also noted that a strict adherence to the significant nexus test would produce "bizarre outcome[s]." *Id*.

20 *Id*. at 66. *See Cundiff*, 480 F. Supp. 2d at 944 (adopting *Johnson*'s interpretation of *Rapanos*) (appeal pending).

21 842 F.2d 1436 (3d Cir. 1988).

22 483 U.S. 711 (1987).

23 *Compare id*. at 729-30 (plurality opinion) *with id*. at 731 (O'Connor, J., concurring in part and concurring in the judgment).

24 *See Student Public Interest Research Group*, 842 F.3d at 1451 ("Because the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the court.").

25 *See King*, 950 F.2d at 784 (citing Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting), [another famous split decision upholding the constitutionality of the Court of Claims] for the proposition that "a result is binding even when the Court fails to agree on reasoning.").

26 524 U.S. 498 (1998).

27 438 U.S. 104 (1978). *See E. Enterps.*, 524 U.S. at 529 (plurality opinion).

28 *E. Enterps.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

29 Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999) ("*Eastern*, therefore, mandates judgment for the plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence.") (citing Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998)); Mary Helen Coal Corp. v. Hudson, 164 F.3d 624 (4th Cir. 1998) (table) (granting appellant summary reversal because the case was "materially indistinguishable from *Eastern*").

30 *See* United States v. Dico, Inc., 266 F.3d 864, 879 (8th Cir. 2001); Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 552 (6th Cir. 2001). Some of the cases have applied the "shifting majority" rule to *Eastern Enterprises*. *See* Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339 & n.10 (Fed. Cir. 2001) (citing various authorities for proposition that "regulatory actions requiring the payment of money are not takings").

31 *Cf*. PLF Amicus Brief, Nos. 06-853, 06-1014, 2007 WL 868963, at 4 (Mar. 21, 2007).

32 Kimura, *supra* note 4.

33 *See id*. at 1599-1600.

34 *See id*. at 1606.

35 *Id*. at 1624.

36 485 U.S. 312 (1988).

37 *See id*. at 315.

38 475 U.S. 41 (1986).

39 *Boos*, 485 U.S. at 320-21 (plurality opinion).

40 *See id*. at 334-335 (Brennan, J., concurring in part and concurring in the judgment).

41 *See id*. at 338-39 (Rehnquist, C.J., concurring in part and dissenting in part).

42 Kimura, *supra* note 4, at 1623.

43 *Id*. at 1601-02.

44 Thurmon, *supra* note 8.

45 *Id*. at 452.

46 *Id*. at 454.

47 *See id*. at 455-56.

48 *See id*. at 451.

49 Novak, *supra* note 8, at 762-64.

50 *Id*. at 764-65.

51 *Id*. at 768.

52 *See id*. at 779.

53 *See* Hochschild, *supra* note 8, at 283-86. Interestingly, one rather hoary commentary contends that the interpretation of seriatim decisions is really no different from the interpretation of majority decisions. *See* Goodhart, *supra* note 1, at 179.

54 Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell L. Rev. 186, 192-94 (1959). Thomas Jefferson famously criticized Marshall for changing the Court's practice. *See* Thomas Jefferson, Writings 1446 (The Library of America 1984) (Letter from Jefferson to Thomas Ritchie, dated Dec. 25, 1820).

55 Note, *Plurality Decisions and Judicial Decisionmaking*, 94 Harv. L. Rev. 1127, 1145 (1981).

56 *See* Berkolow, *supra* note 7, at 48-49.

57 Cacace, *supra* note 16, at 130-31.

58 *See Rapanos*, 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting).

59 Whaley, *supra* note 8, at 376.

60 *See King*, 950 F.2d at 793.

61 *See generally* Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (Federal courts have no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot

affect the matter in issue in the case before it.") (citation omitted).

62 *Cf.* United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) ("We are controlled by the decisions of the Supreme Court. Dissenters, by definition, have not joined the Court's decision."). In *Robison*, the Eleventh Circuit adopted Justice Kennedy's significant nexus test as controlling under *Marks*. *See Robison*, 505 F.3d at 1222.

63 *See Johnson*, 467 F.3d at 65-66 (citing Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring); League of United Latin Am. Citizens v. Perry, 126 S.Ct. 2594, 2607 (2006) (Kennedy, J.); and Alexander v. Sandoval, 532 U.S. 275, 281-82 (2001) (Scalia, J.), as examples where a Justice has derived a case's "holding" from the views expressed in dissents). *See also Rapanos*, 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting).

64 Whaley, *supra* note 8, at 376.

65 For the influence of the middle-of-the-road Justice, see generally Andrew D. Martin *et al.*, *The Median Justice on the United States Supreme Court*, 83 N.C.L. Rev. 1275 (2005).

66 For the value of dissenting opinions generally, see William J. Brennan, *In Defense of Dissents*, 50 Hastings L.J. 671 (1999).

67 Walter P. Gewin, *Opinions-Dissents, Special Concurrences, Policy, Techniques*, 63 F.R.D. 594, 595 (1972).

Ressurrect Rule 11

*By Karen R. Harned & Zeke J. Roeser**

Over the past few years tort reform advocates have realized significant victories at the state and even federal levels. States have successfully enacted reforms that seek to limit the destructive effects of frivolous suits and unmerited damage awards. Several states have capped non-economic and punitive damage awards and abolished joint and several liability.[1] At the federal level, significant class action reform was enacted in 2005.[2] These reforms should help reduce the costs associated with the nation's tort system over time. Yet, most of these reforms are geared to cases requesting larger damage awards. Little has been done to curb frivolous and unwarranted "nuisance" suits from being threatened or filed. Federal Rule of Civil Procedure 11 ("Rule 11") was implemented to help keep frivolous and unwarranted litigation out of the courts. The rule, which sanctions attorneys for filing frivolous lawsuits, has been amended twice since its inception in 1938.[3] But no iteration has satisfied the public, attorneys, and politicians, all.

The rule initially confined attorneys to generally attest that pleadings were made in good faith. In 1983, it was expanded to impose significant penalties on lawyers who filed frivolous actions, including damages and attorneys' fees.[4] In some cases, the attorney would be referred to the bar for administrative hearings.[5] Currently, Rule 11 is a benign instrument that does not require judges to take action in the face of an obvious violation of the rule, and, as a result, is seldom used.[6] Rule 11 was once derided by some as an obstacle to civil rights plaintiffs and "creative lawyering," which dictated penalties that otherwise free-handed judges would determine.[7] Now it is scoffed at by some as a paper tiger—a useless weapon against careless and baseless lawsuits.

The problems with civil litigation in this country are real and measurable. There is an economic cost for a system that does little to discourage worthless lawsuits, which are filed to bully settlements out of defendants who cannot afford to fight long legal battles. Rule 11 currently does not sufficiently deter or punish the filing of frivolous claims, and it is often branded as merely paying lip service to policing dishonest or lazy attorneys. This could add to the negative impression that many Americans have for the legal system and its practitioners. This article will discuss the evolution of Rule 11 and assess various recommendations for how it could be strengthened.

The Costs of a Weak Rule 11

It is no secret that the costs of America's tort system are great. A 2002 study by the Small Business Administration Office of Advocacy found that the direct economic cost of tort litigation in the U.S. was about $223 billion,[8] or over two percent of the nation's Gross Domestic Product that year.[9] A 2007 Pacific Research Institute study puts the figure at $865.37 billion annually, once indirect costs like healthcare expenditure, losses in innovation, and stockholder wealth are taken into account.[10] In addition, a 2006 Towers Perrin Tillinghast study found that, from 1950 to 2005, the average annual increase in aggregate tort costs was 9.5 percent, while the average annual increase in GDP was only 7.1 percent.[11]

Small businesses, or those which are least capable of fending off frivolous suits, bear a significant burden. In 2005, the direct cost to businesses with annual revenue of less than $10 million was $98 billion, up from $83 billion in 2002.[12] For small businesses and their employees, these costs have severe consequences. A Harris Interactive study for the U.S. Chamber Institute for Legal Reform found that 34 percent of small business owners have had lawsuits filed against them in the last ten years, and 46 percent have been threatened with lawsuits.[13] Of those surveyed, 96 percent believed that frivolous lawsuits were a problem for their businesses, and 63 percent believed that they were a "major problem."[14]

Out of the hundreds of thousands of civil lawsuits filed in the U.S. each year, the vast majority are settled out of court.[15] A significant number of these lawsuits are identified as falling under the so-called "nuisance-value settlement" problem, which describes the process by which defendants will settle lawsuits, no matter how frivolous, because the cost of doing so is less than the cost of fighting the suit in court.[16]

Evolution of the Rule

Rule 11 promised to help curb such abuse. Promulgated in 1938, the rule held attorneys accountable for the pleadings they signed. A lawyer's signature certified that he or she "has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."[17] Courts could strike pleadings found to be signed in bad faith and the offending lawyer could be penalized with "appropriate disciplinary action."[18]

The initial rule generally was left on the shelf. Rule 11 motions were filed in only nineteen reported cases from 1938 to 1976.[19] Of those cases, courts issued sanctions in only three.[20] Courts rarely enforced the rule, in large part because standards of conduct and penalties for non-compliance were vague.[21] Moreover, attorneys hesitated to evoke Rule 11 against fellow lawyers.[22] Meanwhile, the per capita costs of the U.S. tort system, adjusted for inflation, more than quadrupled from 1950 to 1980.[23] Observers watched this massive expansion of tort liability with growing concern. Over time, there arose a consensus among legal professionals, including Chief Justice Warren Burger, that the rule was not working and should be changed.[24]

In 1983, the Advisory Committee on Civil Rules of the Judicial Conference declared that, "in practice, Rule 11 has not been effective in deterring abuses."[25] The Committee extended

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the application of the rule and made it easier to enforce. The new rule required lawyers to perform a reasonable inquiry into the factual and legal basis of any signed filing,[26] and explicitly prohibited filings for any improper purpose. If a judge determined that a lawyer failed to comply, the rule mandated that the judge impose sanctions, a significant change from the discretionary sanctions of the old rule.[27]

Nearly seven thousand Rule 11 opinions were published under the 1983 version the following decade.[28] A study by American Judicature found that Rule 11 violations were alleged in a third of federal civil suits filed in the six years after the change.[29] Furthermore, over half of all respondents said that either formal or informal threats of Rule 11 sanctions had been made against them.[30]

The American Judicature findings and pressure from civil litigators spurred the Advisory Committee in 1993 to once again revise the rule. They argued that the 1983 rule "tended to impact plaintiffs more frequently and severely than defendants," "occasionally had created problems for a party which seeks to assert novel legal contentions," and "provide[d] little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law."[31] As a result, the Committee rolled back the provisions that it deemed necessary only ten years earlier. Gone were mandatory sanctions, replaced with discretionary punishments limited to those that would be "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[32] Rather than require that filings be based upon evidentiary support, the 1993 rule only requires that the existence of such support be "likely."[33] Finally, the 1993 rule includes a "safe harbor" provision that allows attorneys twenty-one days to withdraw filings before opposing counsel can invoke Rule 11.[34] Despite the furor that erupted among conservative lawyers, legislators, and jurists, this more forgiving version of Rule 11 is in effect today.

Restoring a Rule that Works

The U.S. Supreme Court has declared that "baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay."[35] To help protect against frivolous cases that either end in a quick settlement or clog the courts, many have called for restoring the teeth to Rule 11. Specifically, sanctions should be made mandatory, the "safe harbor" provision should be removed, and there should be a requirement that evidence support all papers signed by an attorney when they are filed.

Advocates maintain that Rule 11 should impose mandatory sanctions for non-compliance. It is true that mandatory sanctions under the 1983 version of Rule 11 resulted in significant satellite litigation. Yet, by 1987, the number of cases decided under Rule 11 had leveled.[36] By 1991, over 80 percent of judges felt that the rule should be preserved.[37] Furthermore, while it is impossible to tell how many cases or filings Rule 11 deterred, one can surmise that the number was significant. Fifty-five percent of attorney respondents to the AJS Study reported being subject to sanctions or the threat of sanctions under Rule 11.[38] All studies and surveys concerning the effects of the 1983 rule showed that it forced attorneys to "stop and think" and conduct "significantly more prefiling research than they had before Rule 11 was amended."[39]

Reform proponents similarly suggest that the "safe harbor" provision should be repealed. Although the 1993 rule's "safe harbor" provision curbed Rule 11 litigation significantly, it also has been maintained that it succeeded in encouraging frivolous filings, particularly of the nuisance-settlement variety. As Justice Scalia predicted, "parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: if objection is raised, they can retreat without penalty."[40] The U.S. Supreme Court seemed to presciently warn against such a policy when it wrote that "even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal."[41] The Advisory Committee itself previously held the same view.[42]

Finally, Rule 11 could, as some propose, require filings to be backed by evidence. In the absence of such a requirement, attorneys can file suits without regard to the facts in hope of a quick settlement or the discovery of useful evidence in the future. Prior to 1993, over 60 percent of lawyers performed more thorough prefiling investigations, declined to file pleadings, or acted affirmatively in some other way due to the threat of sanctions under Rule 11.[43] As one scholar noted, with so many attorneys altering their behavior in the face of that threat, "there may have been a lot of lawyers acting unprofessionally before the 1983 amendments, which in turn confirms that existing mechanisms for enforcing professional standards were not working… It is likely that the rule did indeed raise the level of lawyering across a broad spectrum of practice."[44]

CONCLUSION

The diminution of Rule 11 sanctions after the 1993 change was not the result of lawyer self-discipline, but of judges failing to pursue Rule 11 claims when they are not compelled. Opponents of reform argue that a return to the 1983 rule will once again clog the courts with Rule 11 litigation. This may be so, though the Advisory Committee has stated that "widespread criticisms of the 1983 version of the rule... [are] frequently exaggerated or premised on faulty assumptions."[45] But the question is whether passing over reform on workload grounds would mean that an effective law had been stricken because too many people broke it. As the costs of America's civil litigation system continue to rise, the interests of justice demand that the judiciary and the legal profession continue to scrutinize whether Rule 11 is a fair mechanism for curbing frivolous litigation attacks on individuals and businesses.

Endnotes

1 *See generally* S.B. 281, 124th Leg. (Ohio 2003); S.B. 80, 125th Leg. (Oh. 2003); H.B. 145, 2006 Leg. (Fl. 2006); S.B. 6, 1988 Leg. (Fla. 1988); H.B. 775, 1999 Leg. (Fla. 1999); S.B. 28, 75 (R) Leg. (Tex. 1995); S.B. 25, 75 (R) Leg. (Tex. 1995); H.B. 13, 2004 Leg. (Miss. 2004).

2 Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2005).

3 Fed. R. Civ. P. 11 (1938) (amended 1983); Fed. R. Civ. P. 11 (1983) (amended 1993).

4 Fed. R. Civ. P. 11 (1983).

5 *Id.*

6 Fed. R. Civ. P. 11

7 *See* Aaron Hiller, *Rule 11 and Tort Reform: Myth, Reality, and Legislation*, 18 Geo. J. Legal Ethics 809, 813 (2005).

8 Small Business Administration Office of Advocacy, Impact of Litigation on Small Business, No. 265, 3 (2005).

9 Executive Office of the President of the United States, Budget of the United States Government: Historical Tables Fiscal Year 2002, *available at* http://www.gpoaccess.gov/usbudget/fy02/hist.html.

