

E  
N  
G  
A  
G  
E



The  
Journal of the  
Federalist Society  
Practice Groups

Project of the  
E.L. Wiegand  
Practice Groups

NOTA BENE

*Lyondell Chemical Co. v. Ryan: The Duty of Good  
Faith Comes to Revlon-Land*  
by Robert T. Miller

*The Individual Health Insurance Mandate and  
the Constitutional Text*  
by Ilya Somin

*Anna Nicole Smith Goes Shopping:  
The New Forum Shopping Problem in Bankruptcy*  
by G. Marcus Cole & Todd Zywicki

*Why Vote in Secret? Balancing Autonomy and  
Accountability in Absentee, Card Check, and  
Corporate Voting Contexts*  
by Allison R. Hayward

*Sixty Years Later: Holden Caulfield, Fair Use,  
and Prior Restraint Under the Copyright Act*  
by David Applegate

*The Opportunity and Peril of Smart Grid*  
by Ray Gifford & Eric Gunning

BOOK REVIEWS

*Crisis and Command: A History of Executive Power from George  
Washington to George W. Bush* by John Yoo  
& *The National Security Court System: A Natural Evolution of  
Justice in an Age of Terror* by Glenn Sulmasy

**The Federalist Society  
For Law and Public Policy Studies**

**Directors/Officers**

Steven G. Calabresi, *Chairman*  
Hon. David M. McIntosh, *Vice Chairman*  
Gary Lawson, *Secretary*  
Brent O. Hatch, *Treasurer*  
Eugene B. Meyer, *President*  
...  
T. Kenneth Cribb, *Counselor*

**Board of Visitors**

Hon. Robert H. Bork, *Co-Chairman*  
Hon. Orrin G. Hatch, *Co-Chairman*  
Lillian BeVier  
Hon. C. Boyden Gray  
Hon. Lois Haight Herrington  
Hon. Donald Paul Hodel  
Hon. Frank Keating  
Harvey C. Koch  
Robert A. Levy  
Hon. Edwin Meese, III  
Hon. Gale Norton  
Hon. Theodore B. Olson  
Andrew J. Redleaf  
Hon. Wm. Bradford Reynolds  
Nicholas Quinn Rosenkranz

**Staff**

*President*

Eugene B. Meyer

*Executive Vice President*

Leonard A. Leo

*Senior Vice President & Faculty Division Director*

Lee Liberman Otis

Erin Sheley, Deputy Faculty Director

Barrett Young, Assistant Faculty Director

*Lawyers Division*

Dean Reuter, Practice Groups Director

Lisa Budzynski Ezell, Lawyers Chapters Director

Jonathan Bunch, State Courts Project Director

Juli Nix, Deputy Director

David C.F. Ray, Associate Director

Hannah DeGuzman, Assistant Director

Catherine Zanetti, Assistant Director

Allison Aldrich, Assistant Director

*Student Division*

Peter Redpath, Director

Daniel Suhr, Deputy Director

Kate Beer, Associate Director

Caitlin Carroll, Assistant Director

*Pro Bono Center Director*

Peggy Little

*International Law and Sovereignty Project*

James P. Kelly, III, Director

Alyssa Luttjohann, Deputy Director

*Finance Director*

Douglas C. Ubben

*Development*

Patty Price, Director

Emily Kuebler, Associate Director

Thomas Kraemer, Assistant Director

*Information Technology Director*

C. David Smith

*Membership Director*

Bridget Brophy

*Office Management*

Rhonda Moaland, Director

Matt Nix, Assistant Director

*Letter from the Editor...*

*Volume 11, Issue 1*

ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY PRACTICE GROUPS provides original scholarship on current, important legal and policy issues. It is a collaborative effort, involving the hard work and voluntary dedication of each of the organization's fifteen Practice Groups. Through its publication, these Groups aim to contribute to the marketplace of ideas in a way that is collegial, measured, and insightful—to spark a higher level of debate and discussion than we often see in today's legal community.

Likewise, we hope that members find the work in the pages to be well-crafted and informative. Articles are typically chosen by our Practice Group chairmen, but we strongly encourage members and general readers to send us their commentary and suggestions at [info@fed-soc.org](mailto:info@fed-soc.org).

## ADMINISTRATIVE LAW & REGULATION

- The Regulation of Prescription Drug and Restricted Medical Device Advertising  
*by Kyle Sampson & Kayte Spector-Bagdady*..... 4

## CIVIL RIGHTS

- Fixing the Civil Rights Commission *by Kenneth L. Marcus* ..... 9

## CORPORATIONS, SECURITIES & ANTITRUST

- Lyondell Chemical Co. v. Ryan*: The Duty of Good Faith Comes to *Revlon*-Land  
*by Robert T. Miller*..... 14

## CRIMINAL LAW & PROCEDURE

- McDonald v. Chicago*, the Meaning-Application Distinction, and “Of” in the Privileges or Immunities Clause  
*by Christopher R. Green* ..... 24

## ENVIRONMENTAL LAW & PROPERTY RIGHTS

- The Record of the Roberts Court in Environmental Cases: Pro-Business or Pro-Government?  
*by Jonathan H. Adler* ..... 31
- Junk Science and Climate Change: Thoughts from the Federalist Society’s 1997 Colloquium on “Junk Science, the Courts, and the Regulatory State”  
*Foreword by Mark C. Rutzick*..... 39  
*Report on Colloquium by Jeffrey Clark*..... 40

## FEDERALISM & SEPARATION OF POWERS

- The Individual Health Insurance Mandate and the Constitutional Text  
*by Ilya Somin*..... 49
- Originalism, in a Nutshell *by Emily C. Cumberland*..... 52

## FINANCIAL SERVICES & E-COMMERCE

- Anna Nicole Smith Goes Shopping: The New Forum Shopping Problem in Bankruptcy  
*by G. Marcus Cole & Todd Zywicki* ..... 57
- Proposed Federal Legislation Seeks to Overturn Supreme Court Limits on Aiding and Abetting Liability in Certain Securities Cases  
*by Jeffrey J. Jones, J. Todd Kennard & Marjorie P. Duffy*..... 63

## FREE SPEECH & ELECTION LAW

- Why Vote in Secret? Balancing Autonomy and Accountability in Absentee, Card Check, and Corporate Voting Contexts  
*by Allison R. Hayward*..... 67
- The Regulation of Grassroots Lobbying  
*by William R. Maurer*..... 73
-

---

## INTELLECTUAL PROPERTY

- Sixty Years Later: Holden Caulfield, Fair Use, and Prior Restraint Under the Copyright Act  
*by David Applegate* ..... 77
- “Promoting the Progress” or Paying for Delay? Balancing Patent and Antitrust Law in the Age of  
Health Care Reform  
*by Robert G. Pluta* ..... 86

## INTERNATIONAL & NATIONAL SECURITY LAW

- Putting Terrorists out of Business: Using Sarbanes-Oxley to Prosecute Terror Financiers  
*by Adam R. Pearlman* ..... 91
- The European Union, the Treaty of Lisbon, and “Justice and Home Affairs”  
*by Paul Rosenzweig* ..... 97
- International Law Under the Constitution and Transnational Progressives  
*by Vincent J. Vitkowsky* ..... 101

## LABOR & EMPLOYMENT LAW

- The Future of Work Status Legislation and E-Verify *by Samson R. Elsbernd* ..... 104

## LITIGATION

- RAND Issues Report on Abuse of Medical Diagnostic Practices in Mass Litigation  
*by Mark A. Behrens & Corey Schaecher* ..... 109
- Holding Pharma Plaintiffs to Their Pleading Burden: Implications of *Twombly* and *Iqbal*  
*by Eric Lasker & Michael Junk* ..... 113
- Authorities Split After the Supreme Court’s *Hall Street* Decision: What Is Left of the Manifest  
Disregard Doctrine?  
*by Stephen J. Ware & Marisa C. Maleck*..... 119