10 *See* Lawrence J. McQuillan, Hovannes Abramyan, & Anothony P. Archie, Pacific Research Institute, Jackpot Justice: The True Cost of America's Tort System, 28 (2007), *available at* http://special.pacificresearch.org/pub/sab/entrep/2007/Jackpot_Justice/Jackpot_Justice.pdf.

11 Towers Perrin Tillinghast, 2006 Update on U.S. Tort Cost Trends, 3 (2006), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf

12 NERA Economic Consulting Study, Small Business Studies Release, 1.

13 Harris Interactive, Small Business: How the Threat of Lawsuits Impacts Their Operations, 7, 16 (2007), *available at* http://etseq.law.harvard.edu/images/uploads/lawsuitbusiness.pdf.

14 *Id.* at 21.

15 *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared To Settlement*, 44 UCLA L. Rev. 1, 2 (1996).

16 *See* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. Rev. 1849, 1851 (2004).

17 Fed. R. Civ. P. 11, quoted in 1983 Amendments.

18 *Id.*

19 *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rules of Civil Procedure 11*, 61 Minn. L. Rev. 1, 34-35 (1976).

20 *Id.* at 36-37.

21 21 *See* Georgene Vairo, *Rule 11 and the Profession*, 67 Fordham L. Rev. 589, 596 (1998).

22 *Id.*

23 23 *See* Towers Perrin Tillinghast, *supra* note 11, at 5.

24 H.R. Rep. No. 104-62, at 9 (1995).

25 Fed. R. Civ. P. 11 (1983) advisory committee's note to 1983 amendment.

26 Fed. R. Civ. P. 11 (1983).

27 *Id.*

28 *See* Vairo, *supra* note 21, at 626.

29 *See* Lawrence C. Marshall et al., *Public Policy: The Use and Impact of Rule 11*, 86 N.W.U.L. Rev. 943, 952-53 (1992) [*hereinafter* AJS Study].

30 *Id.* at 952, 954-56.

31 Letter to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, reprinted in 146 F.R.D. 519, 523 (1993).

32 Fed. R. Civ. P. 11 (b)(c)(2).

33 Fed. R. Civ. P. 11 (b)(3).

34 Fed. R. Civ. P. 11 (c)(1)(A).

35 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990).

36 *See* Vairo, *supra* note 21, at 598.

37 *See* John Shapard, et al., Federal Judicial Ctr., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure, at § 2A.

38 *See* AJS Study, *supra* note 26, at 954-56.

39 Peter Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 Loyola L.A. L. Rev. 765, 782 (2004) (quoting Vairo, *supra* note 21, at 621).

40 Antonin Scalia, Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 508 (1993).

41 *Cooter & Gell*, 496 U.S. at 398.

42 *See* Scalia, *supra* note 40.

43 AJS Study, *supra* note 29, at 961.

44 Vairo, *supra* note 21, at 622-23.

45 *See* Letter to Honorable Robert E. Keeton, *supra* note 31.

Professional Responsibility & Legal Education

State Judicial Selection: Once More Unto the Breach

*By Michael E. DeBow**

Another election season approaches and with it the debate over the proper mechanism to select state judges. This has been a recurring debate in American politics, and today's critics of judicial elections show no sign of fatigue. The ABA and various state bar associations, the American Judicature Society, and quite a few academic and judicial critics have recently been joined by retired Supreme Court Justice Sandra Day O'Connor in the attack on judicial elections.[1] This article offers, by contrast, a look at the seldom-heard arguments *in favor* of electing judges, and raises significant questions about the alternatives urged by some of the critics.[2]

Money Worries, Mostly

The case against electing judges is based largely on the supposedly corrosive effects of campaign fundraising in the context of judicial elections. Judicial candidates in elective states typically have to raise money to run, and the amounts raised in some states have risen dramatically over the past decade or so. Critics point to this phenomenon and the worry about a related loss of public confidence in judicial integrity. The public, it is said, will come increasingly to doubt that a judge who had to raise large amounts of money can be impartial in deciding cases involving contributors—both parties and attorneys—who appear in court.[3]

This argument obviously should not be dismissed summarily. The effect of judicial candidate fundraising may be to raise doubts about judicial impartiality. However, this does not mean that the solutions urged by the critics will actually improve matters on net. The question, as always, should be: Will the cure be worse than the disease?

While the worry about fundraising dominates the case against judicial elections, the critics sometimes make other arguments as well. Some worry about the increased level of issue-oriented debates in judicial campaigns—especially involving hot-button issues such as the death penalty and same-sex marriage. This concern about increased partisanship in judicial electioneering was boosted by the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, which struck down a common form of state regulation of judicial candidates' speech.[4] Increasingly, candidates for state judicial office are quizzed on their position on issues of interest to voters. This fact worries the critics. At an August 2006 meeting of the Conference of Chief Justices, the chief justice of Indiana, Randall Shepard, summed up this position: "It's the money, it's the judicial questionnaires, it's a whole constellation of things happening now that don't advance the public's confidence in the courts."[5]

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The critics are discussing a fairly wide range of reform options, some of which have more merit than others.[6] My purpose here is limited to challenging the idea that appointment of judges followed by "retention" elections, or "non-partisan" election of judges, would be preferable to the election of judges in partisan races.[7]

How Meritorious is Merit Selection?

Merit selection of judges typically involves some form of the following mechanism: A judicial nominating commission reviews the bona fides of those lawyers and judges who wish to be considered for judicial offices, and sends a short list of potential nominees to (typically) the governor, who then chooses one of the listed candidates for the job. The legislature may or may not be involved in confirming the governor's choice. Typically, an incumbent judge in a merit selection state who wishes to remain in office runs for reelection in a "retention" election, where he does not face an actual challenger. Instead, the ballot asks voters to answer yes or no to the question, "Should Judge X be retained in office?"

As the term implies, merit selection is thought by its supporters to result in more qualified and otherwise "better" judges than electoral selection. There is just one hitch to this—there is virtually no empirical support for this claim. There is a large body of social science research on state supreme courts and it shows that there is no real, observable difference between the judges chosen in merit selection states, and those chosen in the other states.[8] Judges from State A tend to look and act almost the same as judges from States B through Z—regardless of how they are selected or retained. In other words, a given state's choice between merit selection and partisan election does not seem to have any discernible effect on the kinds of people chosen for the bench, or their performance on it.

Merit selection advocates thus cannot point to any compelling evidence in favor of their preferred method. In addition, one finds controversy and debate over the actual operation of merit selection in some of the states that have adopted it; including, ironically, Missouri, where merit selection originated.[9] Dissatisfaction with the reality of merit selection (as distinct from the good-government vision promoted by its partisans in other states) stems from the fact that it is impossible to remove "partisan" politics from the judicial selection process, no matter which selection mechanism is used. Because the judicial nominating committee plays such a strong role in merit selection, private interest groups—including, most prominently, the plaintiffs' bar and the business community—try to get "their" representatives named to the committee and then try to dominate the committee's work. A *Wall Street Journal* editorial on the Missouri situation summed up the point well: "The Missouri plan was originally seen as preferable to a system directly electing judges, which in other states has left sitting judges beholden to the wealthy trial lawyers who are their

biggest campaign donors. But as the current case has shown, special interests are no less involved in the state's selection process—the only difference is that this now happens behind closed doors."[10]

Merit selection, soberly viewed, is far from a magic bullet solution to the problems posed by partisan election. Merit selection carries with it the potential for just as broad a field of play by private interest groups as in electoral politics, and brings with it a new downside in the form of decreased transparency to the public. Closed-door meetings as the alternative to electoral politics probably does not sound like a particularly good trade for many voters, particularly once it becomes clear that the lawyer-members of nominating commissions are likely to dominate the discussion. To put it another way, the lack of political pressure to move in the direction of merit selection in most election states is probably best explained by broad public resistance to the idea of relinquishing a democratic vote in favor of rule by an appointed nominating committee meeting behind the scenes and dominated (in all probability) by its lawyer members.[11]

How Non-Partisan Are Non-Partisan Judicial Elections?

This selection mechanism involves having multiple candidates run against one another, but without identifying themselves by political party. Such "non-partisan" races are used in a number of states; however, as with merit selection, the proponents of this type of reform cannot point to any evidence that their favored method of selection makes any difference in the quality of persons ascending to the bench. Professor Melinda Gann Hall summarized the evidence on this point in her 2001 presidential address to the American Political Science Association:

> Court reformers argue that partisan elections fail to evidence accountability, while nonpartisan and retention elections promote independence. Thus, issue-related or candidate-related forces should not be important in partisan elections, and external political conditions should not be important in nonpartisan and retention elections. *Results indicate that reformers underestimated the extent to which partisan elections have a tangible substantive component and overestimated the extent to which nonpartisan and retention races are insulated from partisan politics and other contextual forces. On these two fundamental issues, arguments of reformers fail.*[12]

This passage states the majority view among political scientists on this comparison.

In addition to having nothing particularly positive in its favor, the proposal to substitute non-partisan for partisan elections, like merit selection, carries with it a distinctly anti-democratic flavor. The essence of the proposal is to deny the public a relevant piece of information—the party identification of judicial candidates. Presumably this denial stems from the conviction that party membership ought not to matter when it comes to judicial candidates. In a perfect world this would be true. But, for better or worse, a candidate's self-identification as Republican or Democrat likely carries some information as to the candidate's philosophy of judging—his choice between textual and non-textual theories of Constitutional and statutory interpretation, or his understanding of the role of government and the relations among the three branches of state government. While it would be nice if this were not the case, many voters think it is true. It is remarkably condescending and paternalistic to say that voters should be denied party ID in judicial races, and would raise substantial First Amendment issues (especially after *White*) if applied to candidate advertising.

Finally, it must be noted that some of the most contentious of the recent battles over control of state supreme courts occurred in states with non-partisan elections. Georgia is a stand-out on this point, viewing the 2006 election cycle.[13] At a minimum, the recent experience of non-partisan states should raise significant doubts about that format's capacity to improve judicial selection.

Can Anything Be Said in Favor of Partisan Elections?

The observant reader has noticed, no doubt, that the article thus far has been devoted to pointing out the shortcomings of the alternatives to partisan judicial elections. As it happens, there is a positive case to be made for partisan elections as well.

Perhaps the biggest argument in favor of electing judges was alluded to in the quote from Professor Hall. She explains that supporters of judicial election often speak in terms of promoting judicial accountability, while critics of judicial election speak in terms of promoting judicial independence. I will follow this convention, with one modification: I will speak in terms of judicial integrity rather than judicial independence. This is because, as we have seen, the current critics of judicial elections tend to emphasize the threat to judicial integrity—or the appearance of judicial integrity—posed by the need to solicit campaign contributions in such a system. Judicial independence, on the other hand, is properly understood as dealing with the relations among the judicial, legislative and executive branches of a state (or the national) government.[14] Accordingly, the critics' argument is that the alternatives to partisan elections will better promote judicial integrity than will partisan elections.

The counter-argument is that partisan elections better promote judicial accountability to the public than do the alternative mechanisms. To be sure, partisan elections do not guarantee perfect accountability to the public for any number of reasons. However, the amount of public input in a partisan election system is vastly greater than in a merit selection system, and at least somewhat greater than in a non-partisan election system. Unless one takes the position that accountability to the public is *per se* a bad thing in the case of judges, this must be reckoned on the positive side of the ledger for partisan judicial elections.

In my home state of Alabama, voters saw a series of hard-fought partisan campaigns for the state supreme court, beginning in 1994. As a result of the choices made by the voters, the Alabama Supreme Court was transformed, and now reflects more nearly the conservative views of most Alabama voters.[15] I would argue that voters in any particular state should not be saddled with a judiciary that is significantly out of step with the majority on such matters as tort reform, the death penalty, public school finance, or same-sex marriage. Judicial

accountability via partisan elections is one way the majority may escape judicial tyranny on questions such as these.

The ultimate question is the apparent trade-off between judicial accountability and judicial integrity. A state may increase the public's perception of judicial integrity by removing the appearance of impropriety involved in judicial campaign fundraising, but this comes at the cost of further insulating sitting judges from public accountability for their job performance. Conversely, a state may increase public accountability of judges by subjecting them to partisan reelection contests, but this comes at the cost of raising some doubt in the minds of the public as to whether the judges' impartiality and integrity have been compromised in the pursuit of campaign contributions. Reasonable people can, and do, differ on this question.

Indeed, both sides in the debate would do well to remember the difficulty of nailing down with any precision either side of the relevant trade-off—that is, the appearance of judicial integrity and the value of judicial accountability. Humility, caution, and openness to new data are all called for here.[16]

Destroying the Village in Order to Save it

And yet, some of the proponents of reform in Alabama have reminded me of the unnamed U.S. commander in the Vietnam War who allegedly said that his unit had to destroy a village in order to save it from the Viet Cong.[17] Some critics' characterization of partisan judicial election campaigns seem to me to come very close to disparaging the impartiality and integrity of sitting judges. Rhetorically speaking, it is a very short step from alleging the "appearance of impropriety" to appearing to allege impropriety itself. It will be—at the least—ironic if one of the results of the critics' campaign is the smearing of the image of the judiciary in the minds of the public, when the critics' stated purpose is to protect the image of the judiciary in the minds of the public.

One example of this problem will suffice. In its Sunday, October 8, 2006 edition, the *Birmingham News* managing editor picked up on a quote from an Ohio supreme court justice reported in the *New York Times*: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race." The editorial argued that Alabama should scrap partisan judicial elections, and was accompanied by an editorial cartoon showing a judge, wearing a robe and holding a gavel, standing next to a streetwalker under a street lamp, saying "Buzz off sister! This is my corner." Of course, if you parse the Ohio judge's statement, you will see he did not say he was a prostitute, only that he felt like one—but that nuance is gone in the editorial cartoon. Such criticism—or, rather, ridicule—may well encourage some Alabama voters to think that the states' judges are corrupted by the current selection process. That would be a real shame, and a disservice to both the courts and the citizens of the state. Responsible critics of partisan elections clearly ought to avoid this kind of destructive, incendiary rhetoric.

The Elephant in the Living Room

Opponents of partisan elections sometimes adopt a fairly strident tone in their attacks on judicial elections. One common refrain is that they do not wish to see the public think of judges as legislators. Indeed, much of the rhetoric of the reformers has to do with preserving the unique status of judges as functioning above and outside of politics. This is all well and good, except that some judges *do* make choices that strike members of the public as more political than judicial. To the extent that judges act like legislators, it can be argued that it is proper that they be chosen as legislators are chosen—in partisan electoral contests. Many judges and law professors have adopted a results-oriented conception of judging that applauds judges who consciously push public policy through their decisions.[18] Some partisans of judicial activism likely do not wish to debate the issue in an electoral setting, and this attitude may well account for some of the objection to judicial elections.[19] Such squeamishness is, however, not sufficient reason to take the issue of judicial philosophy out of the public arena by making judicial selection less transparent and less democratic via merit selection or nonpartisan elections.

Consider same-sex marriage. If judges on a state supreme court are presented with the matter, some voters—likely a majority—will see this question not as one of abstract "interpretation" of the state constitution's due process clause (for example), but rather as a political choice. Or consider school finance. If judges on a state supreme court are asked to mandate increases in state spending, or redistribution of state funds among school districts, some voters—likely a majority—will see this as politics rather than judging. The same will likely hold true for quite a few other issues, including abortion, gun control, and tort reform.

Judges may avoid this sort of voter reaction by refraining from acting like legislators. But, to the extent they act like legislators, judges should expect voters to consider them in the same light—and properly subject them to the same kind of accountability —as legislators. The proper connection between majority rule and the judicial function deserves to be at the center of all discussion of judicial selection.

Endnotes

1 In October 2007, the Sandra Day O'Connor Project on The State of the Judiciary at the Georgetown University Law Center sponsored a day-long conference on "The Debate Over Judicial Elections and State Court Judicial Selection." Most of the speakers seemed to me convinced that there is some sort of crisis in state judicial selection that should be addressed by one reform program or another. The conference webpage contains a good deal of background material and a video of the conference itself, http://www.law.georgetown.edu/judiciary/.

2 This article is designed to update *Federalist Society White Paper, The Case for Partisan Judicial Elections*, 33 U. Tol. L. Rev. 393 (2001).

3 For an example of the genre, see Sandra Day O'Connor, *Justice for Sale*, Wall St. J., Nov. 15, 2007, p. A__. The Annenberg Public Policy Center of the University of Pennsylvania surveyed 1,514 people on their views of the federal and state judiciaries, and released the results in conjunction with the conference described in note 1. *See Partisan Judicial Elections Foster Cynicism and Distrust*, Oct. 17, 2007, *available at* http://www.annenbergpublicpolicycenter.org/.

4 536 U.S. 765 (2002).

5 Quoted in Tony Mauro, *Chief Justices Sound Alarm on Judicial Elections*, Legal Times, Aug. 23, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1156248911451.

6 *See, e.g.,* the list of recommendations made by the O'Connor Project at the close of the conference described in note 1, *at* http://www.law.georgetown.edu/judiciary/documents/Recommendations.pdf

7 The recommendation to drop partisan elections was the seventh, and final, item in the list of recommendations adopted by the O'Connor Project, cited in note 6.

8 An overview of this research literature as of 2001 can be found in *Federalist Society White Paper, supra* note 2, 33 U. Tol. L. Rev. at 398-99. For a more current discussion reaching the same basic conclusion, see Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, John M. Olin Law & Economics Working Paper No. 357 (U. of Chicago, Aug. 21, 2007), https://www.law.uchicago.edu/files/357.pdf. This paper concludes that "there is little empirical evidence" for the view that "appointed judges are superior to elected judges," but also concludes that the "evidence does not prove that elected judges are superior to appointed judges."

9 The term "Missouri plan" is often used as a synonym for "merit selection."

10 Editorial, *Show Me the Judges*, Wall St. J., Aug. 30, 2007, A10. For an extensive discussion of recent developments in Missouri, see William G. Eckhardt & John Hilton, *The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992-2007* (Federalist Society, 2007), http://www.fed-soc.org/doclib/20070801_FedSocMissouriWhitePaper.pdf. For the controversy over merit selection in neighboring Kansas, see Stephen J. Ware, *Selection to the Kansas Supreme Court* (Federalist Society, 2007), http://www.fed-soc.org/publications/pubID.441/pub_detail.asp.

11 In the Annenberg study cited in note 3, respondents were asked "Which of the following do you think would be better for your state?" The response "Judges run for election and the people vote on the candidates" was chosen by 64%, while "Governors nominate judges from a list of names prepared by an Independent committee made up of Democrats, Republicans and Independents" was chosen by 31%. *See* http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Survey_Questions_10-17-2007.pdf.

12 Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 Am. Pol. Sci. Rev. 315 (2001) (emphasis added).

13 Jill Young Miller, *Hunstein Wins Supreme Court Race*, Atlanta Journal-Constitution, Nov. 8, 2006, http://www.ajc.com/metro/content/shared-blogs/ajc/elections/entries/2006/11/08/georgia_supreme.html.

14 For a thought-provoking essay on the topic, *see* William H. Pryor, Jr., *Not-So-Serious Threats to Judicial Independence*, 93 Va. L. Rev. 1759 (2007), http://www.fed-soc.org/publications/pubid.465/pub_ detail.asp.

15 *See* Marc James Ayers, *Staying the Course: An Update on the Alabama Supreme Court* (Federalist Society, 2006), http://www.fed-soc.org/publications/pubID.91/pub_detail.asp, and Michael DeBow, *The Road Back From "Tort Hell": The Alabama Supreme Court, 1994-2004* (Federalist Society, 2004), http://www.fed-soc.org/publications/pubID.92/pub_detail.asp.

16 For example, a forthcoming article by James E. Alt (of Harvard University) and David Dreyer Lassen (of Copenhagen University), presents evidence that states with elected judiciaries experience lower levels of corruption, which the authors explain in terms of more vigorous checks and balances among the branches of state government in those states. *Political and Judicial Checks on Corruption: Evidence from American State Governments* (EPRU Working Paper No. 2005-12), http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=816045.

17 *See Ben Tre*, http://en.wikipedia.org/wiki/Ben_Tre. Some think the comment apocryphal.

18 In two speeches directly relevant to the question of state judicial selection, Justice William Brennan famously urged state supreme court justices to adopt the judicial philosophy of the Warren Court. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), and William J. Brennan Jr., *The Bill of Rights and the Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986).

19 Judges probably enjoy criticism about as much as the average person. It is interesting to note that Justice O'Connor has exhibited a certain sensitivity to public criticism of the U.S. Supreme Court. *See, e.g.,* Bill Mears, *O'Connor: Don't call us "activist judges,"* Nov. 28, 2006, http://www.cnn. com/2006/POLITICS/10/27/mears.judicialindependence/index.html.

Religious Liberties

Bronx Household of Faith

and the Access of Public Facilities to Religious Groups

*By Paul J. Zidlicky & Kristen V. Williams**

Recently, the U.S. Court of Appeals for the Second Circuit, in *Bronx Household of Faith v. Community School District No. 10*, rendered an important decision addressing access to public facilities by religious groups.[1] The splintered decision underscores the unsettled nature of this area among the lower courts, notwithstanding the U.S. Supreme Court's consistent decisions recognizing and enforcing the rights of religious groups to meet after hours at public facilities.[2]

The Supreme Court's decisions confirm that the government is prohibited from discriminating against such groups by denying them access to public facilities based on the "religious viewpoint" of their speech.[3] Under these cases, if a secular group were permitted to hold an assembly at a public facility discussing events of the day, a religious group cannot be denied access to the same facilities merely because it seeks to discuss those same issues from a religious perspective.

In *Bronx Household*, Judges Calabresi and Walker issued lengthy opinions reflecting continuing disagreement over whether there is a "religious worship" exception to the protections afforded to religious groups under the First Amendment.[4] That is, whether "religious worship" is a *sui generis* category of speech for which viewpoint discrimination is inapplicable. Part I of this paper discusses the controlling precedent developed by the United States Supreme Court governing this area. Part II examines the procedural background of the *Bronx Household* litigation, culminating in the opinions by Judge Calabresi and Judge Walker. Part III evaluates these competing positions against Supreme Court precedent. Ultimately, the paper concludes that Judge Calabresi errs in seeking to distinguish "religious worship" from "religious speech." Judge Calabresi's approach has been criticized by the Supreme Court, which has explained that the distinction between "religious speech" and "religious worship" lacks "intelligible content," and that efforts to draw such a distinction would impermissibly "entangle the State with religion."[5]

Rather, the appropriate approach is to treat "worship services" as any other form of protected speech and to assess whether religious groups seek to discuss issues that otherwise would be permitted in the public facility. Put simply, if a forum is available to community groups, it should make no difference whether the speech is made by a religious preacher, an agnostic, or an atheist.[6] Applied here, that principle compels the conclusion that the Bronx Household of Faith should be permitted to meet in the public school during non-school hours to hold meetings/services that pertain to the welfare of the community. To the extent the state seeks to exclude them because their meetings involve "religious worship," that prohibition constitutes impermissible viewpoint discrimination that violates the Free Speech Clause.

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I. Supreme Court's Decisions Addressing Access to Public Facilities By Religious Groups

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." On a number of occasions, the Court has addressed the interplay between the Free Speech and Establishment Clauses in the context of access to public facilities by religious groups.[7]

A seminal case in this area is *Widmar v. Vincent*. There, the Court struck down a state university policy that "prohibit[ed] the use of University buildings or grounds for purposes of religious worship or religious teaching."[8] The Court reasoned that the state had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion."[9] To justify that discriminatory exclusion, the university was required to "show that its regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."[10] In doing so, the Court expressly rejected the suggestion by the dissent that "'religious worship' is not speech generally protected by the 'free speech' guarantee."[11]

The *Widmar* Court also rejected the state's argument that exclusion of religious groups was compelled by the Establishment Clause. The Court reasoned that an "equal access policy" would not be "incompatible with this Court's Establishment Clause cases"[12] if it passed the test articulated in *Lemon v. Kurtzman*.[13] Applying *Lemon*, Justice Powell easily determined that "equal access policy" would have a secular purpose, and would avoid entanglement with religion, thus satisfying the first and third *Lemon* prongs.[14] With regard to the second prong—*i.e.*, the primary effect prong—the Court engaged in a detailed analysis, concluding that the primary effect of an equal access policy would not be the advancement of religion; rather, any benefit to religious groups from an open access policy would be merely "incidental."[15]

Almost a decade later, the Supreme Court again considered the issue of access to public facilities by religious groups in *Board of Education of the Westside Community Schools v. Mergens.*[16] There, a majority of the Court applied the reasoning of *Widmar* to public secondary schools, and held that the Equal Access Act (EAA) prohibited the public school from rejecting student requests to form a "non-curriculum related" Christian organization that would be entitled to meet on school grounds.[17] Likewise, a majority of the Justices agreed that the EAA did not violate the Establishment Clause.[18] Although the Justices disagreed about the appropriate test that should govern the Establishment Clause analysis, there was broad agreement

on the Court that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[19]

Three years later, in *Lamb's Chapel v. Center Moriches Union Free School District*,[20] the Court addressed whether the Free Speech Clause permitted the state to "deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today."[21] The Court unanimously concluded that exclusion of the group amounted to viewpoint discrimination and that, under *Widmar*, such discrimination was not compelled by the Establishment Clause.[22] The *Lamb's Chapel* Court explained that the state engages in viewpoint discrimination when it permits "school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."[23] And because "the showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members."[24] The Court concluded that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."[25]

In *Rosenberger v. Rector & Visitors of the Univ. of Va.*,[26] the Court again ruled that it was unconstitutional for the government to discriminate against a religious entity that is participating in the same activity as a non-religious entity, simply because of its religious viewpoint.[27] The Court held that the University of Virginia was engaged in viewpoint discrimination when it refused to grant a religious student group campus funding to publish a student journal.[28] Additionally, the Court ruled that the Establishment Clause did not forbid the religious group from receiving funds to print articles addressing, from a religious perspective, topics discussed by other student groups that received funding from the University.[29] In doing so, the Court again rejected the notion that the "Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."[30]

Finally, in 2001, the Court again addressed the intersection of the Free Speech and Establishment Clauses in *Good News Club* v. *Milford Central School*.[31] *Good News Club* involved "a private Christian organization for children ages 6 to 12" that submitted a "request to hold the Club's weekly after school meetings in the school," which housed children from primary grades through high school.[32] The Good News Club proposed to use the facility to teach the children religious songs, to study Scripture and to pray.[33] The school district refused the group's request, alleging that the proposed activities were "the equivalent of religious worship,"[34] and therefore forbidden pursuant to the "community use policy." [35]

The Supreme Court granted certiorari to resolve the "conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech."[36] Significantly, the conflicting decisions cited included the Second Circuit's resolution of similar claims by *Bronx Household*.[37] The *Good News* Court reversed the Second Circuit, holding that "teaching morals and character development to children is a permissible purpose under [the school district's] policy," and that "it is clear that the [Good News Club] teaches morals and character development to children."[38] The Court rejected the view that instruction from a "Christian viewpoint is unique" because the Court could see "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations" that were permitted access.[39] It noted that even if the activities of the Club encompassed "religious worship," such activities were not "divorced from any teaching of moral values."[40] Finally, applying *Widmar* and *Lamb's Chapel*, the Court ruled that there was no valid Establishment Clause claim to support the exclusion of the religious group.[41]

II. Equal Access Litigation Brought By The Bronx Household of Faith

The Bronx Household of Faith is an evangelical Christian church run by pastors Jack Roberts and Robert Hall. It sought permission to use the gymnasium-auditorium of Anne Cross Merseau Middle School on Sunday mornings for weekly services.[42] The defendant school district denied the church's request based on its "Standard Operating Procedures: Topic 5 ("SOP") and New York Education Law § 414 (McKinney's 1995), both of which prohibit rental of school property for the purpose of religious worship."[43] The school district policy provides, however, that school facilities may be used for enumerated purposes which include the following:

> 5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.
>
> 5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be nonexclusive and open to the general public.[44]

Specifically, section 5.9 provides:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.[45]

In 1994, after the Court had decided *Lamb's Chapel* and *Widmar*, Bronx Household of Faith made two formal requests to rent a school facility for Sunday morning services. After the second request was denied, "Bronx Household brought suit in the Supreme Court of the State of New York under 42 U.S.C. § 1983. The School District removed the case to federal court."[46]

The case initially came before United States District Court for the Southern District of New York, which granted the defendant school district's motion for summary judgment. As to Bronx Household's Free Speech claim, Judge Preska determined that "because SOP and [state law] clearly limit[s] access to the

school to those purposes enumerated and effectively prohibit use by all exclusive groups, SOP5 and [state law] indicate the creation of a limited public forum."[47] Judge Preska declined to address Plaintiff's Establishment Clause claim "[b]ecause [she found] that the state has not created a public forum and thus must demonstrate only a legitimate purpose to justify its ban of exclusive groups and has done so."[48]

On appeal, the Second Circuit affirmed. The majority ruled that the school had created a limited public forum, and that the exclusion of religious worship and instruction was both reasonable and viewpoint neutral. Specifically, the panel ruled that the school was not engaged in viewpoint discrimination because it "specifically permits any and all speech from a religious viewpoint" and does not permit "religious worship services."[49] As such, the majority concluded that the exclusion was based on the nature of the speech, not the viewpoint of the speaker.[50]

Four years later, after the Supreme Court decided *Good News Club*, plaintiffs renewed their request to rent the public school.[51] Tracking the permitted uses set forth in SOP 5.6.1 and 5.6.2, Bronx Household sought permission to use the school to engage in "singing, the teaching of adults and children from the viewpoint of the Bible," and to engage in "social interaction among members of the church, in order to promote their welfare and the welfare of the community."[52]

Judge Preska granted plaintiff's motion for preliminary injunction. First, applying the Supreme Court's decision in *Good News Club*, Judge Preska noted that the Supreme Court expressly rejected the argument that a "distinction can be drawn without difficulty between religious worship services and other forms of speech from a religious viewpoint."[53] Specifically, she determined that the activities proposed by Bronx Household of Faith "[could not] be categorized as mere religious worship, divorced from any teaching of moral values."[54] Rather, Judge Preska held that the activities were "clearly consistent with the other types of activities previously permitted" by the school district: helping people with basic needs such as food, clothing, and rent; social services like counseling, friendship, welfare-to-work assistance, drug rehabilitation, and personal finances management.[55] "The proposed activities also include the teaching of moral values—another activity benefiting the welfare of the community,"[56] and "singing, socializing, and eating—clearly recreational activities."[57]