## RELIGIOUS LIBERTIES

- Christian Legal Society v. Martinez*: Religious Student Groups, Nondiscrimination Rules, and the  
Constitution  
*by Gregory S. Baylor*..... 122
- Positive Secularism and the American Model of Religious Liberty  
*by Richard W. Garnett*..... 126

## TELECOMMUNICATIONS & ELECTRONIC MEDIA

- The Opportunity and Peril of Smart Grid  
*by Ray Gifford & Eric Gunning*..... 128

## BOOK REVIEWS

- CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO  
GEORGE W. BUSH by John Yoo  
*Reviewed by John C. Eastman* ..... 132
- THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF  
TERROR by Glenn Sulmasy  
*Reviewed by Hartmann Young*..... 134
-

---

# ADMINISTRATIVE LAW & REGULATION

## THE REGULATION OF PRESCRIPTION DRUG AND RESTRICTED MEDICAL DEVICE ADVERTISING

By Kyle Sampson & Kayte Spector-Bagdady\*

---

As the Internet's presence in the lives of Americans grows, so does the opportunity for companies to promote their products online. The healthcare industry, in particular, has been influenced by the proliferation of information on the Internet, with over 52 million adults searching the Internet for health information<sup>1</sup> and almost half of all adults turning to the Internet as their first reference point for healthcare information.<sup>2</sup> The Internet's important role in disseminating healthcare information to the public has led inexorably to a proliferation of prescription drug and medical device advertising on the Internet.

Under the Federal Food, Drug and Cosmetic Act (the "FD&C Act"), the U.S. Food and Drug Administration ("FDA" or "Agency") is responsible for regulating the labeling of prescription drugs and medical devices, as well as the advertising of prescription drugs and restricted medical devices.<sup>3</sup> While FDA has issued numerous regulations and Guidance documents<sup>4</sup> on the promotion and advertising of prescription drugs generally, the Agency has not issued any comprehensive regulations or Guidances that give adequate direction to advertising on the Internet.

This Article discusses the current legal framework of FDA regulation of labeling and advertising, how the medium of the Internet confounds the premises upon which current regulations are built, and the steps the FDA currently is taking to understand and regulate prescription drug and restricted medical device advertising on the Internet. The Article then proposes possible approaches to regulation that the FDA may consider.

### I. FDA Regulation of Labeling and Advertising of Prescription Drugs and Restricted Medical Devices

The FDA is responsible not only for regulating the labeling of prescription drugs and medical devices, but also for the advertising of prescription drugs and restricted medical devices. It is important to understand the difference between labeling and advertising in order to consider their possible application to communications on the Internet.

#### A. Prescription Drug and Medical Device Labeling

Under the FD&C Act, a "label" is defined as "a display of written, printed, or graphic matter upon the immediate container of any article."<sup>5</sup> In addition, the Act defines "labeling"

to mean "all labels and other written, printed, or graphic matters (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."<sup>6</sup> In *Kordel v. United States*,<sup>7</sup> the U.S. Supreme Court interpreted the statutory definition of "labeling" broadly, holding that the FDA has the power to regulate both written materials attached to the product (i.e., labels), as well as any written materials that have a "textual relationship" with the product. "One article or thing is accompanied by another when it supplements or explains it . . . . No physical attachment one to the other is necessary."<sup>8</sup> Written materials about a product therefore do not have to be attached to or sent along with a product to be regulated by the FDA as labeling.

Based on *Kordel*, the FDA has issued a regulation defining labeling materials to include

[b]rochures, booklets, mailing pieces, detailing pieces . . . calendars, price lists, catalogs . . . letters, motion picture films . . . sound recordings, exhibits, literature, and reprints and similar pieces of printed, audio, or visual matter descriptive of a drug . . . which are disseminated by or on behalf of its manufacturer, packer, or distributor.<sup>9</sup>

Labeling therefore includes a broad spectrum of written materials. If materials are deemed to be labeling, they must contain "adequate directions for use" of the drug or device, as well as adequate warnings against harmful use<sup>10</sup>—and the materials must not contain any "false or misleading" statements.<sup>11</sup>

#### B. Prescription Drug and Restricted Medical Device Advertising

The FD&C Act does not define "advertising," but the FDA has interpreted the term to include information, besides labeling, that is issued by or on behalf of the "manufacturer, packer, or distributor of the drug" for the intention of drug promotion.<sup>12</sup> FDA regulations list examples of advertising that include "published journals, magazines, other periodicals, and newspapers, and advertisements broadcast through media such as radio, television, and telephone communication systems."<sup>13</sup> If material is deemed to be advertising, then it must contain the established name of the drug, the drug's ingredients, and a "brief summary" composed of "side effects, contraindications, and effectiveness."<sup>14</sup>

### II. The Application of FDA Advertising Regulations to the Internet

FDA's regulation of labeling and advertising as set forth in Section I., *supra*, is premised on labeling and advertising that is communicated primarily in print or on television or radio. Court and administrative interpretations have established a body of information about the limits of the law and FDA's regulatory authority and provided regulated industry with some certainty—allowing drug and device companies to label and

---

\* Kyle Sampson is a partner (admitted only in Utah) at Hunton & Williams LLP ([www.hunton.com](http://www.hunton.com)) and a member of the firm's Food and Drug Practice. He can be reached at [ksampson@hunton.com](mailto:ksampson@hunton.com). Kayte Spector-Bagdady is an associate (admitted only in New York) at Hunton & Williams LLP and a member of the firm's Food and Drug Practice. She can be reached at [kspector@hunton.com](mailto:kspector@hunton.com).



promote their products in magazines and on TV in a lawful manner. Internet search engines, such as Google, that enable consumers to enter keywords and obtain brief summaries of websites potentially relevant to their search, however, have presented unique challenges to drug and device companies who wish to promote their products in compliance with FDA strictures. The so-called “Web 2.0,” which includes interactive social media like YouTube, Facebook, and Twitter, where consumers can create or alter Internet-based communications, also increases the complexity of these challenges. The FDA is likewise challenged to keep up with new technologies and an increasingly technologically savvy public.

Not surprisingly, then, both the FDA and regulated industry are concerned about the lack of clarity surrounding the legal requirements for prescription drug and restricted device advertising on the Internet. On April 3, 2009, the Agency sent 14 Untitled Letters to drug companies that used sponsored links<sup>15</sup> on search engines, such as Google.<sup>16</sup> The Untitled Letters condemned the fact that the brief summaries appearing with the sponsored links did not include all of the risk information required in drug advertising, even though the summaries included links to fully compliant advertising pages.<sup>17</sup>

In light of the dearth of Internet-specific advertising regulatory guidance, the letters frustrated some members of industry.<sup>18</sup> Compounding the frustration was the fact that the brief summaries appearing with the sponsored links are, per search engine standards, only allowed to be of a certain length and cannot, as a result, include all mandatory risk information.<sup>19</sup> Prior to issuance of the Untitled Letters, many in the industry had adhered to a “one-click rule,” believing that if risk information was only a click away, the FDA would determine that the communications were compliant.<sup>20</sup> The FDA apparently did not agree with this assessment.

After the Untitled Letters were issued, an FDA spokesperson confirmed in an interview that “[o]ur laws for how products that are approved by the Agency can be marketed to consumers are the same regardless of the medium, whether they are print ads, radio ads, television ads or Internet ads.”<sup>21</sup> In making these statements, the FDA declared unequivocally that its regulation of prescription drug and restricted medical device advertising extends to the Internet, albeit without addressing the unique complications of applying the Agency’s “earthbound” regulations to that ever-changing medium.