Second, relying on the Supreme Court's ruling in *Good News Club*, Judge Preska rejected "defendant's position that religious services or worship are distinct activities not comparable to other activities" in the forum.[58] In particular, she rejected the school district's argument that worship is different because "*inter alia*, the discrete activities are linked… by ceremony and ritual [and] may involve rituals with special significance for a particular religious faith."[59] Judge Preska noted, however, that the record reflected the "use of public middle school facilities by various groups that also engage in ceremony and ritual of particular significance to the group."[60] Judge Preska pointed out that even if worship were an activity different in kind from other permissive activities, attempting to regulate a distinction is "futile." Judge Preska echoed the reasoning of the Supreme Court "[i]n recognizing that religious worship and discussion are forms of speech and association protected by the First Amendment."[61] Accordingly, Judge Preska found it "impossible to distinguish between" worship and non-worship.[62]

The Second Circuit, applying an abuse of discretion standard, affirmed Judge Preska's grant of a preliminary injunction.[63] Thereafter, in 2005, Judge Preska entered a permanent injunction in favor of plaintiffs.[64] On appeal, however, a divided panel of the Second Circuit reversed Judge Preska's grant of a preliminary injunction, although in a manner that leaves unresolved whether religious groups can be excluded from public facilities because they are engaged not in merely religious speech but "religious worship." The panel issued a short per curiam decision reversing the permanent injunction and longer concurring and dissenting opinions by each of the individual panel members.[65] In his opinion, Judge Calabresi concluded that a bar of "worship services... is a content-based restriction and does not constitute viewpoint discrimination."[66] According to Judge Calabresi, "[w]orship is the *sui generis* subject 'that the District has placed off limits to any and all speakers,' regardless of their perspective."[67] His opinion relied upon the fact that Bronx Household's pastor identified the proposed activities as "Christian worship service," which includes "the singing of Christian hymn and songs, prayer, fellowship with other church members, Biblical preaching and teaching, communion, sharing of testimonies and social fellowship among church members."[68]

Judge Calabresi rejected the argument that worship services were "simply the religious analogue of ceremonies and rituals conducted by other associations that are allowed to use school facilities."[69] According to Judge Calabresi, "the notion that worship is the same as rituals and instruction" is "completely at odds with *my* fundamental beliefs" because "[w]orship is adoration, not ritual; and any other characterization is both profoundly demeaning and false."[70] Finally, in drawing a distinction between "religious speech" and "religious worship," Judge Calabresi acknowledged the Supreme Court's decision in *Widmar,* but concluded that it was inapposite, because that Court did not conclude that "the exclusion of worship constituted viewpoint discrimination."[71] Judge Calabresi ultimately concluded that "defendant's exclusion of worship services is viewpoint neutral" and therefore constitutional.[72]

In dissent, Judge Walker concluded that the school district had "engaged in a form of invidious viewpoint discrimination forbidden by the First Amendment."[73] In contrast to the approach of Judge Calabresi, Judge Walker would "compare the purposes of Bronx Household's proposed expressive activity to the purposes for which the Board has created its limited public forum and, if the fit is close, inquire searchingly of the government's motives."[74] To that end, Judge Walker concluded that Bronx Household's expressive activity was designed to develop a community of believers, which has "as its anticipated result increased community support for the school."[75] That purpose "fits within" the Board's desire to "foster a community in their geographic vicinity in ways that will inure to their benefit."[76] Moving to the Board's intent, Judge Walker concluded that the record lead "ineluctably to the conclusion that the Board, in fact, has undertaken to exclude a particular viewpoint from its property."[77]

Neither Judge Calabresi nor Judge Walker garnered a majority for their competing approaches, because Judge Leval, who provided the deciding vote, concluded that there was no standing because the Board had adopted a new regulation that had not yet been applied to Bronx Household. As such, Judge Leval voted to vacate the preliminary injunction on grounds largely unrelated to the merits of the dispute.[78]

III. Analysis of *Bronx Household* Under Supreme Court Precedent

The Second Circuit's decision in *Bronx Household* raises the question—which it does not resolve—of whether there is a "religious worship" exception to the decisions of the Supreme Court, holding that the state may not exclude from a public facility religious groups that seek to engage in expressive activity of a sort permitted to non-religious groups. In assessing whether a "religious worship" exception is workable or appropriate, it is important to understand the scope of that exception, and whether it would swallow the general rule guaranteeing religious groups with equal access to public facilities. To make these assessments, however, it is essential to define what is "religious worship," and how, if at all, it differs from other expressive religious activity that is protected from viewpoint discrimination.

In *Bronx Household*, the opinion of Judge Calabresi makes no real effort to provide an objective definition of "religious worship," or to explain how it differs from other religious speech. Instead, according to Judge Calabresi, "worship" is "a *sui generis* subject 'that the District has placed off limits to any and all speakers.'"[79] The lack of an objective definition is not surprising. Indeed, as Judge Walker explained, the chief difficulty with a "religious worship" exception is that it assumes that "judges can define 'worship,'" when, in fact, judges are not "competent to offer a legal definition of religious worship."[80]

On this issue, the *Bronx Household* panel did not write on a clean slate. Indeed, both Judge Calabresi and Judge Walker acknowledged that in *Widmar* v. *Vincent*, the Supreme Court upheld the rights of students "to use a generally open forum to engage in religious worship and discussion." Nevertheless, Judge Calabresi found *Widmar* to be distinguishable because, there, the Court was concerned "solely with whether worship was religious speech," and did not conclude that "the exclusion of worship constituted viewpoint discrimination," as described in decisions like *Good News Club*, *Rosenberger*, and *Lamb's Chapel*.[81]

Judge Calabresi is correct in stating that *Widmar* did not address viewpoint discrimination because the forum there was a "public forum" for which content-based distinctions must be narrowly tailored to serve a compelling governmental interest. Judge Calabresi, however, is mistaken in concluding that *Widmar* did not address the question whether there was, or could be, a distinction drawn between religious speech and religious worship. The *Widmar* Court held not only that there was no intelligible distinction between the two, but also that no such distinction could be drawn by the courts or by government.

First, the *Widmar* Court held that such a distinction lacks "intelligible content," because there is "no indication when 'singing hymns, reading scripture, and teaching bible principles,' cease to be 'singing, teaching and reading'... and become unprotected 'worship.'"[82] Here, Judge Calabresi's opinion acknowledges that "some of the same activities that were part of the religious instruction validated in *Good News Club* are included in the worship services that Bronx Household seeks to conduct."[83] As noted, there is no principled basis for denying access to public facility when a preacher seeks to present a sermon addressing important issues such as racial strife when the same type of speech would be permitted if it were not called a "sermon."[84]

Second, the *Widmar* Court explained that even if there were a principled line between "religious expression" and "worship," "it is highly doubtful that it would lie within the judicial competence to administer."[85] Specifically, to draw such a distinction, the state would be required "to inquire into the significance of words and practices to different religious faiths," but such "inquiries would tend inevitably to entangle the State with religion in a manner forbidden [by the Supreme Court's] cases."[86] On this point, Judge Calabresi argued that religious worship was not the "analogue of ceremonies and rituals conducted by other associations," but that conclusion was inherently subjective and turned on his own "fundamental beliefs" as a "person of faith."[87] In stark contrast, the Supreme Court in *Good News Club* rejected a similar suggestion that "quintessentially religious" speech was somehow a "unique" category of speech because, for purposes of the First Amendment, there was "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by the other associations."[88]

Finally, the *Widmar* Court concluded that the difficulty in distinguishing religious speech from worship, even if it could be done, was not worth the effort because there was no reason that different forms of religious speech should be afforded greater or lesser protection under the Constitution.[89] Here, too, Judge Calabresi offered no rationale for concluding that religious worship was entitled to less protection under the First Amendment than religious speech.

Simply put, the Supreme Court has in the past rejected efforts to distinguish religious speech from religious "worship." In rejecting that distinction, the Court has not required that local governments must allow "New York's schools [to] resemble St. Patrick's Cathedral."[90] To the contrary, the government is fully justified in reserving a forum for only certain groups or limiting access to student-sponsored speakers. Likewise, the government may legitimately establish rules so that access would not be provided solely to one or more religious groups in a manner that would convey the message that the government endorses a particular religion or group of religions. What the government cannot do, however, is open its facilities to a broad set of civic associations for general community-building purposes, and then deny access to a religious group that seeks to use the same facilities to conduct expressive activity of the same sort from a religious perspective.

Endnotes

1 Bronx Household of Faith v. Community Sch. Dist. No. 10, 492 F.3d 89 (2d Cir. 2007).

2 *See*, *e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

3 *See* Good News Club, 533 U.S. at 111-12; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); Bronx Household of Faith v. Community Sch. Dist. No. 10, 226 F. Supp. 2d 401, 416 (S.D.N.Y. 2002).

4 U.S. Const. amend. I, cl. 1.

5 Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981) (rejecting distinction between "religious speech explicitly protected by our cases, and a new class of religious 'speech [acts]' constituting 'worship.'").

6 *See*, *e.g.*, *Eulogy for the Martyred Children, reprinted in* I Have a Dream, Writings and Speeches that Changed the World at 115 (Harper 1992) ("The Reverend Dr. King delivered this sermon at the funeral of the little girls who were killed on September 15, 1963, by a bomb as they attended the Sunday school"); *see also The Drum Major Instinct, reprinted in id.* at 180 (recounting a prophetic and highly personal sermon from the pulpit).

7 *Widmar*, 454 U.S. at 269 n.6.

8 *Id.* at 265 (internal citations omitted).

9 *Id.* at 269.

10 *Id.* at 270.

11 *Id.* at 269 n.6.

12 *Id.* at 271.

13 Lemon v. Kurtzman, 403 U.S. 602 (1971). A staple of religious law jurisprudence, the Court's decision in *Lemon* created the framework under which cases involving the Establishment clause are evaluated. The *Lemon* test requires that the government action (1) "must have a secular… purpose," (2) must have a "principle or primary effect… that neither advances nor inhibits religion," and (3) "must not foster an excessive government entanglement with religion." *Id.* at 612-13.

14 *Widmar*, 454 U.S. at 271-72 ("[A]n open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion.").

15 *Id.* at 273 ("[The u]niversity has opened its facilities for use by student groups," it has created an open forum, and it may not "exclude groups based on the content of their speech.").

16 *Bd. of Ed. of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

17 *Id.* at 235.

18 *Id.* at 253.

19 *Id.* at 248.

20 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 384 (1993)

21 *Id.* at 387.

22 *Id.* at 395.

23 *Id.* at 393.

24 *Id.* at 395.

25 *Id.* at 389. Significantly, the Court noted that the church had submitted a request to hold their Sunday morning worship services at the school and were denied access, but they did not challenge the denial.

26 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

27 *Id.* at 846.

28 *Id.* at 845.

29 *Id.* at 846.

30 *Id.* at 839

31 Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

32 *Id.* at 103.

33 *Id.*

34 *Id.*

35 *Id.* (the community use policy "prohibit[ed] use by any individual or organization for religious purposes") (internal citations omitted).

36 *Id.* at 105.

37 *Id.* at 105-06.

38 *Id.* at 108.

39 *Id.* at 111 (internal quotations omitted).

40 *Id.* at 112 n.4.

41 *Id.* at 113.

42 Bronx Household of Faith v. Community Sch. Dist. No. 10, No. 95 Civ. 5501 (LAP), 1996 U.S. Dist. Lexis 18044, at *2 (S.D.N.Y. December 5, 1996).

43 *Id.* (internal citations omitted). Section 414 of N.Y. Education Law was the same provision at issue in *Lamb's Chapel* and *Good News Club*. New York Education Law § 414 permits use of school facilities for meetings, with the following exception: "such use shall not be permitted if such meeting, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization."

44 *Id.* at *3.

45 *Id.* at *3-4.

46 *Id.* at *5.

47 *Id.* at *15.

48 *Id.* at *18.

49 Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 214 (2d Cir. 1997).

50 *Id.* at 217.

51 Bronx Household of Faith v. Community Sch. Dist. No. 10, 226 F. Supp 2d 401, 409 (S.D.N.Y. 2002).

52 *Id.* at 409.

53 *Id.* at 413.

54 *Id.* at 414 (internal quotations omitted).

55 *Id.*

56 *Id.* ("Those who attend the Sunday morning meetings are taught to love their neighbors as themselves, to defend the weak and disenfranchised, and to help the poor regardless of their particular beliefs.").

57 *Id.* at 414-15 ("[T]he facts presented here fall squarely within the Supreme Court's precise holding in *Good News Club*: the activities are not limited to 'mere religious worship' but include activities benefiting the welfare of the community, recreational activities and other activities that are consistent with the defined purposes of the limited public forum.").

58 *Id.* at 416.

59 *Id* (internal quotations omitted).

60 *Id.* at 416-17 ("For example, Dave Laguer, Director of the Legionnaire Greys Program, explains that the group meets in M.S. 206B on Fridays from 6 to 9 p.m. and on Saturday from 9 a.m. to 2 p.m. and counts approximately sixty to seventy people in attendance from age ten. The group's program is geared toward teaching United States history, and because the format of [its] meetings is framed in an army military style environment, uniforms are required, ranks are held and salutes are mandatory to higher ranked individuals just as in the military. Lageur also explains that: at the start of each meeting, the students line up into proper formation and stand at attention as we begin with ceremonial flag presentation. During this ceremony, the flags are brought in and posted while a trumpeter plays the national anthem. At this time, the

students stand at attention and salute while the colors are presented and then posted. Likewise, Jeffrey G. Fanara, the Director of Learning for Life and Urban Emphasis at the Greater New York Councils, Boy Scouts of America, describes the activities of the four Cub Scout Packs and six Boy Scout Troops that meet in New York City public schools in the Bronx. Each Scout takes an oath promising: "On my honor I will do my best to do my duty to God and my country...." Troop meetings start with an initial gathering period followed by a formal opening ceremony, and end with a formal closing ceremony. An induction ceremony is held for each new boy who joins the Troop, and advancements in rank are marked by more elaborate ceremonies called Courts of Honor. On the basis of this uncontradicted evidence, there is no dispute that the Greys Legionnaires engage in ceremony and ritual at M.S. 206B and that the Boy Scouts engage in ceremony and ritual at various New York City public schools in the Bronx.") (internal quotations omitted).

61 *Id.* at 418.

62 *Id.* at 422.

63 Bronx Household of Faith v. Community Sch. Dist. No. 10, 331 F.3d 342, 355 (2d Cir. 2003).

64 Bronx Household of Faith v. Community Sch. Dist. No. 10, 400 F. Supp 2d 581 (S.D.N.Y. 2005).

65 Bronx Household of Faith v. Community Sch. Dist. No. 10, 492 F.3d 89 (2d Cir. 2007).

66 *Id.* at 98.

67 *Id.* at 100.

68 *Id.* at 101.

69 *Id.* at 103.

70 *Id.* at 103.

71 *Id.* at 104.

72 *Id.* at 106.

73 *Id.* at 124 (Walker, J., dissenting).

74 *Id.* at 125.

75 *Id.* at 126.

76 *Id.*

77 *Id.* at 127. Judge Walker strongly criticized the approach adopted by Judge Calabresi. Specifically, Judge Walker argued that Judge Calabresi failed either to define (i) the scope of the "limited public forum" at issue or (ii) the scope of the term "worship" that was central to his ruling.