FDA’s failure to address the unique complications of the Agency’s regulation of Internet communications on prescription drugs and restricted devices is problematic. If, for example, FDA continues to enforce the requirement that sponsored links on Internet search engines must contain all of the risk information required of advertising, then drug companies will be forced to change their promotional efforts significantly. These changes may include removing the indication or dosage of a product in order to fall within the regulatory exception from providing safety information for “reminder advertising,”<sup>22</sup> or omitting the name of the product entirely and disseminating only “help-seeking” advertisements.<sup>23</sup>

With nearly half of Internet users employing a search engine,<sup>24</sup> drug and device companies likely will be tempted to employ reminder or help-seeking advertisements on

search engines, rather than miss out on such a large amount of consumer traffic. Industry leaders point out, however, that removing product names and indications might be more confusing and misleading to consumers than the brief summaries associated with Internet search results.<sup>25</sup> For example, Propecia® advertisements currently link to the site, hair-loss-medication.com, which in turn redirects Internet users to Propecia.com. Thus, a consumer might click on hair-loss-medication.com, expecting neutral information about hair loss medication, and instead receive biased advertising materials promoting Propecia®.<sup>26</sup> On the other hand, if drug and device companies do not appear on search engine advertising, it will be more difficult for consumers to locate the official, FDA-regulated company sites regarding the product. Moreover, it will be more likely that consumers are instead unwittingly directed to unregulated, pseudo-medical sites that contain false and misleading information.<sup>27</sup>

In November 2009, the FDA sponsored a public hearing to consider the “special characteristics of Web 2.0 and other emerging technologies” and “issues related to the promotion of FDA-regulated medical products.”<sup>28</sup> In doing so, the Agency acknowledged that the “FDA has not comprehensively addressed when Internet promotion of prescription drugs and medical devices is labeling versus advertising,” but noted that the FDA has jurisdiction over all prescription drug and biologic promotion, device labeling, and restricted device advertising when conducted by a manufacturer, packer, or distributor.<sup>29</sup>

At the hearing, the FDA sought input regarding how the Internet could be used to promote drugs and devices to consumers and healthcare professionals in a truthful, nonmisleading, and balanced manner. The FDA also pointed out several Web 2.0 innovations that challenge the Agency’s current regulatory structure, including blogs, microblogs (i.e., Twitter), podcasts, social networks and online communities, video sharing, widgets, and wikis.<sup>30</sup> In particular, the FDA presented five questions on which it sought public comments:

1. For what online communications are manufacturers accountable?
2. How can manufacturers fulfill regulatory requirements in their Internet and social media promotion, particularly when using tools that have space limitations or allow for real-time communications?
3. What parameters should apply to the posting of corrective information on websites controlled by third parties?
4. When is the use of links appropriate?; and
5. What responsibility do manufacturers have to collect and investigate adverse event information that is posted by Internet users?<sup>31</sup>

The manner in which FDA answers these questions will form the basis of its prospective regulation of promotional communications on the Internet.

---

### III. Possible Approaches to Regulation of Prescription Drug and Medical Device Advertising on the Internet

The questions presented by the FDA at the public hearing appropriately frame the most important issues. The first is a line-drawing question: when should Internet communications about a prescription drug or restricted device be attributed to the manufacturer? Official websites which promote a product to consumers or healthcare professionals that are sponsored, paid for, and maintained by a manufacturer unquestionably should be considered advertising and regulated as such. In contrast, truly independent communications made by a third party—communications that are not initiated or solicited by the product's manufacturer—should not be regulated by the FDA. Indeed, regulation of such non-commercial communications could raise significant free speech concerns under the First Amendment.<sup>32</sup> But what of a Web 2.0 interactive scenario where an official, company-sponsored website permits visitors to post their personal thoughts and opinions about a product? Or where a manufacturer “hosts” a blog at which individuals may leave comments? Permitting third parties not connected with the company to provide or alter content on an official, company-sponsored website would likely lead to FDA violations including skewing the “fair balance” presentation of a product's risks and benefits,<sup>33</sup> promoting the product for uses not contained in the FDA's approved label,<sup>34</sup> or posting false or misleading statements about the product.<sup>35</sup>

Inevitably, companies would be obliged to monitor and censor third-party content on company-sponsored sites. In doing so, however, the communications would no longer be fairly characterized as “independent,” and instead would effectively be transformed into communications by the company. Social media thrives on real-time, authentic, person-to-person interaction. Any attempt to influence the content of such communications by a drug or device manufacturer would have to be disclosed to maintain social media credibility.<sup>36</sup> For these reasons, monitoring of such communications by a drug or device manufacturer simply is impractical.

Perhaps this line-drawing problem is best resolved with a bright-line rule: drug and device manufacturers are responsible for Internet-posted content about their products that they created, solicited, or disseminated—including by providing the site on which the content appears. Truly independent third-party communications, by contrast, are not attributable to the manufacturer, and are not prohibited by the FD&C Act.<sup>37</sup> Such a bright-line rule, in addition to being easily understood, would have the salutary benefit of promoting the public health, as consumers would be better able to distinguish between official, FDA-compliant advertising, on the one hand, and communications that are not necessarily accurate, may discuss off-label uses of the product, or may not present a fair balance of risks and benefits associated with using the drug or device, on the other hand.

A second question on which the FDA has solicited comments concerns Internet communications by manufacturers when space is limited. This issue boils down to whether the FDA should adopt the “one-click rule.” Where website space is limited, is a link to the product's risk information sufficient?

The FDA's issuance of 14 Untitled Letters in April of 2009 served to reveal a potential lack of understanding regarding search engines and how they are used by consumers of healthcare information. Search engines are intended to be a gateway to further research and information gathering, to provide many websites relevant to keywords quickly and efficiently. Consumers do not expect all of the information about a topic to appear on the search engine's results page. When a consumer finds the website they believe is most relevant to their search, they click on the link which directs them to another website where they can find substantive information. To require a full and balanced presentation on a search engine results page misses the point. Moreover, because so many consumers of healthcare information begin with the Internet, and because so many Internet users begin with a search engine, prohibiting drug and device companies from providing sponsored links would close consumers out of important relevant health information. In consideration of these circumstances, what makes the most sense is adopting the “one-click rule,” where consumers can easily obtain the FDA-approved label information they decide is relevant to their search.

Whether a manufacturer has the right or obligation to respond to inaccurate or misleading content published on the Internet by third parties presents a difficult question for both the regulated industry and the FDA. Sophisticated consumers know that not all information found on the Internet is truthful, and no company could respond to every inaccurate statement made about its product in cyberspace. Although the FDA has long been concerned about unsophisticated consumers,<sup>38</sup> it cannot compel companies to respond to independent communications made by third parties about drugs or devices<sup>39</sup>—it can only require that the company's own communications about FDA-regulated products are appropriate.<sup>40</sup>

The question therefore becomes whether companies should be allowed to respond to incorrect information at all and, if so, how much information on the independent website should the company become responsible for? For example, if a website claims that Product X marketed by Company Y produces birth defects, and a spokesperson for Company Y posts a comment on the site stating that birth defects have never been reported in connection with Product X, is the spokesperson's statement advertising? If it is, must all of the requirements imposed on advertising be followed? One possible bright-line rule is to permit companies to respond to inaccurate or misleading third-party communications on the Internet, but only with a reference to the company's official, FDA-compliant website.

Just as it is problematic for drug or device companies to have an influence over what is said on independent websites, it is also concerning if a drug or device company allows a link on its official product page that re-directs to a non-FDA regulated website. Consumers should be able to rely on a company-sponsored website as being fair, balanced, truthful, and compliant with all FDA advertising regulations. Similarly, consumers should be able to rely on the websites to which a company-sponsored website links. The argument behind the industry-favored “one click” rule for sponsored links is that the entire purpose of displaying a link is to encourage consumers to click on it for more information. Therefore, drug and device

companies on their official product page should not encourage consumers to redirect to unregulated pages. A company-sponsored site should be a safe haven of regulated material, and links to sites which are not so regulated is confusing and misleading for consumers.