78 *Id.* at 115.

79 *Id.* at 100.

80 *Id.* at 129 (Walker, J. dissenting).

81 *Id.* at 104.

82 Widmar v. Vincent, *454 U.S. 263, 269 n.6 (1981).*

83 *Bronx Household*, 492 F.3d at 102 (Calabresi, J., concurring).

84 *See supra* note 8.

85 *Widmar*, 454 U.S. at 269 n.6.

86 *Id.*

87 *Bronx Household*, 492 F.3d. at 103 (Calabresi, J., concurring).

88 Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001).

89 *Widmar*, 454 U.S. at 269 n.6.

90 *Bronx Household*, 492 F.3d at. 127 (Walker, J., dissenting).

Telecommunications & Electronic Media

State Revanchism: Can the Latest Efforts to Regulate Voice over Internet Protocal be Stopped?

*By Gregory E. Sopkin**

> *Revanchism* (from French *revanche,* "revenge") is a term used since the 1870s to describe a political manifestation of the will to reverse territorial losses incurred by a country, often following a war.… Extreme revanchist ideologues often represent a hawkish stance, suggesting that desired objectives can be reclaimed in the positive outcome of another war. Revanchism is linked with irredentism, the conception that a part of the cultural and ethnic nation remains "unredeemed" outside the borders of its appropriate nation-state.
>
> - Wikipedia

The last "war" fought over Voice over Internet Protocol ("VoIP") occurred in 2003-2004, when the Minnesota Public Utilities Commission decided that Vonage's VoIP telephony service seemed a lot like traditional circuit-switched service (it "quacked like a duck"), and so was subject to state agency regulation.[1] A federal district court in Minnesota disagreed, holding that federal law preempts state regulation, because VoIP is an "information service." [2] In 2004, the FCC weighed in with its own *Vonage Order,* declaring that VoIP providers do not need to abide by a Byzantine set of regulations by fifty-one state commissions.[3] Two years later, the Eighth Circuit Court of Appeals upheld the district court's decision.[4] State agencies lost, and VoIP providers won—or so it seemed.

In 2004, as Chairman of the Colorado Public Utilities Commission, I wrote: "There are a host of reasons why state regulators should not enter the Voice over Internet Protocol (VoIP) fray, at least until national policy issues are addressed by the Federal Communications Commission (FCC)."[5] Four years later, the FCC has done little to define the jurisdictional limits of state regulatory authority over VoIP, notwithstanding its commencement of the *IP-Enabled Services* docket in 2004.[6] Regulators abhor a regulatory vacuum. So naturally state agencies have begun to retest the jurisdictional waters.

This is entirely expected. State regulators view themselves as consumer protectors. When rogue telephone providers come in and sell their services without agency oversight, consumers can be harmed. Usually left out of the analysis is whether state agency oversight is necessary in a competitive marketplace, or could harm consumers because intrusive regulation acts as a barrier to entry, meaning many carriers will choose not to do business in the state. Absent a natural monopoly, less competition means less choices, higher prices, and worse service.

Two recent decisions by state utility commissions highlight the spectrum of regulatory burden. The most intrusive imposition is represented by a Missouri Public Service Commission (MPSC) decision, effective December 31, 2007, finding that Comcast IP Phone, LLC[7] "is offering and providing local exchange and interexchange telecommunications services without a certificate of convenience and necessity" (CPCN) in violation of Missouri law.[8] The Commission distinguished the Vonage court and FCC cases, *supra*, as applicable to only "nomadic" (*i.e.,* portable) VoIP service, not "fixed" VoIP service like cable telephony. But, as more fully described below, many of the bases for state preemption in the FCC's *Vonage* decision are not dependent on portability.

The MPSC's decision that a CPCN is required opens the state regulatory floodgates. The requirement of a CPCN is what distinguishes regulated "public utilities" from unregulated companies, and the distinction is rather important, as regulated utilities must comply with various state statutes as well as hundreds of telecommunications "rules" adopted by state agencies (public utility commissions). For a telephone utility, these statutes and rules can dictate product prices and offerings, service quality, market entry and exit, record keeping, filing of reports, payment of various fees and high cost funds, service deposits, and service disconnection, among others. In Colorado, the PUC's telecommunications rules are over 200 pages long—and this, after an attempt to reduce overly burdensome requirements.

A much lighter regulatory imposition is represented by a Kansas Corporation Commission (KCC) decision dated January 9, 2008, which held that a rational construction of Kansas law compels "requiring interconnected VoIP providers to contribute to the KUSF" (Kansas Universal Service Fund).[9] The decision mentions two other states—Nebraska and New Mexico—that have required VoIP carriers to contribute to their respective state high cost funds. Notably, the KCC decision limited its determination exclusively to the issue of whether interconnected VoIP carriers must contribute to the KUSF, and stated that the KCC is not treating them as a "traditional telephone company." In other words, while the KCC wants VoIP providers to pay into the KUSF, the agency is not subjecting them to the full panoply of regulations applicable to traditional incumbent local exchange carriers.

The KCC has a legitimate policy argument that because "interconnected" VoIP providers make use of the loop, switches, and other telecommunications facilities in high cost areas they should have some responsibility to pay into a state high cost fund.[10] Wireless carriers as a rule pay into state high cost funds for this reason. But wireless carriers are largely exempt from *other* state regulation by virtue of § 332(c)(3)(A) of the Telecommunications Act of 1996, which provides:

> STATE PREEMPTION. -- … *[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service* or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial

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mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.[11]

There have been various cases from several courts interpreting the provisions § 332(c)(3)(A) of the Act, regarding rate regulation of a CMRS in various scenarios.[12] What is clear from these cases is that states can impose a charge on wireless companies for state high cost funds, but cannot explicitly or implicitly regulate rates or entry of these carriers.

The MPSC has no good reason to subject "fixed" VoIP providers to traditional regulation. The MPSC could have merely required high cost fund pay-in like the KCC, and left it at that. Instead, MPSC did what the Minnesota Public Utilities Commission (MPUC) tried four years ago, attempting to distinguish the MPUC case as applicable only to "nomadic" VoIP providers, not fixed VoIP providers.

Until four years ago, the FCC's tendency was to preempt state regulation of VoIP services. Since then, there has been some backtracking, with no clear rules set forth on state jurisdiction. With the MPSC decision, the FCC needs to revisit the issue with an eye toward federalization. Ultimately, the federalization—and consequent eventual economic deregulation —of telecommunications services would be as beneficial as it was of the airline, trucking, and railroad industries. Because of the convergence of voice and data, and the trend toward telecommunications' facility decentralization and intelligence at the edges, both Congress and the FCC have the power today to take away state authority over service rates, entry, service quality, and other regulatory mechanisms for *all* types of telecommunications. Nonetheless, as discussed below, states should always have some authority over limited telecommunications issues related to public safety, fraud, interconnection of bottleneck facilities, and certain state fees like state high cost funds. But the full-throated "mother may I" regulation imposed by regulatory agencies surely must come to an end, and the first iteration should be VoIP, whether nomadic or fixed.

Now, as a member of the Federalist Society, I generally believe that decision-making should be made at the lowest level governmental unit appropriate to the issue. However, even the National Association of Regulatory Utility Commissions—(no states' rights slouch)—adopted a resolution that "NARUC is open to the possibility that, as markets evolve and local products and services take on more national and international characteristics, traditional jurisdictional principles may need to be re-evaluated." The time is now to do just that for VoIP. The FCC or Congress should get off the fence, declare all VoIP service to be informational and interstate in nature, and therefore not subject to state agency authority (with limited exceptions described below). Below I address the authority of the FCC and Congress and the policy reasons to do so.

I. VoIP Federalization Tools

Over the years, there has been a gradual shift from state to federal authority over telecommunications companies and their services. A seismic shift clearly occurred when the FCC ruled that state utility commissions have no jurisdiction over Vonage's VoIP services. But the transition started long before 2004.

A brief summary: In 1966 in its Computer I decision,[13] the FCC decided that regulation should not be imposed on data processing services. In 1980, in its Computer II inquiry,[14] the FCC adopted a new regulatory scheme that distinguished between the common carrier offering of "basic" transmission services and the offering of "enhanced" services. The FCC held that "basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." The FCC found that basic services should be regulated as a common carrier service under Title II of the Telecommunications Act, but that enhanced services should not be regulated under the Act.

Fast forward to 1996. In the Telecommunications Act of 1996, new regulatory classifications were born. If a product meets the definition of "telecommunications service," it is heavily regulated as a common carriage service under Title II; if it is classified as an "information service," it is subject to Title I and hence lighter regulation, if any. Telecommunications is defined in the statute as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."[15] A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[16] An "information service" consists of "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications... but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[17]

One commentator rightly labeled this taxonomic structure an exercise in "metaphysics."[18] Given the relative infancy of the Internet in 1996, apparently no one thought of how to treat a service—transmission of Internet Protocol packets—that is structurally indistinguishable from both data transmission and an ordinary telephone call. Thus, trying to classify the various VoIP manifestations is a mind-bending experience.

But that has not stopped the FCC. The two classifications—telecommunications versus information—were put to the test in three FCC cases, all decided in 2004.

The first case involved IP to IP communications; that is, where both sides of the call use either a specialized IP converter phone or a "soft phone" through a computer. In 2004, the FCC held that Pulver.Com's Free World Dialup IP to IP VoIP

service ("FWP") is an unregulated information service subject to FCC jurisdiction.[19] Applying the statutory classifications, the Commission reasoned that FWD is not "telecommunications" because its "heart" is transmission, and Pulver does not offer or provide any transmission; rather, FWD members must bring their own broadband transmission to interact with the FWD server. Further, information provided by FWD is not "information of the user's choosing, without change in the form or content," because FWD provides new information about whether other FWD members are present, IP addresses, and a voicemail or email response. Finally, the FCC held that FWD is an "information service" because it offers a number of "computing capabilities," including, among other things, storing member information and processing the Session Internet Protocol (SIP) invite.

The most interesting aspect of the FCC's *Pulver Order* is the length it went to ensure that there would be no state jurisdiction over IP to IP service. While the FCC stated there were two bases for such preemption, by my count it is more like seven:

1. Asserting federal jurisdiction (*i.e.,* preemption) over FWD is consistent with—and supported by—the states' already-limited role with regard to information services, for which the Commission has asserted a national policy of nonregulation.

2. Passage of the 1996 Act increases substantially the likelihood that any state attempt to impose economic regulation of FWD would conflict with federal policy, because in that Act Congress expressed its preference that a competitive free market for the Internet be preserved.

3. "[D]eclaring FWD to be an unregulated information service ... will encourage more consumers to demand broadband service, which also is consistent with the Act."

4. FWD clearly cannot appropriately be characterized as a purely intrastate information service, because FWD customers hail from fifty states and 170 countries, and their physical locations can continually change.

5. The end-to-end analysis has little relevance in determining the jurisdictional nature of FWD, because a member's location in making a call is portable. The only purpose in trying to determine the caller's location would be for the sake of regulation itself, rather than any policy purpose.

6. Even if some form of an end-to-end analysis were deemed applicable to FWD, FWD would still be an interstate information service under the Commission's "mixed use" doctrine, because it is impossible or impracticable to attempt to separate FWD into interstate and intrastate components, and more than a *de minimus* amount of FWD's offering is interstate.

7. State regulation of VoIP may well violate the Commerce Clause, which denies "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Even if not a per se violation, courts have inquired whether the burden imposed on interstate commerce by state regulation "would be clearly excessive in relation to the putative local benefits," and the FCC "cannot envision how state economic regulation of the FWD service ... could benefit the public."

Arguably the first three and the seventh of these reasons for state preemption apply to all VoIP telecommunications services, not just "nomadic" VoIP. As even traditional carriers continue to migrate to IP-based transmission based on cost efficiencies, the former, purely intrastate call may now bounce across two or more states before reaching its destination. Also, as a result of cell phones and VoIP, area codes are quickly becoming irrelevant to physical location. At some point down the road, the FCC could assert that state economic regulation of all modes of telephony is no longer justifiable based on its interstate character and the Commerce Clause.

Granted, the FCC did in April 2004 deny AT&T's petition for declaratory ruling that its "phone-to-phone" IP telephony services are exempt from access charges that apply to circuit-switched calls.[20] The issue in this second 2004 VoIP case was the classification of a call that both originates and ends with no specialized receiver—just an ordinary telephone—but that undergoes a conversion from analog signal to Internet Protocol and back again during the call. The FCC found that AT&T must pay terminating access charges because its phone-to-phone IP service must be categorized as "telecommunications." AT&T offers "telecommunications" because it provides "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." And its offering constitutes a "telecommunications service" because it offers "telecommunications for a fee directly to the public." Users of AT&T's specific service obtain only voice transmission with no net protocol conversion, rather than information services, such as access to stored files. More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under section 153(20) of the Act. The FCC noted that end-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service, and the decision to use its Internet backbone to route certain calls was made internally by AT&T.[21]

However, the FCC's AT&T ruling is explicitly limited to an interexchange service that:

1. Uses ordinary customer premises equipment ("CPE") with no enhanced functionality;

2. Originates and terminates on the public switched telephone network ("PSTN"); and

3. Undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology."[22]

The use of the conjunctive "and" in the Commission's three-prong test invites companies to fiddle with their services to avoid Title II—and state—regulation. Not surprisingly,

many incumbent local exchange companies are offering a VoIP product and, more importantly, utilizing IP technology for their traditional telephony services. These events make eventual federalization of all services more likely.

More importantly, the third prong—that the service undergoes no net protocol conversion and provides no enhanced functionality to end users from use of IP technology—does not apply to fixed cable VoIP services. Cable telephony converts analog sound to IP packets, then converts the packets to traditional telephone protocol, before handing off the call to the PSTN. Customers *can* utilize advanced services in connection with the IP service, including email messages, reviewing call logs, and otherwise performing functions that traditional telephony does not provide. This net protocol conversion and enhanced functionality renders the FCC's AT&T decision inapposite.[23]

The third FCC decision on VoIP concerned Vonage's IP to phone service. With its DigitalVoice service, Vonage's customers can utilize specialized equipment (again, an IP phone or soft phone) to originate calls on the Internet, which are routed over Vonage's servers to the destination, which could be another Vonage customer or a customer using the Public Switched Transmission Network (PSTN). Vonage customers can also receive calls from a PSTN customer over Vonage's servers. Although Vonage customers receive a NANP number, a call to the number is not tied to a physical location, so the customer can be reached anywhere in the world.

In its *Vonage Order,* the FCC preempted an order of the Minnesota Public Utilities Commission regulating Vonage's service. Like the FWD decision, the *Vonage Order* gave a plethora of bases for preemption:

1. The FCC has exclusive jurisdiction over all interstate and foreign communication. The nature of Vonage's DigitalVoice service "precludes any suggestion that the service could be characterized as a purely intrastate service" because "Vonage has over 275,000 subscribers located throughout the United States, each with the ability to communicate with anyone in the world from anywhere in the world."

2. State commission regulation would necessarily conflict with the FCC's valid exercise of authority: Commission preemption of state regulation is permissible with DigitalVoice because (a) the matter to be regulated has both interstate and intrastate aspects; (b) preemption is necessary to protect a valid federal regulatory objective; and (c) state regulation would negate the exercise by the FCC of its own lawful authority, because regulation of the interstate aspects of the matter cannot be "unbundled" from regulation of the intrastate aspects.