Finally, the FDA has sought input on the extent to which manufacturers should be required to collect and investigate adverse event reporting on the Internet. In March of 2001, the FDA issued a draft Guidance in which it differentiated between a company's obligation to monitor websites that the company itself sponsors for adverse event reports, and its obligation to monitor websites of third parties not connected to the company for adverse event reports. In sum, the draft Guidance provides that companies are not responsible for monitoring third-party sites; however, if a company becomes aware of an adverse event on a third-party site, then the company must investigate the adverse event and determine whether it should be reported to the FDA.<sup>41</sup> If it were otherwise, and companies were expected to monitor the entirety of the Internet and investigate every reported adverse event, the magnitude of the obligation would be enormous and the resources required to address it and collect all required information would be staggering, if not impossible. Moreover, the draft Guidance is in harmony with the possible approaches we have suggested, which recommend that the FDA establish a bright line of demarcation between company-sponsored Internet sites and content, on the one hand, and independent, third-party sites and content, on the other.

### Conclusion

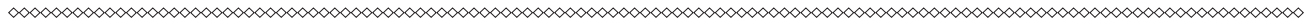
The FDA appears to be moving to address the important issues relating to regulation of prescription drug and restricted device advertising on the Internet. Providing certainty to the industries it regulates, as well as to consumers, should be a primary objective of its actions in the future. Adopting bright-line rules and policies on Internet-based communications about drugs and devices will go far to meet this objective.

### Endnotes

- 1 See Ben S. Gerber & Arnold R. Eiser, *The Patient-Physician Relationship in the Internet Age: Future Prospects and the Research Agenda*, 3(2) J. MED. INTERNET RES. e15 (2001).
- 2 See generally B.W. Hesse et al., *Trust and Sources of Health Information: The Impact of the Internet and Its Implications for Health Care Providers: Findings from the First Health Information National Trends Survey*, 165(22) ARCH. INTERN. MED. 2618 (2005).
- 3 I.e., devices requiring a prescription or pre-market approval from the FDA. See FDA, GUIDANCE FOR INDUSTRY: PRESENTING RISK INFORMATION IN PRESCRIPTION DRUG AND MEDICAL DEVICE PROMOTION (May 2009), available at <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm064956.htm>.
- 4 Guidance documents provide the Agency's "latest thinking" on a topic. See FDA, Guidances, available at <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm> (last visited Feb. 6, 2010).
- 5 21 U.S.C. § 321(k).
- 6 *Id.* § 321(m).
- 7 335 U.S. 345 (1948).

- 8 *Id.* at 350.
- 9 21 C.F.R. § 202.1(l)(2).
- 10 21 U.S.C. § 352(f).
- 11 *Id.* § 352(g).
- 12 21 C.F.R. § 202.1(k).
- 13 *Id.* § 202.1(l)(1).
- 14 21 U.S.C. 352(n).
- 15 Sponsored links are advertisements that appear on other websites, such as search engines, that solicit consumers, with a brief description, to click on a link that will lead them to the product's website for more information. The host website gets paid every time someone clicks on the sponsored link.
- 16 The FDA issues Untitled Letters to regulated industry for violations of legal requirements. The FDA issues Warning Letters for violations that are of "regulatory significance." Warning Letters state that the Agency may take enforcement action if the violation is not corrected.
- 17 See FDA, 2009 Warning Letters and Untitled Letters to Pharmaceutical Companies, available at <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/ucm055773.htm> (last visited Jan. 31, 2010).
- 18 See Rich Thomaselli, *FDA to Hold Public Hearings on Big Pharma's Social-Media Use*, ADVERTISINGAGE, Sept. 23, 2009.
- 19 See Arnold I. Friede & Robert B. Nicholas, *Yes, We Can: Time for an FDA Internet Drug Advertising Policy*, FDLI UPDATE, July/Aug. 2009, at 22.
- 20 See Posting of Mark Senak to eye on FDA, 14 Warning Letters in a Day! What's that About?, [http://www.eyeonfda.com/eye\\_on\\_fda/2009/04/14-warning-letters-in-a-day.html](http://www.eyeonfda.com/eye_on_fda/2009/04/14-warning-letters-in-a-day.html) (Apr. 6, 2009).
- 21 Stephanie Clifford, *F.D.A. Rules on Drug Ads Sow Confusion as Applied to Web*, N.Y. TIMES, Apr. 16, 2009.
- 22 21 C.F.R. § 202.1(e)(2)(i).
- 23 FDA, HELP-SEEKING AND OTHER DISEASE AWARENESS COMMUNICATIONS BY OR ON BEHALF OF DRUG AND DEVICE FIRMS (Jan. 2004), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM070068.pdf>.
- 24 See DEBORAH FALLOWS, PEW INTERNET AND AMERICAN LIFE PROJECT DATA MEMO RE: SEARCH ENGINE USE, available at <http://pewinternet.org/Reports/2008/Search-Engine-Use.aspx> (last visited Feb. 1, 2010).
- 25 See Clifford, *supra* note 21.
- 26 See *id.*
- 27 See Friede & Nicholas, *supra* note 19.
- 28 FDA, Notice of Public Hearing: Promotion of Food and Drug Administration-Regulated Medical Products Using the Internet and Social Media Tools, 74 Fed. Reg. 48,083 (Sept. 21, 2009).
- 29 *Id.*
- 30 See *id.*
- 31 See *id.*
- 32 See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-64 (1980) (discussing the "commonsense" distinction between commercial speech and "other varieties" of speech).
- 33 21 C.F.R. § 202.1(e)(5)(ii).
- 34 See *id.* § 202.1(e)(4)(i)(a).
- 35 See *id.* § 202.1(e)(5)(ii).
- 36 See Pharma Companies Should Have Public Social Media Disclosure Policies, Survey Results Show, <http://pharmamktg.blogspot.com/2009/10/pharma-companies-should-have-public.html> (Oct. 8, 2009).
- 37 21 U.S.C. 331.
- 38 See FDA, GUIDANCE FOR INDUSTRY: PRESENTING RISK INFORMATION IN PRESCRIPTION DRUG AND MEDICAL DEVICE PROMOTION (May 2009), available





at <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm064956.htm>.

39 See generally *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (expanding the limitations of compelling speech to corporations as well as individuals).

40 See 21 C.F.R. § 202.1(e)(5)(ii).

41 See FDA, DRAFT GUIDANCE FOR INDUSTRY: POSTMARKETING SAFETY REPORTING FOR HUMAN DRUG AND BIOLOGICAL PRODUCTS INCLUDING VACCINES (Mar. 2001), available at <http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Vaccines/ucm074850.htm>.



---

# CIVIL RIGHTS

## FIXING THE CIVIL RIGHTS COMMISSION

By *Kenneth L. Marcus\**

---

Several dozen advocacy organizations have recently promoted a high-profile proposal to “fix” the U.S. Commission on Civil Rights.<sup>1</sup> Their goal is to change the name of the commission to “The U.S. Commission on Civil and Human Rights” and to authorize the new commission to monitor U.S. compliance with international human rights treaties. At the same time, the current commissioners would be terminated, and the President would be authorized to appoint a new slate subject only to senate confirmation.<sup>2</sup> The primary advocate of this plan is none other than former commission chair Mary Frances Berry, who developed the concept in her 2009 book, *And Justice for All: The United States Commission on Civil Rights and the Continuing Struggle for Freedom in America*.<sup>3</sup> Popular with Democratic congressional staff, the Berry plan has been actively promoted by a large coalition led by the American Civil Liberties Union, the Leadership Conference on Civil and Human Rights, the American Constitution Society, and a new group formed precisely to advance this proposal, the “Campaign for a New Domestic Human Rights Agenda.”<sup>4</sup>

### History

Established by President Dwight David Eisenhower under the Civil Rights Act of 1957, the Commission is an independent, bi-partisan fact-finding agency.<sup>5</sup> Charged with investigating a wide range of discriminatory conduct, but given no enforcement powers, the agency has long functioned as a research institution or think tank, issuing reports and railing from the bully pulpit.

During its first quarter century, the Commission probed racial and ethnic bigotry in the United States, laying the groundwork for landmark legislation such as the Civil Rights Act of 1964, the Fair Housing Act, and the Voting Rights Act. All along, powerful figures have tried to derail its investigations, which have often provoked strong outcry among those charged with bias. For example, John and Robert Kennedy connived to obstruct the commission from undertaking field hearings in Mississippi during the early 1960’s for fear that this would alienate or embarrass Southern Democrats in Congress. The Commission’s courageous work during this period earned it the title of “conscience of the nation on civil rights.”<sup>6</sup>

For much of its second quarter century, the Commission’s record was much spottier. During this period, marked by Commissioner Mary Frances Berry’s long tenure, the

Commission was known instead as a “Mickey Mouse agency” and as “Little Hanoi on the Potomac.” Berry gained notoriety for her support for Maoist educational and Soviet social policy,<sup>7</sup> as well as her insistence that civil rights laws do not apply to white men.<sup>8</sup> Late in Ms. Berry’s tenure, the General Accounting Office reported that the Commission was “an agency in disarray” lacking even “basic management controls.” Berry fought and lost a legal battle to prevent one of President George W. Bush’s appointees from being seated to the Commission.<sup>9</sup> When her last term expired, Berry initially threatened to stay on longer, disputing the executive and judicial branches’ interpretation of the period of commissioner terms.<sup>10</sup>

In December 2004, conservatives were appointed to a majority of the Commission’s seats (including Dr. Berry’s former seat) as well as to the office of Staff Director.<sup>11</sup> In 2007, *The Wall Street Journal* lauded the agency, stating that it “deserves a medal for good governance” after achieving back-to-back clean financial audits. At the same time, the Commission refocused its agenda on a wide range of topics important to conservative civil rights advocates, such as “religious freedom, school choice, Title IX reform, voter fraud, the impact of economic regulation on minority employment, and the impact of illegal immigration on black employment.”<sup>12</sup> The Commission has also addressed, during this period, various other topics not generally associated with the conservative civil rights agenda, such as the misdiagnosis of racial minorities for special education,<sup>13</sup> discrimination against Native Americans in border towns,<sup>14</sup> and the effectiveness of historically black colleges and universities.<sup>15</sup>

More controversially, perhaps, the Commission also issued a series of important reports during this period which challenge an array of assumptions concerning the governmental application of racial preferences, e.g., that racial diversity produces demonstrable educational benefits;<sup>16</sup> that preferences actually help black students;<sup>17</sup> that the American Bar Association’s diversity standards comply with federal law;<sup>18</sup> that the Akaka Bill on native Hawaiian sovereignty does not amount to racial balkanization;<sup>19</sup> that the Justice Department increases re-segregation when it releases Southern school districts from desegregation orders;<sup>20</sup> that federal agencies comply with their constitutional obligation to seriously consider race-neutral alternatives before resorting to preferences in government contracts;<sup>21</sup> and that the temporary provisions of the Voting Rights Act of 1965 are as necessary today as when they were first enacted.<sup>22</sup> As two conservative Commissioners observed, the Commission’s new agenda asks this question of racially preferential governmental policies: “Should the principle of non-discrimination be temporarily sacrificed in the hope that such a sacrifice will, in the long run, help us become the society of equal opportunity that we all aspire to?” That is to say, the Commission has challenged the underpinnings of

---

\* *Kenneth L. Marcus holds the Lillie & Nathan Ackerman Chair in Equality & Justice in America at the City University of New York’s Bernard M. Baruch College School of Public Affairs and directs the Initiative on Anti-Semitism & Anti-Israelism at the Institute for Jewish & Community Research in San Francisco. He was Staff Director of the U.S. Commission on Civil Rights from 2004-2008.*



Even more questionable, however, is her proposed cure. If her goal is to expand the Commission's jurisdiction to include sexual orientation, this can be done through ordinary legislation, just as the Commission's jurisdiction was previously expanded to include disability issues.<sup>38</sup> It would be a rather minor change, since the Commission is already authorized to investigate discrimination on any basis, including sexual orientation, in "the administration of justice."<sup>39</sup> The Commission has traditionally interpreted this jurisdictional basis to support, for example, inquiry into whether equal protection is denied by state laws which limit marriage to opposite-sex couples. Since such matters are already within the Commission's jurisdiction, the inclusion of other issues of sexual orientation would be a relatively minor change, which would hardly justify the sort of transformation which is now proposed. At any rate, the question of gay rights is typically framed as a matter of antidiscrimination law, which is to say, an issue of "civil" and not just "human" rights. As a political matter, Berry's focus on gay issues may help her to build a constituency for legislative change; but as a legal matter, it seems irrelevant to her proposal to shift the Commission's focus to human rights.

#### C. *Would the Proposal Abdicate Civil Rights?*

Those who are committed to civil rights enforcement will object that the Berry proposal would dilute the effectiveness of the Commission's civil rights work by dividing its attention among competing priorities. "Given the continued contention and resurgence of conflicts over race and other domestic issues," Berry observes, "it might . . . be better to maintain the commission's focus on civil rights in this country."<sup>40</sup> Moreover, as Berry also recognizes, to change the Commission's mandate "might signal a belief that the work that needs doing is done or an abandonment of the idea of further progress because the job is too difficulty and the issues intractable."<sup>41</sup> Nevertheless, Berry seems not to appreciate the force of her own arguments, concluding despite these ideas that "[t]he best approach would be a commission on civil and human rights."<sup>42</sup>

#### D. *Does the Proposed Change Transform Human Rights?*

To the extent that the proposed change would dilute the Commission's civil rights capabilities, this cost must be balanced against the putative benefits in terms of human rights compliance. Here, though, the proposal's advocates have been somewhat vague. Presumably, the Commission's proposed new powers to monitor human rights compliance are intended to reduce the likelihood of civil liberties violations of the sort claimed during the last Administration. In fact, however, the human rights discourse of the left has increasingly drifted in other directions. This can be seen most saliently in Secretary of State Hillary Clinton's major address on "the Obama administration's human rights agenda for the 21st century."<sup>43</sup> The "human rights agenda for the 21st century," Clinton announced, will "see human rights in a broad context," insisting that "people must be . . . free from the oppression of want—want of food, want of health, want of education, and want of equality in law and in fact."<sup>44</sup>

The first thing to be said about this agenda is that it is distinct from the question of human rights. Conflating human rights with social welfare policy was first devised, several decades

ago, by the Soviet foreign ministry, which distracted attention away from the Soviet Union's abysmal human rights record by drawing global focus to social welfare.<sup>45</sup> *The Washington Post* caught the irony, reminding Secretary Clinton that

[A]s U.S. diplomats used to tirelessly respond, rights of liberty—for free expression and religion, for example—are unique in that they are both natural and universal; they will exist so long as governments do not suppress them. Health care, shelter and education are desirable social services, but they depend on resources that governments may or may not possess. These are fundamentally different goods, and one cannot substitute for another.<sup>46</sup>

Why would the Obama Administration want to reverse policy on this fundamental matter of principle? Opponents say that it is precisely for the same reason that motivated the Soviets, *i.e.*, in order to distract public attention from their abysmal record on human rights. It was not that long ago that Clinton was herself criticized by human rights activists for minimizing the importance of human rights discourse in the Administration's relationship with China.<sup>47</sup> Worse, President Obama's recent refusal to meet with the Dalai Lama at the White House—for fear that doing so would upset the Chinese, because it might remind the world of continuing human rights violations in Tibet—signals for many that the Administration is all too willing to sacrifice human rights objectives in the name of engagement.<sup>48</sup> The same observations have been made about Obama's policies on Iran and elsewhere.<sup>49</sup>

Adding "human rights" to the Commission's agenda would have the benefit of creating the appearance that the Obama Administration cares about civil rights without actually requiring the president to make the difficult choices that he has not liked to make. By shifting the "human rights" discourse away from abuses by undemocratic countries, Obama is able to change the topic from a weakness to a strength. Most importantly, perhaps, it would enable the Obama Administration to turn the Civil Rights Commission into an advocate for economic redistribution. By negotiating multi-lateral treaties on such matters as education, health care, food, and general economic conditions—and then using the new Commission as a means to enforce U.S. compliance—Obama and his Democratic supporters could achieve a backdoor means of imposing redistributionist policies that might otherwise be anathema to the American people.