3. State regulation of DigitalVoice directly conflicts with the FCC's pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations. State entry and certification requirements must contain detailed information, can take months to decide, and can result in denial of certificate. Similarly, tariffs and price lists are lengthy documents subject to specific filing and notice requirements, and the state commission could require cost justification information or order a change to a tariff rate, term or condition.

4. There is no practical way to sever DigitalVoice into interstate and intrastate communications to enable state regulation to apply only to intrastate calling functionalities without also reaching interstate aspects of the service: Vonage has no service-driven reason to know users' locations, and to require Vonage to attempt to incorporate geographic "end-point" identification capabilities into its service solely to facilitate the use of an end-to-end approach would serve no legitimate policy purpose. Further, using proxies to determine geographic location (such as NPA NXX or residence address) would deem a call to be local even though the caller could be out of state, and would diminish the advantages of the Internet's ubiquitous and open nature, all for regulatory purposes.

5. State regulation is inconsistent with policies and goals of 1996 Act: Congress, in Section 230 of the 1996 Act, stated that "[i]t is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." In interpreting the phrase "unfettered by Federal or State regulation," the FCC "cannot permit more than 50 different jurisdictions to impose traditional common carrier economic regulations such as Minnesota's on DigitalVoice and still meet [its] responsibility to realize Congress's objective." Further, section 706 of the Act directs the FCC and state commissions to encourage the deployment of advanced telecommunications capability to all Americans by using measures that "promote competition in the local telecommunications market" and removing "barriers to infrastructure investment." Since DigitalVoice services are capable of being accessed only via broadband, and broadband is an advanced service, it would conflict with the goals of the Act to have multiple disparate attempts to impose economic regulation on DigitalVoice.

6. State commission regulation of DigitalVoice likely violates the Commerce Clause. Under such jurisprudence, the Clause is violated if: (a) a state law has the "practical effect" of regulating commerce occurring wholly outside that state's borders; (b) the burdens imposed on interstate commerce by state regulation would be "clearly excessive in relation to the putative local benefits"; or (c) there is state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment. Minnesota's order likely violates the Commerce Clause for all three reasons.

Perhaps the most telling aspect of the FCC's *Vonage* order is that it preempted state commission regulation without even finding that DigitalVoice is an information service. (The FCC deferred that analysis to its IP-Enabled Services Proceeding.) That is, even if the FCC later finds the IP-to-phone service to be "telecommunications" under the 1996 Act, states are still preempted from regulating it. Another telling aspect is the FCC's exhaustive list of reasons to preempt state decisions in footnote 66 of the *Vonage Order:*

> [F]ederal law and policy preempt state action in several circumstances: (1) where compliance with both federal and state law is in effect physically impossible ...; (2) when there is outright or actual conflict between federal and state law ...; (3) where

> the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress ...; (4) when Congress expresses a clear intent to preempt state law; (5) where there is implicit in federal law a barrier to state regulation; and (6) where Congress has legislated comprehensively, thus occupying an entire field of regulation. Additionally, the Supreme Court has held that preemption may result not only from action taken by Congress but also from a federal agency action that is within the scope of the agency's congressionally delegated authority.

Moreover, the FCC opined that, "*to the extent that other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this order*" (emphasis added). On appeal to the Eighth Circuit, however, the FCC argued that the issue of preemption of cable VoIP was not yet ripe for judicial review, and the court agreed.[24] The FCC to date has not made good on its prediction.

Based on its actions and statements in 2004, the FCC was not shy about taking away plenary telecommunications regulatory authority from states, or at least state commissions. This FCC tendency was bolstered by the *Brand X* decision, in which the Supreme Court upheld the FCC's decision that cable modem service, which includes both telecommunications and information service elements, is an information service, thus not subject to state regulation.[25]

Since 2004, however, the FCC has backed off on its move toward federalization. In 2006, the FCC, in addressing VoIP providers' responsibility to contribute to the universal service fund, stated that "an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider."[26] Many fixed VoIP providers can so track customer calls. Thus, the implication is that these providers may be fully regulated by state commissions.

This 2006 *dicta* is inconsistent with the FCC's 2004 VoIP decisions, and flatly contradicts its 2004 *Vonage Order* prediction that cable VoIP services would be preempted from state regulation to a comparable extent as Vonage's DigitalVoice service. While the mixed-use rationale may not be applicable to fixed VoIP service in which calls can be jurisdictionally tracked, as noted above, there are others justifying preemption. Not the least of these are the burden on VoIP carriers (and interstate commerce) of attempting to comply with fifty-one different sets of state utility agency rules, and the disincentive for customers to subscribe to broadband capable service offered with cable VoIP packages.

If the FCC continues to be unwilling to firewall VoIP services from entry and economic regulation, Congress should step in. Industry players agree that the Telecommunications Act of 1996 is already a dinosaur that needs to be rewritten, for the simple reason that IP-based communications does not slip easily into existing taxonomic categories--information or telecommunications. Congress has the power to invoke the Interstate Commerce Clause to preclude state regulation of rates and entry of all VoIP services, just as it did with wireless regulation with 47 U.S.C. § 332(c)(3)(A), *supra*.[27]

Legislation at the state level is also feasible, as several states have largely deregulated state agency authority over VoIP services. At the very least, legislation should preclude agencies from rate and entry regulation, and I would add service quality (other than 911) to the *verboten* list.

II. Why Preemption of VoIP Regulation is Necessary

If the MPSC's gambit to fully regulate fixed VoIP proves successful, the unfairness of regulatory asymmetry will be apparent: Why should Vonage not be regulated simply because its service is portable, whereas cable telephony is not? After all, while Vonage customers can port their telephone number to any location where broadband service is available, most of its customers use the service primarily in one location, their home or business address. Why should Vonage have less regulatory expenses in terms of payment into state high cost funds or fees than cable service?

The more fundamental objection of state regulation of VoIP is the utter lack of a reasonable basis to do so. Public utility commissions were created to regulate monopoly providers—electric, gas, and telecommunications companies that were granted the right to exclusively serve geographic areas in exchange for their rates and service quality being regulated. This concept has been abolished *de jure* for telecommunications by the Telecommunications Act of 1996, at least for non-rural providers. The only reason left to regulate is a demonstrably uncompetitive telecommunications market, which would be hard to show in non-rural regions. Indeed, VoIP providers, whether cable or Vonage-like, only *add* to competition in areas where an incumbent local exchange carrier already exists. These ILECs are default providers of last resort, fully regulated, and will remain so in the near term. So long as consumers have this default choice, there is no reason to regulate would-be competitors who seek to compete on price, service quality, advanced services, or a combination of these. To the extent a VoIP provider cannot compete, its business model will fail, and consumers can go back to their ILEC or switch to another competitor.

Regulation also reduces competition—which is why larger companies often support it. One of the biggest complaints I heard as a commissioner was the lack of telephone provider competition for residential services. Why would a state want to decrease available carriers by subjecting them to state agency barriers to entry, as well as burdensome operating regulations? There is little reason to do so other than state agency revanchism (an attempt to reverse the loss of authority imposed by the Vonage decisions) and irredentism (VoIP can be redeemed only through state oversight).

I emphasize that my advocacy for loss of state authority over VoIP services is confined to *traditional* powers exercised by state commissions, including retail rate and entry regulation, tariffing, service quality rules, and unbundling. There will almost certainly be no loss of state authority of after-the-fact *enforcement*—meaning, injunctive and fining authority for slamming, cramming, fraud, misleading advertising, improper commercial or billing practices, and public health and safety issues. (The FCC noted this continuing responsibility of states in its Vonage decision.) These enforcement issues can be handled

by attorneys general or state commissions. Also, it appears from the Vonage decision that state commissions may be able to regulate 911 cost, availability, and service quality, so long as it is not tied to certification requirements. Assuming the FCC does one day complete its IP-Enabled Services rulemaking, states most likely will be given explicit authority to impose state high cost fund charges on VoIP services.

These high cost fund charges are necessary because few other than hard-line economists or think tanks advocate a flash cut to a subsidy-free world. Rural LECs who depend on intrastate toll rates for two-thirds of their revenues and universal subsidies for a significant part of the remainder would need a massive increase in retail rates to cope with a loss of those revenues. Without subsidies, the monthly charge for basic service would be hundreds of dollars per month for many rural exchanges across the nation. Economists can offer opinions as to the desirability of these subsidies, but economists do not run the state or federal legislatures. People like Ted Stevens do. So states will continue to impose high cost funds on all interconnected carriers.

States will also remain involved in telecommunications safety issues, *i.e.,* 911 services, low-income telephony support, and wholesale interconnection requirements. It is certainly true that the FCC has vast resources that dwarf those of most state commissions. However, it is equally true that state commissions have greater expertise of local conditions; that is, the cost to serve each local exchange; reasonable wholesale rates for intrastate bottleneck facilities; the 911 system, including E-911 charges, public safety answering points, and emergency service providers; and the needs of the low-income and disabled communities.

A national expert on telecommunications, University of Colorado law professor Phil Weiser, has said much more on the cooperative federalism subject than perhaps any other. He posits in a recent paper that "the FCC should only insist on uniformity where there are substantial and clear efficiencies from eliminating diverse approaches, where a single approach is clearly optimal over others, or where there is a clear showing that the costs of diversity outweigh the benefits of state experimentation and implementation."[28] This is entirely reasonable.

To take one example, the issue of how best to collect and distribute high cost and universal service monies can greatly benefit from state experimentation. A number of proposals have been made: means testing (*i.e.,* should the urban poor support high cost vacation home phones in Aspen?); vouchers (by which the high-cost recipient can spend the money on his local ILEC, a wireless provider, or broadband provider to obtain VoIP); and reverse auctions (under which one or more winning bidders collect high cost monies in return for low cost service). Each of these ideas, taken separately or together as various hybrids, has merits and pitfalls. To say that the FCC would necessarily arrive at the best solution to this intractable issue is to ignore the history of grandiose federal programs. Airline regulation, welfare, food stamps, health care: the list of programs fraught with inefficiency, fraud, and incompetence is endless. The cost of the FCC or Congress getting it wrong is massive and, after the creation of reliance interests, hard to reverse. The cost of a state getting it wrong is much lower and more temporary. (As an aside, I would admit that California's propensity to get everything wrong has affected both its neighboring states and whole industries, but other states have benefited from this by learning what not to do.)

CONCLUSION

The FCC or Congress should insist on uniformity, meaning preemption, with regard to state agency economic and traditional telephony regulation of VoIP services. Whether nomadic or fixed, all VoIP services require high-speed broadband capability, and are the type of advanced services for which Congress has expressed a desire for national uniformity and encouragement. They also represent competition in the residential market, which should lead to better prices, choices, and service quality.

The decidedly anti-federalist notion that state public utility commissions must be preempted or legislatively precluded from regulating VoIP services like any other telephone service is not because commissions have ill intentions or are inept. It is precisely the opposite: commissions and their staff are rather adept at executing their well-intentioned regulations on those classified as "public utilities." But such a designation is anachronistic for non-monopolistic and competitive advanced services, like nomadic, fixed, and wireless types of VoIP service.

Endnotes

1 *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm'n Sept. 11, 2003) (order finding jurisdiction and requiring compliance).

2 Vonage Holdings Corp. v. Minnesota Public Utilities Commission, 290 F. Supp.2d 993 (D. Minn. 2003).

3 *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* WC Docket No, 03211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).

4 Minn. Public Utility Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007).

5 Available at http://www.dora.state.co.us/puc/DocketsDecisions/decisions/2004/C04-0004_03M-220T.doc.

6 WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

7 Full disclosure: I have done work for Comcast in the State of Colorado as outside counsel. This article has not been requested or commissioned by Comcast, and my position that VoIP should largely be deregulated was the same when I was a PUC commissioner in 2004. *See* http://www.dora.state.co.us/puc/DocketsDecisions/ decisions/2004/C04-0004_03M-220T.doc.

8 *See* Staff of the PSC v. Comcast IP Phone, LLC, Case No. TC-2007-0111.

9 *In the Matter of the Investigation to Address Obligations of VoIP Providers with Respect to the KUSF,* Docket No. 07-GIMT-432-GIT, ¶ 26.

10 By this I am not suggesting that states have the legal right to impose fees or charges at will on VoIP providers. To the extent states can do so, they should explicitly and legislatively limit state agency oversight to payment of such fees/charges, public safety, and interconnection.

11 47 U.S.C. § 332(c)(3)(A) (emphasis added).

12 *See* Sprint Spectrum, L.P. v. State Corporation Comm'n of Kansas, 149 F.3d 1058 (10th Cir. 1998) (addressing § 332(c)(3)(a) in the context of whether a state could require a CMRS to contribute to USF); Cellular

Telecommunications Industry Association v. FCC, 168 F.3d 1332 (D.C. Cir. 1999) (court found that § 332(c)(3)(A) did not preempt Texas law requiring CMRS providers in state to contribute to two state-run universal service programs); Digital Communications Network, Inc. v. AT&T Wireless Services, 63 F.Supp.2d 1194 (C.D. Cal. 1999) (where court determined that § 332(c)(3)(A) prevented state commission from asserting jurisdiction over a dispute between telecommunications providers regarding whether one provider was required to make its "one rate" plan available to reseller at wholesale rates); Bastien v. AT&T Wireless, 205 F.3d 983 (7th Cir. 2000) (involves a suit alleging *AT&T* misled plaintiff about his cellular telephone service and an analysis of § 332(c)(3)(A) and the Savings Clause); Texas Office of PUC v. FCC, 265 F.3d 313 (5th Cir. 2001) (in addressing whether a subscriber line charge price cap violated §§ 254(b)(1) and 254(i), the court held that the FCC's interpretation that §§ 254(b)(1) and 254(i) are merely aspirational is permissible under the *Chevron* analysis); Texas Office of Public Utility Counsel, et al.v. Federal Communications Commission, 183 F.3d 393 (5th Cir. 1999) (addressing CMRS contributions to the Federal USF and ETC designations).

13 Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, Final Decision and Order. 28 F.C.C.2d 267 (197I).

14 Amendment of Section 64.702 of the Commission's Rules and Regulation (Second Computer Inquiry), 77 F.C.C.2d 384 (1980).

15 47 U.S.C. § 153(43).

16 47 U.S.C. § 153(46).

17 47 U.S.C. § 153(20).

18 *'The Metaphysics of VoIP,"* Randolph J. May, C\LF article at http://news.com.com/2010-7352-5134896.html (January 5. 2004).

19 *Pu1ver.Com Free World Dialup,* Memorandum Opinion and Order, 19 FCC Red 3307 (rel. Feb. 19, 2004) ("*Pulver Order*").

20 *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges,* 19 FCC Rcd 7457 (rel. April 21, 2004).

21 *Id.* at *9.*

22 *Id.* at 1-2.

23 *See* Southwestern Bell Telephone, L.P. v. Missouri PSC, 461 F. Supp.2d 1055 (E.D. Mo. 2006) ("Net protocol conversion is a determinative indicator of whether a service is an enhanced or information service").

24 Minn. Public Utilities Commission v. FCC, *supra*, 483 F.3d at 582-83.

25 NCTA v. Brand X Internet Services, 545 U.S. 967 (2005).

26 *In re* Universal Service Contribution Methodology, 21 F.C.C.R. 7518 at 7546 ¶ 56 (2006).