#### Conclusion

Given the intense criticism that the Civil Rights Commission has faced over the course of the last few decades, it is rather surprising that anyone would seek to expand its jurisdiction over other issues that they care about. Yet that is precisely what some advocates appear to be doing. This issue would look less partisan if the advocates for this bill would provide an effective date for their proposed legislation after the commencement of the next presidential term. That way, the substance of the proposal could be evaluated on its own terms and not as partisan politics.

Even on its own terms, however, the proposal is at best dubious. Those who believe that discrimination remains a persistent American problem, as these advocacy groups certainly



do, must explain how saddling this long under-budgeted agency with significant additional substantive responsibilities can have any effect other than to weaken its current capabilities. At a minimum, this significant cost must be balanced against whatever benefits the restructuring is thought to provide. Those benefits remain somewhat nebulous. Given Secretary Clinton's pronouncements on human rights policy, it appears that a new human rights commission would be less concerned with protecting actual human rights or civil liberties and more concerned with implementing redistributionist policies in the areas of education, health, jobs and the economy. This would not strengthen the Commission's traditional functions but would supplant them.

## Endnotes

- 1 Laura Awad, *Rights Groups Urge Congress to Fix Broken Civil Rights Commission*, CIVILRIGHTS.ORG (posted Nov. 19, 2009), <http://www.civilrights.org/archives/2009/11/837-commission.html>; CATHERINE LEROY, RESTORING THE CONSCIENCE OF A NATION: A REPORT ON THE U.S. COMMISSION ON CIVIL RIGHTS (2009), [available at http://www.civilrights.org/publications/reports/commission/lccref\\_commission\\_report\\_march2009.pdf](http://www.civilrights.org/publications/reports/commission/lccref_commission_report_march2009.pdf). (report issued by the Leadership Conference on Civil Rights Education Fund) [hereinafter, the "LEADERSHIP CONFERENCE REPORT"]; Press Release, *Coalition of Civil and Human Rights Organizations Calls on President Obama to Live Up to Peace Prize by Fulfilling Human Rights Commitments Here at Home*, Campaign for a New Domestic Human Rights Agenda, <http://www.prnewswire.com/news-releases/coalition-of-civil-and-human-rights-organizations-calls-on-president-obama-to-live-up-to-peace-prize-by-fulfilling-human-rights-commitments-here-at-home-78895962.html>; Catherine Powell, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, HUMAN RIGHTS AT HOME: A DOMESTIC POLICY BLUEPRINT FOR THE NEW ADMINISTRATION 4-5 (2008), <http://www.acslaw.org/files/C%20Powell%20Blueprint.pdf>.
- 2 See *The Law of the Land: U.S. Implementation of Human Rights Treaties: Hearing Before the S. Subcomm. on Human Rights*, 111th Cong. (2009) (statement of Wade Henderson, President & CEO, Leadership Conference on Civil and Human Rights), [available at http://www.civilrights.org/advocacy/testimony/henderson-human-rights.html](http://www.civilrights.org/advocacy/testimony/henderson-human-rights.html).
- 3 See MARY FRANCES BERRY, AND JUSTICE FOR ALL, THE UNITED STATES COMMISSION ON CIVIL RIGHTS AND THE CONTINUING STRUGGLE FOR FREEDOM IN AMERICA 337-39 (2009) (drawing the blueprint for these changes).
- 4 See Henderson, *supra* note 2.
- 5 Civil Rights Act of 1957, Pub. L. No. 85-315, Pt. I, 71 Stat. 634.
- 6 See, e.g., GABRIEL J. CHIN & LORI WAGNER, UNITED STATES COMMISSION ON CIVIL RIGHTS: REPORTS ON VOTING.
- 7 See Posting of Gail Heriot to The Right Coast, There's Something About Mary Frances Berry, <http://rightcoast.typepad.com/rightcoast/2009/03/theres-something-about-mary-frances-berry-gail-heriot.html> (Mar. 2, 2009).
- 8 *Statement of Commissioners Blandina Cardenas Ramirez and Mary Frances Berry on the Hishon and Stotts Decisions*, in USCCR, TOWARD AN UNDERSTANDING OF STOTTS 63 (1985), [http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=ED253611&ERICExtSearch\\_SearchType\\_0=no&acno=ED253611](http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED253611&ERICExtSearch_SearchType_0=no&acno=ED253611) ("Civil rights laws were not passed to give protection to all Americans, as the majority of this commission seems to believe.") (emphasis original).
- 9 Lynette Clemetson, *Bush Wins Latest Round in Legal Battle on Civil Rights Panel*, THE NEW YORK TIMES, May 10, 2002, at A33; *Seat Bush Nominee, Rights Panel Is Told*, THE NEW YORK TIMES, Jan. 11, 2002, at A19.
- 10 Randal C. Archibold, *Adviser on Civil Rights Quits, Declining Legal Fight for Job*, THE NEW YORK TIMES, Dec. 8, 2004.
- 11 See Darryl Fears, *Civil Rights Commission Prepares for a New Era:*

- Conservative Bush Appointees Replace Liberals*, THE WASHINGTON POST, Dec. 9, 2004, at A31, [available at http://www.washingtonpost.com/wp-dyn/articles/A49648-2004Dec8.html](http://www.washingtonpost.com/wp-dyn/articles/A49648-2004Dec8.html). President George W. Bush appointed the author to the position of Staff Director at that time.
- 12 Kenneth L. Marcus, *Right Frontier for Civil Rights*, 19 GEO. MASON U. CIV. RTS. L.J. 77, 78-79 (Fall 2008) and accompanying notes.
- 13 See Press Release, USCCR, Civil Rights Commission to Examine Whether Minorities Are Misplaced in Special Education (Nov. 30, 2007), [available at http://www.usccr.gov/press/2007/113007\\_minorities.pdf](http://www.usccr.gov/press/2007/113007_minorities.pdf).
- 14 See Press Release, USCCR, Civil Rights Commission to Examine Discrimination Against Native Americans in Border Towns (Nov. 6, 2007), [available at http://www.usccr.gov/press/2007/110607\\_bordertownsmedia.pdf](http://www.usccr.gov/press/2007/110607_bordertownsmedia.pdf).
- 15 See Press Release, USCCR, USCCR to Examine Historically Black Colleges and Universities (May 1, 2006), [available at http://www.usccr.gov/press/2006/050506HBCUbriefing.pdf](http://www.usccr.gov/press/2006/050506HBCUbriefing.pdf).
- 16 USCCR, THE BENEFITS OF DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION (2007), [available at http://www.usccr.gov/pubs/112806diversity.pdf](http://www.usccr.gov/pubs/112806diversity.pdf).
- 17 USCCR, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS (2007), [available at http://www.usccr.gov/pubs/AALReport.pdf](http://www.usccr.gov/pubs/AALReport.pdf).
- 18 *Id.*
- 19 USCCR, THE NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2005 (2006), [available at http://www.usccr.gov/pubs/060531NatHawBriefReport.pdf](http://www.usccr.gov/pubs/060531NatHawBriefReport.pdf).
- 20 USCCR, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS (2007), [available at http://www.usccr.gov/pubs/092707\\_BecomingLessSeparateReport.pdf](http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf).
- 21 USCCR, FEDERAL PROCUREMENT AFTER ADARAND (2006), [available at http://www.usccr.gov/pubs/080505\\_fedprocadarand.pdf](http://www.usccr.gov/pubs/080505_fedprocadarand.pdf).
- 22 USCCR, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT'S SECTION 5 PRECLEARANCE PROVISION (2006), [available at http://www.usccr.gov/pubs/060706VRAbrief524.pdf](http://www.usccr.gov/pubs/060706VRAbrief524.pdf); USCCR, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE'S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS (2006), [available at http://www.usccr.gov/pubs/051006VRASStatReport.pdf](http://www.usccr.gov/pubs/051006VRASStatReport.pdf).
- 23 Jerry Seper, *Justice Dept. Subpoenaed in New Black Panthers Case: Panel Cites Lack of Cooperation*, THE WASHINGTON TIMES, Dec. 9, 2009, [available at http://www.washingtontimes.com/news/2009/dec/09/records-ordered-to-explain-panthers-handling/](http://www.washingtontimes.com/news/2009/dec/09/records-ordered-to-explain-panthers-handling/).
- 24 Editorial, *Protecting Black Panthers: The Obama Administration Ignores Voter Intimidation*, THE WASHINGTON TIMES, May 29, 2009.
- 25 Jerry Seper, *Justice Rebuffs Panthers Subpoena: Rights Panel's Probe Stymied*, THE WASHINGTON TIMES, Jan. 13, 2010.
- 26 Letter from Gerald A. Reynolds et al. to President Obama and Senators on Senate Health Care Bill (December 11, 2009) [available at http://www.usccr.gov/correspd/LetterPresidentSenatorsHealthCare12-11-09.pdf](http://www.usccr.gov/correspd/LetterPresidentSenatorsHealthCare12-11-09.pdf).
- 27 42 U.S.C. § 1975d.
- 28 BERRY, JUSTICE FOR ALL, *supra* note 3, at 337-8.
- 29 *Id.* at 338.
- 30 Samuel G. Freedman, *50 Years of Struggle*, THE NEW YORK TIMES, Feb. 12, 2009, [available at http://www.nytimes.com/2009/02/15/books/review/Freedman-t.html](http://www.nytimes.com/2009/02/15/books/review/Freedman-t.html).
- 31 LEADERSHIP CONFERENCE REPORT, *supra* note 1, at 44-45.
- 32 *Id.* at 45.
- 33 42 U.S.C. § 1975(2)(b).
- 34 *Id.* at 339.
- 35 Mary Frances Berry, Op-Ed., *Gay but Equal?*, THE NEW YORK TIMES, Jan. 18, 2010, at A29, [available at http://www.nytimes.com/2009/01/16/](http://www.nytimes.com/2009/01/16/)



---

# CORPORATIONS, SECURITIES & ANTITRUST

## LYONDELL CHEMICAL CO. V. RYAN: THE DUTY OF GOOD FAITH COMES TO REVLON-LAND

By Robert T. Miller\*

---

Section 102(b)(7) of the Delaware General Corporation Law authorizes Delaware corporations to include in their certificates of incorporation a provision eliminating the personal liability of directors for breaches of their duty of care but not for, among other things, breaches of their duty of loyalty or actions taken not in good faith.<sup>1</sup> The Delaware General Assembly enacted this provision<sup>2</sup> to quell the crisis caused by the Delaware Supreme Court's decision in *Smith v. Van Gorkom*,<sup>3</sup> and nowadays all well-advised Delaware corporations have such provisions in their certificates. Hence, shareholder-plaintiffs often cannot recover damages (and their lawyers cannot earn fees) in suits based on alleged breaches of the board's duty of care. An unintended but foreseeable consequence of the prevalence of 102(b)(7) provisions is that plaintiffs (and their attorneys) have a strong incentive to recast claims based on an alleged breach of the board's duty of care as claims based on breaches of the board's duty of good faith.<sup>4</sup>

This dynamic has played out in a variety of settings. In the *Disney* cases, the alleged wrongdoing by the defendant board concerned an ordinary business decision—the hiring and subsequent firing of a senior executive.<sup>5</sup> At least arguably, the board had breached its duty of care by not informing itself of all the material facts reasonably available regarding the executive's employment agreement before approving it or again before terminating him and obligating the company to pay an enormous severance. But such claims, even if true, would have been blocked by the company's 102(b)(7) provision, and so the plaintiffs argued that the board's alleged derelictions were so extreme that they amounted to conduct not in good faith—a claim that would *not* have been blocked by the 102(b)(7) provision.<sup>6</sup> Similarly, in *Stone v. Ritter*, the alleged wrongdoing was a failure of oversight—a failure by the defendant board to detect and prevent conduct by junior employees that subjected the company to liability.<sup>7</sup> Once again, the allegation naturally sounded in negligence as a breach of the board's duty of care, and, once again, the plaintiffs argued that the board's alleged dereliction was so extreme that it amounted to conduct not in good faith and so not shielded by the 102(b)(7) provision.<sup>8</sup>

The argument common to these two cases trades on an ambiguity in the concept of *bad faith*.<sup>9</sup> As Chancellor Chandler recognized in *Disney*, many quite different kinds of wrongful conduct can reasonably be said to be in bad faith.<sup>10</sup> As the Delaware Supreme Court later said, grossly negligent conduct can be labeled as being in bad faith<sup>11</sup>—presumably because, for example, the conduct is blameworthy. That, however, cannot be the sense demanded by Section 102(b)(7), for then all breaches

of the duty of care would also be breaches of the duty of good faith, and Section 102(b)(7) provisions would accomplish nothing. Hence, bad faith in the relevant sense must include something more than gross negligence. The Delaware Supreme Court identified two other kinds of such conduct: (a) “conduct motivated by an actual intent to do harm” to the corporation,<sup>12</sup> and (b) “intentional dereliction of duty, a conscious disregard for one's responsibilities.”<sup>13</sup> Conduct of the first kind would be especially hard to prove because it would seem to demand direct proof about a director's subjective intention. Not surprisingly, therefore, the latter kind of conduct—intentional dereliction or conscious disregard of duty—has become the focus of bad-faith claims.

But given these clarifying definitions from the Delaware Supreme Court, it would seem that it should be difficult for a plaintiff whose case is really based on a breach of the duty of care to recast the case as involving a breach of the duty of good faith. A breach of the duty of care requires grossly negligent conduct. A breach of the duty of good faith by “intentional dereliction” or “conscious disregard” (like the Delaware Supreme Court, I use these terms interchangeably) would require *not only* grossly negligent conduct *but also* actual knowledge on the part of the agent director that his or her conduct was in fact grossly negligent. There is a kind of *scienter* element to the claim. It would seem, therefore, that plaintiffs alleging a breach of the duty of good faith by intentional dereliction or conscious disregard would have to allege, in addition to facts suggesting gross negligence, some additional facts that would permit an inference that the directors had a certain state of mind, i.e., that they knew what they were doing was grossly negligent.