27 While the Supreme Court in *United States v. Lopez* held that Congress exceeded it authority when it passed the Gun-Free School Zone Act because the Act could not be sustained as a regulation of an activity that substantially affects interstate commerce, no one can seriously doubt that inconsistent and burdensome regulation of 51 different state commissions substantially affects interstate commerce. 514 U.S. 549 (1995).

28 Philip J. Weiser, C*ooperative Federalism and its Challenges,* 2003 Mich. St. DCL L. Rev. 727, 729 (2003).

Tiers of a Fan: Sports, Programming, and the Referees

*By Raymond L. Gifford & Adam M. Peters**

Professional and college football fans across the country recently found themselves caught in the middle of an increasingly pitched struggle between the providers of sports programming and video distribution platforms. In a Super Bowl XLII preview, the New England Patriots sought to complete a perfect regular season against the New York Giants on The NFL Network and two national broadcast channels in the first multicast of an NFL game since Super Bowl I in 1967. Appalachian State's historic victory over Michigan was carried on the fledgling Big Ten Network, but the spectacle at the "Big House" was not available to Comcast or Time Warner customers.

Sports programming has exploded from Saturday afternoons past "thrill of victory and agony of defeat" to include specialized channels for specific sports (Golf, Fox Soccer), national sports networks (ESPN, ESPN 2), league-specific networks (NBA TV, NFL Network), regional sports networks (MASN, Fox Sports–region), conference specific (Big 10, Mountain), team specific (YES) and team owner-specific (Altitude). With constraints on the amount of bandwidth that video programmers can dedicate to sports on cable and satellite systems, passionate fan demand for access to their specific sports passion, and no immediately principled way to balance pricing access to video platforms with sharing the rents generated by sports programming, what look like simple, bi-lateral contract disputes between programmers and video platform owners turn quickly into first order political and regulatory issues.

The examples from last football season typify the contractual spats between programmers and major cable companies over whether sports networks should be located on special tiers of programming at a higher per-subscriber price or, in the alternative, more widely circulated (and thus more widely paid for) on "enhanced" video subscription packages. While the cable companies point to the spiraling costs of sports programming in an effort to shift some sports content to specialized tiers, the programmers counter that these companies unduly favor their own affiliated sports content by including these channels on basic or enhanced offerings.

The finger-pointing between programmers and distributors has resulted in messaging campaigns which have caught the attention of lawmakers and regulators alike. Some in Congress have threatened to pull the NFL's long-standing antitrust exemption if the league does not seek ways to more widely distribute "must see" games like the Patriots-Giants. State legislatures and regulators at the FCC have considered whether to intervene by mandating the resolution of disputes through an arbitration process. These disputes threaten to submerge what should be the object of commercial negotiations into a regulatory free-for-all—with all the unforeseen and unintended consequences that brings.

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Fragmentation, Exclusive Dealing, and Vertical Integration

The friction in the sports programming market is an outgrowth of a complex set of factors and trends in the market. At its core, sports programming is essential for video distributors to effectively compete. But sport is also a good with powerful, yet varying, demand elasticities and very narrow value windows. This means that the desire for "real-time" viewing runs the gamut of being critically important to some consumers and non-existent for others. This might have been less relevant when national broadcasters and ESPN provided most of the sports content necessary to satisfy the existing demand of the times, but sports programming has since become increasingly fragmented into regional sports networks and channels dedicated to certain sports, leagues, and even teams.

As a result of this phenomenon and the "ESPN effect"—which occurs when a network seeks to leverage the popularity of its content by passing higher league or team royalties through to subscribers—the overall cost of sports programming to consumers has risen at a meteoric pace. For instance, Cox, the nation's third largest cable operator, has estimated that roughly 40 % of the fees its pays go toward sports networks carried on standard cable—even though these channels receive only 10% of its total viewership.

Vertical Relationships

Add to this the impact of exclusive deals or vertical integration between video distributors and sports programmers. DirecTV's exclusive NFL Sunday Ticket, which affords consumers the opportunity to view all out-of-market games, has been widely credited as helping the satellite provider establish a beachhead in the market. However, the NFL purportedly limited this deal to DirecTV because it did not want to disturb its arrangement with national broadcasters, leaving cable companies and their customers in the cold. By contrast, a carriage dispute erupted between the YES Network and Cablevision when the cable company refused to carry New York Yankees games for over a year, and then demanded that the games be carried as a premium channel. Cablevision ultimately relented and began offering the network on an expanded tier; but the legal battle between the companies began as an antitrust claim, with YES claiming that Cablevision was using its status as a vertically integrated distributor in an attempt to protect its "monopoly" over sports programming.

While the FCC generally prohibits cable companies from entering into exclusive deals with affiliated programming vendors, competitors do not have unfettered rights to carry cable companies' affiliated content through a so-called "terrestrial loophole" in the federal Communications Act. While this loophole has been criticized as permitting cable companies to use sports programming to inhibit satellite competition in markets like Philadelphia and San Diego, the geographic "clustering" of cable networks have the benefits of allowing

these companies to achieve economies of scale and to compete with telecommunications carriers in voice and high-speed Internet.

To be sure, exclusive deals and vertical integration are largely pro-competitive responses by distributors to differentiate themselves in a market with increasingly vigorous competition between cable, satellite, and telecommunications providers. As these channels find their way onto certain distribution platforms, but not others, though, even an average sports fan may be left with a complex set of choices and the prospect of switching costs, since subscribing to multiple video platforms is not a realistic option for most consumers.

For programmers, placement on an expanded tier virtually guarantees a healthy return through subscriber fees and advertising revenues. But the scarcity of bandwidth on video platforms—exacerbated by the public's apparently appetite for video-on-demand (VOD)—means that distributors must try to maximize the value proposition for all consumers by choosing between thousands of available programming options.

Sometimes this price-value equation just does not add up. Thus, when the NFL Network expanded its programming by showing a limited number of games (announced by the monotone Bryant Gumbel, no less) and sought to ratchet up its price to 70 cents per subscriber in 2006—or when the Big Ten Network demanded $1.10 per subscriber for "second-tier" games in its home region last year—carriage on the coveted expanded tier was far from guaranteed. On the other side of the coin, the NBA recently struck a deal with Time Warner Cable to move NBA TV from a specialized tier *to* an enhanced tier, reducing the per-subscriber license fee from 35 cents per month to around 25 cents per month, because this satisfied the carrier's price-value equation.

While these fights may implicate fans' passions and deeply-held allegiances, from a legal perspective it is tough to see, at first blush, what is problematic. When billion-dollar plus programming platforms and billion-dollar plus sports leagues fight over spoils from consumers' love and willingness to pay for sports, the fights may be nasty and passionate, but they still look like plain old contract negotiations. Nevertheless, because consumers (including politicians) love their sports, because the value of a sports contest peaks and craters during its 'live' window, and because nothing in the communications sphere goes untouched by regulation, sports programming, and its discontents, offer a continuing top-tier regulatory and political struggle.

HD Nation

Coupled with increasing scrutiny by legislators and regulators over the rates charged for tiered programming options, the market dynamics mean that video providers have less flexibility to add more sports programming to their enhanced lineups on today's networks. With the advent and widespread adoption of high-definition (HD) television, the economic tensions endemic to sports programming could reach new heights.

First, pause to consider the broad implications of HD. More HD-ready sets will be shipped by consumer electronics manufacturers than standard-definition models this year, and more than half of HDTV owners will subscribe to a HD service. For sports programming, HD provides a qualitatively superior viewing experience (indeed, it is painfully difficult for some HD subscribers to revert to standard-definition programming). The consumer response to HD is significant. Recent data suggests that ESPN's HD audience in Los Angeles is 22% higher than it is in standard-definition households. Brand recognition of advertisements in HD is estimated to be three times higher than it is for ads in standard-definition format.

For the past several years, there has been tremendous speculation on what "killer application" might arise in the Internet space to fuel further investment in broadband networks. While the impact of video sharing services like YouTube cannot be understated, HD looks like the next killer application, with America's TV-loving culture driving the deployment and adoption of next-generation networks to the home.

And this is just the beginning. The next generation of HD, or ultra-HD, is on the horizon. In an ominous development for news anchors and their makeup artists everywhere, ultra-HD sets are projected to have sixteen times the number of pixels as HD video. These next-generation television sets, which will be powered by the Internet, will also be massive bandwidth hogs.

Unless and until all programming is provided over HD, however, we can expect the emergence of an "HD divide" between programming haves and have-nots. The disputes created by vertical integration and exclusive deals will become more pronounced. And, as HD programming comes with a higher price tag, these costs will need to pass through to consumers. The only question is: Which consumers? Will the costs and revenues be spread out across the broad base of subscribers to video platforms? Or will a subset of consumers pay premium-tier pricing for their interest? The economic stakes are enormous, which means the returns to rent-seeking are likewise.

The Specter of Regulation

Like all forms of television content, many of the issues involved with sports programming boil down to the proper allocation of rents. That said, nothing on television seems to captivate the American viewing public more than live sports; and fans and non-fans alike pay for new ballparks and collegiate sports at public institutions.

In a market with increasing fragmentation, "public interest" considerations are thus more likely to seep into the debate; unless programmers and distributors can reach commercial solutions that are consumer-friendly. Indeed, the historic multicast of the Patriots-Giants game was widely perceived as a concession by the NFL to its fans once the league found Congress to be a less than sympathetic audience. Moreover, the recent negotiations between Major League Baseball and video distributors for the rights to carry the MLB Channel (set to launch in 2009) and the league's Extra Innings package may be a sign of things to come, particularly when DirecTV's exclusive deal with the NFL expires in 2010. (In that case, after MLB reached a deal with DirecTV it offered the

same terms and conditions to other major video distributors. A consortium of cable companies ultimately opted in, but not until Congress played its part by pressuring MLB to make the package widely available.)

The failure of commercial solutions in high-profile cases may create the conditions for more drastic government intervention. Members of Congress have already threatened to reconsider the antitrust exemption for the NFL. Last year, the FCC and legislatures in six states considered rules that would require arbitration when commercial negotiations failed. Such an approach would presumably direct distributors on which programming to place in which tiers of service, effectively inserting a government decision-maker into the editorial process. Leaving free speech issues aside, this new age model for state-run television would seemingly require the government to pick winners and losers, since compelled carriage of one channel would likely require another channel to be bumped to another tier or off a video platform entirely.

For those who object to the high cost of sports programming or the specialized tiering of certain channels, a more radical response would require channels to be sold on an *a la carte* basis. Even with *a la carte*, the subject of considerable controversy, government would most assuredly get involved in mandating certain forms of tiering to protect favored types of content, which is precisely what is occurring with *a la carte* in Canada.

In the near term, however, the mere threat of regulation may conspire with market forces and technological advancements to move us in a direction toward de facto *a la carte*. With prices for tiered subscription packages at a virtual ceiling, and with ever-expanding programming options and outlets, video distributors may respond by offering a more diverse array of "smart bundles" of specialized programming, thereby stemming the regulatory tide.

The Next Playing Field: IPTV

While distributors are currently shifting to switched, interactive IPTV platforms through pay-per-view and VOD, programmers increasingly make their television content available on the Internet. As Bret Swanson and George Gilder point out, IPTV is "not necessarily an Internet service," but "television and the Internet over time will merge into something entirely new." For a glimpse of this future, look no further than Apple TV, which beams content from iTunes onto high-resolution screens in people's living rooms.

As this convergence between television and Internet occurs, the existing sports programming model will be turned on its head. Leagues and teams will have a greater ability to offer live content to consumers over unbundled, proprietary applications. This further fragmentation of sports programming also means that the allocation of rents between programmers and distributors may be determined in large part on whether, and to what extent, "network neutrality" rules are in place. Such rules could not only have a bearing on whether exclusive deals and vertical integration can take place, but whether distributors will have the ability to recoup some of their investment in fatter broadband pipes for next-generation television from programmers.

The dynamism of the broadband, consumer electronic, and programming markets meets head-on during two- and three-hour windows when a live sporting event happens. Intense fans care deeply—and will pay dearly—to watch their team. Meanwhile, broad swaths of viewers could care less. This dynamism cries out for government forbearance from interfering in sports programming markets. The economic model for apportioning rents between programmer and video platform owner is not immediately clear. Correlatively, the degree of vertical integration between platform owner, programming owners, and sports team has no *a priori* answer. The answers—or at least the institutions to facilitate the answers—will be discovered through market processes. While bi-lateral monopoly and situational opportunism problems are present in sports programming markets, in the end, programmers need platforms to reach their viewers, and platforms need content that consumers value; and the higher they value content, the better.

Book Reviews

The Political Foundation of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History

By Keith E. Whittington

*Reviewed by Thomas W. Merrill**

Princeton is probably the most esteemed university in America not to have a law school. It has made up for this deficiency, at least in part, by serving as the home of some of the most astute political scientists specialized in the study of the Supreme Court. The tradition began with Edward Corwin, perhaps the foremost constitutional scholar of the early decades of the twentieth century. Corwin was followed by Walter Murphy, a pioneer in the study of strategic interaction among the justices. The current heir to this title is Keith Whittington, the William Nelson Cromwell Professor of Politics at Princeton. Whittington combines a superb knowledge of Supreme Court history with a sophisticated understanding of the history and dynamics of American political institutions. As a result, his scholarship situates the Court and its decisions in a much broader political context than most lawyers are able to offer. Yet, at the same time, it avoids the reductionism associated with many accounts of the Supreme Court produced by political scientists.

Whittington's latest book addresses one of the central puzzles of American political history: how did the Supreme Court become so powerful? We live in a country that prides itself on being a democracy, in terms of both political governance and culture. Yet, on a remarkably wide-ranging list of social issues, public policy is set by a committee of nine elderly lawyers who have been appointed rather than elected, and who, for practical purposes, serve for life. Whittington's answer to this puzzle is nuanced and multi-dimensional. In the end, however, it boils down to the proposition that the Supreme Court has become so powerful because other political actors, most notably the President and Congress, have wanted the Court to be powerful. Only rarely have presidents sought to supplant the authority of the Supreme Court to define the constitutional framework in which American government operates. More commonly, elected political leaders have found it to be in their interest to defer to the Court, or to encourage the Court to take on hot button issues in the hope of removing them from the arena of ordinary politics.

There is nothing in the Constitution which foreordains the Court's claim to supremacy in interpretation of the "supreme Law of the Land;" that is an understanding which has emerged only over time. This development was almost certainly not anticipated by the framers. They may well have foreseen the power of judicial review. But judicial review—the prerogative of courts independently to construe and enforce the Constitution in cases that come before them—does not entail judicial supremacy. The concept of judicial supremacy means that the political branches of government should defer to the Court's articulation of the meaning of the Constitution, without regard to whether that understanding has been incorporated in a judicial judgment. One way of restating Whittington's thesis is in terms of delegation. Once the political branches, most importantly the President but also Congress, accept the principle of judicial supremacy, they have in effect delegated power to the Supreme Court to make policy in the name of the Constitution. Since the Constitution is a spare document subject to a variety of interpretations, this development has made the U.S. Supreme Court the most politically powerful tribunal in the world.

In an effort to explain this remarkable state of affairs, Whittington divides American presidents into three categories: reconstructive, affiliated, and oppositional. Reconstructive presidents seek to advance a theory of the Constitution that is at odds with the jurisprudence of the current Supreme Court majority. As Whittington correctly notes, such presidents are rare. Franklin Roosevelt and Lincoln are the clearest examples. Whittington also puts Jefferson and Jackson in this category, and thinks that Ronald Reagan aspired to be a reconstructive president, although with only partial success. Only reconstructive presidents embrace a departmentalist conception of constitutional interpretation, in which each branch has authority to interpret the Constitution independently of the others. All other presidents submit to the notion of judicial supremacy.

Affiliated presidents are the easiest to understand. Affiliated presidents agree with the central constitutional views of the current Supreme Court majority, and thus see no reason to question the Court's supremacy in matters of constitutional interpretation. Harding, Coolidge, and Hoover were thoroughly comfortable with the tenets of laissez fair constitutionalism, just as Truman and Eisenhower were thoroughly comfortable with the tenets of New Deal constitutionalism. Affiliated presidents defer to the Court, present arguments designed to flatter the Court, and appoint justices to the Court who will not disturb the constitutional status quo.

Oppositional presidents are much harder to understand. Oppositional presidents embrace constitutional positions that are at odds with the current Supreme Court majority. Yet, for various reasons, they too embrace the concept of judicial supremacy, and thus fail to challenge the Court's preeminence in matters of constitutional interpretation. The most common explanation for this, according to Whittington, is political weakness. The Congress may be controlled by another party, or the President may feel compelled to curry favor with a faction of his own party which has reasons to prefer the existing constitutional paradigm. For example, Grover Cleveland, a Democrat, was beholden to New York financial interests. This may explain why he urged his fellow Democrats faithfully to obey the rulings of the Supreme Court upholding property and contract rights against populist legislation, and appointed Horace Peckham, the author of *Lochner v. New York*, to sit

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on the Court. I also suspect, although Whittington is more circumspect about this matter, that limitations of vision or imagination on the part of certain presidents may account for their diffidence toward the Court.

Whittington's typology is illuminating. But it leaves many questions unanswered. Why have there been so few reconstructive presidents in American history? Why do affiliated presidents and oppositional presidents end up behaving in ways that are virtually indistinguishable? Most fundamentally, what accounts for the slow accretion of power to the Court, if different politicians have different reasons for deferring to the Court? One can understand why a few presidents (Lincoln, Roosevelt, Reagan) would want to take back the power ceded to the Court. And one can understand why many more presidents would be only too happy to cede authority to the Court or to quibble around the margins without directly confronting the Court's claim to supremacy. But why, over time, has power slowly but steadily flowed in the direction of the Court, and away from the political branches?

A number of possibilities suggest themselves. One might be that the Court is in fact more majoritarian than either the Office of the President or the Congress. The President and Congress are beholden to the coalitions of interest groups that put them in power and sustain them thereafter—what we have come to call the "base" of each political party. The Justices, who need not stand for election, and are nearly impossible to remove from office, are not burdened with such obligations. Some justices no doubt decide cases in accordance with their ideological predispositions. But this is difficult to sustain over a long career, especially as issues change in unanticipated ways. The more typical decisional strategy—especially on the part of the median justices who tend to control outcomes in close cases—may be to decide in accordance with what the Justice intuits a majority of Americans would want the result to be. Perhaps this majoritarianism, replicated over a sustained period of time, is what has given the Court enormous authority in the eyes of the public. Hence occasional lapses of overreaching are quickly forgiven, and the Court continues to rule without serious opposition.

Another possibility is that the Court enjoys certain advantages by reason of its continuity as an institution. The average tenure of justices is now over twenty-six years. This means that turnover is low, and the collective level of experience high. Presidential tenure cannot exceed eight years and is often less. Congressional tenure, especially in the Senate, is becoming more transient. As a result, the Court may have certain built-in advantages in the perennial struggle for political power. It may be more capable of acting purposefully over a sustained period of time. As anyone who has worked in a complex organization knows, authority tends to flow towards those who are most competent to get the job done. The Justices may also share a stronger loyalty to their institution and its prerogatives than some presidents or members of Congress do toward their institutions. This loyalty may translate into tacit agreement to temper temporary individual advantage in order to promote the interests of the institution, which are implicitly understood to mean aggrandizement of its power relative to other institutions.

All this is, of course, speculation. Whittington prefers instead to make judgments grounded in the careful gathering of historical facts. And I am sure that this fine scholar, and through him Princeton University (with or without a law school), will continue for some time to be an important contributor to our understanding of the Supreme Court and its outsized role in American society.

Under God: George Washington and the Question of Church and State

By Tara Ross & Joseph C. Smith, Jr.

*Reviewed by John J. DiIulio, Jr.**

Contrary to the arguments of some, James Madison, like most other Framers, envisioned America neither as a Christian or secular state, but rather a godly republic, a constitutional regime that acknowledged the God of Abraham and permitted religion to be both seen and heard in the public square, while promoting religious pluralism and forbidding religious tests for citizenship and office-holding. In 1952, in *Zorach v. Clauson*, U.S. Supreme Court Justice William O. Douglas, even while upholding the hideous, Catholic-baiting, no-aid separation doctrine invented a half-decade earlier by his ex-Klansman colleague, U.S. Supreme Court Justice Hugo Black (*Everson v. Board of Education*), nonetheless wrote that America's political system "presupposes a Supreme Being," and warned church-state separation extremists against trying to outlaw and eradicate even indirect government ties to religion.

Of course, neither Madison nor the other Founders envisioned America developing into a federal republic wherein the national government spent over a trillion dollars each year, or in which it implemented its public laws and policies largely by sending much of that money, with or without strings attached, to state and local governments, or doing so via grants, contracts, and vouchers to for-profit corporations and nonprofit organizations, both religious and secular. Indeed, neither "nonprofit organizations," nor, for that matter, the Internal Revenue Service (IRS) and the IRS code that decides on tax-exempt status, were anywhere in their capacious intellects or imaginations.

But only what Madison would have denounced as "theoretic politicians" and "factious minds" could fail in our day to understand that their wise strictures against "establishment" (as in taxing all to support a preferred state church, or giving public money to sectarian groups for sectarian purposes) do not apply as such to government support for religious congregations or faith-based organizations that use the funds for social services, not worship services, refrain from proselytizing, and contribute their own time and money to the civic-minded cause.

Madison and company would have been doubly dumbfounded by the disingenuousness manifested in our day by legal minds that breeze past studies demonstrating that, in places like Philadelphia, just blocks from where the Constitution was signed, religious non-profits lead in supplying scores of

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social services to neighbors in need without regard to their neighbors' religions, but are often discriminated against when it comes to getting government support to sustain or expand their services.

Memo to Justice Souter, Professor Feldman, the ACLU, and like-minded others: Read *all* your Madison and Jefferson; get out more to inner-city communities that rely heavily on these faith-based organizations; explore the "faith factor" research by scholars at Harvard and other places that show how religion builds "social capital," spurs volunteer mobilization, and cost-effectively begets other pro-social consequences for individuals and communities alike; and start by studying Tara Ross and Joseph C. Smith, *Under God: George Washington and the Question of Church and State*.

Among my favorite recent books on Washington and religion are Peter Lillback, *George Washington's Sacred Fire* (2006), Peter Henriques, *Realistic Visionary: A Portrait of George Washington* (2006), and Michael Novak and Jana Novak, *Washington's God: Religion, Liberty, and the Father of Our Country* (2006). In sum, Lillback argues that Washington was mostly a committed Christian who lived his faith; Henriques concedes that Washington was no Deist, but emphasizes how little he invoked Christ's divinity; and the Novaks (father and daughter) steer a middle path that, in the end, lands them closer to Lillback than to Henriques.

Under God is now another favorite on the subject. In a way that is academically grounded yet accessible, pointed without being polemical, Ross and Smith answer, or at least begin to address, several important but hitherto unresolved questions about Washington's faith-related civic sensibilities and views. The book's part two also reprints many of Washington's writings (letters, speeches, military orders, and more) on religion, letting him speak for himself. The writings that are reprinted are a small sample, but not, so far as I can judge, a biased sample.

In their opening arguments, Ross and Smith note how bizarre it is that Jefferson's "wall of separation" metaphor, which he penned in passing in a letter to Danbury Baptists, has so dominated discourse on the nation's intended church-state cast and character. Washington, like many other Founders, had far more to say about the matter than Jefferson ever did. Washington was a believer, but, like Madison's, his was a church-state civic sensibility tutored by experience. As Ross and Joseph write:

> *Particularly following his years at the head of a diverse American army, Washington knew the importance of protecting the religious liberty of all—even those in minority religious groups. Indeed, this attitude sometimes prompted Washington to exempt religious dissenters from laws of general applicability… This practical approach endeared him to minority religious groups of the time, such as Jews, Baptists, and Quakers*.

My, how refreshing it would be if the ACLU or other groups that falsely invoke Jefferson's wall metaphor as historical authority for their church-state extremism imitated Washington's "practical approach" long enough to understand how, today, the minority religious groups that are adversely affected by anti-religious discrimination by government are mostly led by urban, community-serving African-American and Latino clergy. (Some hoped-for miracles, of course, never happen.)

Ross and Smith add evidence to the case that, while Washington was supremely circumspect in all matters including religion (nobody slapped his back, and he preached to no one), he was, if anything, more prone to express his "specifically Christian commitments" in public than he was in private.

This finding has present-day significance. In the 1960s and 1970s, the "God bless America" or "God bless you" statements with which politicians in both parties today often close their speeches had actually fallen from favor. Even some leaders who were committed Christians rarely breathed a word about either their faith or any faith in public. That began to change with President Ronald Reagan. President Bill Clinton publicly referenced Jesus often during his second term, probably more than President George W. Bush, "faith-based initiative" and all, did during his first term.

As Ross and Smith reason, if in fact Washington was not a Christian, or was a Deist, or was, beneath it all, irreligious (a position that only a few quack historians now favor, but which had its moments in the 1960s and 1970s), then his public expressions about God are all the more, not less, validating for those who believe in the nation's faith-friendly constitutional foundations ,and wish to see them respected, not reviled or renounced, in our own day. As they write, "Washington was always extremely conscious that his actions would set precedents for those who followed him. His official uses of religion are thus particularly relevant in indicating that he believed such uses to be proper and (later) constitutional."

Amen, and *Under God* is remarkably faithful, so to speak, to Washington's legacy from his days as commander of the Virginia Regiment to his days in the Virginia House of Burgesses, from his place at the head of the Continental Army to the years when he served as first president of the United States, which, from 1792 to 1797, included his service as the first president to interpret the First Amendment's two religion clauses.

For instance, Ross and Smith unearth Washington's letter to John Jay concerning "the appropriateness of a public-private partnership for the purpose of converting the Indians to Christianity." He did not "allude to any potential impropriety in giving public assistance to a project" involving religious institutions, because the project had (in Washington's own words) "humanity and charity for its object" and could, with due care, "be made subservient to valuable political purposes." Of course, that is hardly the so-called charitable choice, non-discrimination provision on church-state partnerships signed into law by Clinton in 1996, but Washington's reasoning anticipates that law's sacred places for civic purposes logic.

After the First Amendment was enacted, Washington became even more cautious about paving any federal path to religious establishment or favoring one religion over others. But he saw no reason to behave as if government interface with religious individuals or institutions was constitutionally impermissible, or anything of the sort. Among other bills he signed and actively supported after 1792 were several that made land grants to religious bodies. One grant was to the Moravian Society for Propagating the Gospel. Its name bespoke what today we would term its "pervasively sectarian" character, but Washington applauded the government's partnership with its

work, and supported government-funded religious aid to the Indians without fail.

Ross and Smith conclude their outstanding treatise by contrasting what Washington, like most Founders, believed about the godly republic with how their ideas and ideals have been caricatured or twisted by many since the mid-twentieth century:

> *Washington's approach to church-state relations differs from Jefferson's "wall-of-separation" and the line of modern-day legal decisions it has spawned. Washington's perspective on the First Amendment would permit a much more religion-friendly government, even as it emphasized the importance of religious freedom.*

If I have a criticism, it is that Ross and Smith at times wring the record to make Washington come off like an angelic staff lawyer for the contemporary Christian Right or one of its favorite legal beagle think tanks or advocacy groups. They do that rarely. The book, on the whole, is outstanding and well worth reading and heeding.

Still, let me conclude by reminding, should we need reminding, that Washington, like Jefferson, held slaves. Washington was less moved by Christian convictions than many among his contemporaries (both North and South) were to recognize and witness to slavery's immorality. He was better toward the Indians, but far from just to them. And his religious pluralism often had a distinctly or denominationally southern Protestant accent. It took successive religious movements, including the one led by Dr. Martin Luther King, Jr., to begin to right racial historic wrongs that had long had public law, and otherwise great leaders like Washington, behind them.

Secular liberals played a role in those curative religion-led movements too. The sad irony, however, is that today, aided and abetted by their opposite numbers—namely, some politically conservative Christians who would rather wage culture wars than serve the poor or solve social ills—it is they who distort history and deny to sacred places the public support with which they could freely, fairly, and constitutionally serve civic purposes. Neither Washington nor Jefferson, were they with us today, would join or bless either extreme church-state faction in this one nation under God.

Mass Torts in a World of Settlement

By Richard A. Nagareda

*Reviewed by Mark A. Behrens**

Vanderbilt Law Professor Richard Nagareda's recent book, *Mass Torts in a World of Settlement*, explores the evolution of tort law from individual cases involving idiosyncratic events to the modern era of "mass torts" affecting large numbers of broadly dispersed persons. The book thoroughly analyzes the role of lawyers in many important mass torts including asbestos, Agent Orange, silicone gel-filled breast implants, the fen-phen diet drug combination, the state attorneys general tobacco litigation, lawyer-manufactured silicosis claims, and Vioxx.

The evolving response of the legal system to mass torts, as Professor Nagareda explains, has been to shift from tort to administration: "The sheer numbers of claims, their geographic breadth, their reach across time to unidentified future claimants, and their factual patterns, together, demand the kind of systematized treatment characteristic of administrative processes." Management of mass torts, he argues, has come to resemble the gridlike schemes set up to settle workers' compensation claims, except that mass tort settlements have primarily come through *ad hoc* experimentation by lawyers rather than through public legislation.

Professor Nagareda argues that mass settlements have transformed the tort system so acutely that rival teams of lawyers now operate as sophisticated governing powers rather than mere litigators. He explains: "The real story of mass torts today is the story of how these lawyers have come to function as a rival regime of legal reform, one that wields the power to replace the legal rights of affected persons with a new set of rights spelled out in some manner of settlement agreement." The agents who design the transactions to resolve mass torts, he concludes, have become endowed with the power of governance. Former Clinton Administration Labor Secretary Robert Reich called this phenomenon "regulation through litigation" in the context of the state attorneys general tobacco lawsuits.

Professor Nagareda's controversial and provocative solution to the administration of mass torts is the replacement of the existing tort system with a private administrative framework to address both current and future claims. His solution is pioneering and offers a path that avoids the inability of the court system to resolve such claims through the class action device post-*Amchem* as well as the failure of Congress to overcome political hurdles that have prevented the enactment of comprehensive legislative solutions to mass torts such as asbestos. As Yale Law Peter Schuck explained: "[Nagareda] offers an ingenious and attractive public law solution to what he sees as a public law problem—and shows us how to achieve it."

Professor Nagareda's book is a must-read for concerned citizens, policymakers, practicing lawyers, investors, academics, and executives that must grapple with the changing face of tort litigation in a mass action world.

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