In this context, the Delaware Court of Chancery (Vice Chancellor John W. Noble) took up *Ryan v. Lyondell Chemical Co.*,<sup>14</sup> a case in which the plaintiffs, following the pattern of *Disney* and *Stone*, yet again attempted to argue that an alleged breach of the board's duty of care was in fact a breach of the board's duty of good faith. This time, however, the context was *Revlon*-land, i.e., a situation in which the board had agreed to a change-of-control transaction (in fact a cash-out merger) and so had triggered its *Revlon* duties.<sup>15</sup> The essential question was whether conduct by the board that, at least arguably, had breached its *Revlon* duty of care had also breached its *Revlon* duty of good faith—in other words, whether in breaching its duty of care in a *Revlon* context the board had acted not only with gross negligence but actually knew that it was doing so. The company had a Section 102(b)(7) provision in its certificate of incorporation, and so if all the plaintiffs could prove was a breach of the duty of care, then the case would be over and the defendants would have prevailed.<sup>16</sup>

On the limited record that existed at the time, Vice Chancellor Noble denied the defendant directors' motion for

---

\* Robert T. Miller is an Associate Professor of Law at the Villanova University School of Law.

summary judgment (*Lyondell I*).<sup>17</sup> The directors then moved for certification of an interlocutory appeal to the Delaware Supreme Court, and the Vice Chancellor produced another lengthy opinion denying this motion (*Lyondell II*).<sup>18</sup> The Delaware Supreme Court then took the extraordinary step of accepting the interlocutory appeal, and it reversed the Chancery Court on all issues and remanded with instructions to enter judgment for the defendants (*Lyondell III*).<sup>19</sup> In Section I below, I describe the facts of the case, at least as they were assumed to be for purposes of the defendants' summary judgment motion. In Section II, I briefly summarize the key doctrines under *Revlon* and its progeny. In Section III, I examine the opinions of the Chancery Court and the Supreme Court together, analyzing them to determine why the two courts disagreed as to whether the facts in *Lyondell* permitted an inference that the board had acted in conscious disregard of its *Revlon* duties. Finally, in Section IV, I make some concluding observations.

### I. Factual Background in *Lyondell Chemical Co. v. Ryan*

In early 2007, Lyondell was the third-largest independent, publicly-traded chemical company in North America.<sup>20</sup> The company was strong financially, had paid down several billion dollars in debt in accordance with its strategic plan, and was active in acquiring other companies.<sup>21</sup> On May 11, 2007, however, an affiliate of Basell AF, a privately-held Luxembourg company controlled by Leonard Blavatnik, filed a Schedule 13D with the Securities and Exchange Commission disclosing that it had acquired the right to purchase from Occidental Petroleum, Lyondell's second-largest stockholder, a block of Lyondell shares aggregating about 8.3 percent of the total outstanding Lyondell stock.<sup>22</sup> Blavatnik had in the past expressed an interest in acquiring Lyondell,<sup>23</sup> and the Schedule 13D disclosed that Blavatnik remained interested in a possible transaction with Lyondell.<sup>24</sup> As Vice Chancellor Noble would later say, the filing of the Schedule 13D was, and was understood by the Lyondell board to be, a "signal to the market that Lyondell was 'in play.'"<sup>25</sup>

Although the Lyondell board convened a special meeting promptly after the filing of the Schedule 13D,<sup>26</sup> the directors decided to take a "wait and see" approach<sup>27</sup>—that is, the board "decided . . . that no immediate response was required and that it would await the reaction of the market and Lyondell's major shareholders to Blavatnik's move."<sup>28</sup> In particular, the board neither took steps to put the company up for sale nor erected any defenses to fend off a hostile offer.<sup>29</sup> The company's chief executive officer, Dan Smith, soon received an inquiry from Apollo Management, L.P. concerning whether Lyondell's management would be interested in a management-led leveraged buyout of the company, but Smith rejected the proposal because he and other members of Lyondell's management viewed such transactions as too fraught with conflicts of interest for both management and the board.<sup>30</sup>

Throughout this period—that is, after the filing of Basell's Schedule 13D and from mid-May to late-June of 2007—Smith had some preliminary contacts with a subordinate of Blavatnik at Basell, but Smith and Blavatnik's conflicting travel schedules prevented their arranging a meeting.<sup>31</sup> The board itself, however, made "no effort to value the Company or to assess what options

might be on the table if Basell (or another acquirer) made a move to acquire Lyondell"<sup>32</sup>—conduct (or more accurately, an omission) that Vice Chancellor Noble would later describe as "indolent"<sup>33</sup> and "unexplained inaction."<sup>34</sup>

On June 26, 2007, however, it appeared that Blavatnik had lost interest in Lyondell because Basell announced that it had entered into an agreement to acquire specialty chemicals maker Huntsman Corporation.<sup>35</sup> When Hexion Specialty Chemicals, Inc., one of Apollo's portfolio companies, overtopped this bid,<sup>36</sup> Blavatnik again turned his attention to Lyondell, and on July 9 he met with Smith, who pressed him to make his best offer immediately.<sup>37</sup> By the end of the day, Blavatnik offered to acquire Lyondell for \$48 cash per share, provided that Lyondell also agreed to a \$400 million breakup fee and that a merger agreement was signed within seven days.<sup>38</sup> At the time Blavatnik had filed the Schedule 13D, Lyondell's shares had been trading at about \$33 per share,<sup>39</sup> and so the \$48 per share price represented an approximate 45 percent premium to the undisturbed price.

After that, events moved very quickly. On July 10, the Lyondell board met, discussed Blavatnik's offer, and instructed Smith to obtain a written offer from Blavatnik and more information regarding his financing even though his offer was not contingent on the availability of financing.<sup>40</sup> Blavatnik promptly complied, but since under the Basell-Huntsman merger agreement he had only until July 11 to match or exceed Hexion's topping offer, Blavatnik asked that the Lyondell board provide a firm indication of interest in his proposal by the end of that day.<sup>41</sup> On July 11, the Lyondell board met again, decided it was interested in Blavatnik's offer, and authorized the retention of Deutsche Bank Securities, Inc., as its financial advisor for the potential transaction.<sup>42</sup> Basell then bowed out of the bidding for Huntsman, and Huntsman terminated its merger agreement with Basell.<sup>43</sup> In the next few days, the parties and their counsel negotiated a merger agreement, Basell conducted due diligence, and Deutsche Bank worked on a fairness opinion.<sup>44</sup> Meanwhile, on July 12, the Lyondell board met again and authorized Smith to seek improved terms from Basell,<sup>45</sup> which he did in a request to Blavatnik on July 15 seeking an increase in the price, a go-shop provision,<sup>46</sup> and a reduced breakup fee.<sup>47</sup> Blavatnik, noting that he had already been asked for and produced his "best and final" offer, flatly refused, although he did eventually agree to reduce the breakup fee from \$400 million to \$385 million.<sup>48</sup>

On July 16, the Lyondell board met again and received presentations from management and its financial and legal advisors.<sup>49</sup> Lyondell's counsel explained that, although the proposed merger agreement prohibited Lyondell from soliciting other offers for the company after signing (that is, there was no go-shop), it did contain a standard fiduciary-out clause that would allow the company to receive and consider unsolicited offers superior to the terms offered by Basell.<sup>50</sup> Deutsche Bank offered its opinion that the transaction was fair to Lyondell and its stockholders from a financial point of view.<sup>51</sup> In fact, Deutsche Bank noted that the deal price of \$48 exceeded the value of the company as computed in some of its financial models, and the bank's managing director offered the view that the price was "an absolute home run."<sup>52</sup> Deutsche Bank also explained why it believed that no other parties would be



interested in acquiring Lyondell at a higher price.<sup>53</sup> The Lyondell board then voted to approve the merger.<sup>54</sup>

After the agreement was announced on July 17, 2007,<sup>55</sup> no other parties offered to acquire Lyondell. At a special meeting held on November 20, 2007, the Lyondell stockholders approved the merger with more than 99 percent of the shares voted,<sup>56</sup> and the merger was consummated on December 20, 2007.<sup>57</sup>

## II. Fiduciary Duties in Revlon-Land

When the board of directors of a Delaware corporation decides to pursue a change-of-control transaction, it enters *Revlon*-land.<sup>58</sup> Less colloquially, the board's fiduciary duty changes from the preservation of the company as a corporate entity to the maximization of the value of the company at a sale for the benefit of the stockholders.<sup>59</sup> The key questions regarding the board's so-called *Revlon* duty<sup>60</sup> are thus (a) under what circumstances the duty is triggered, and (b) what exactly the board must do to comply with that duty.

### A. What Triggers Revlon

Ordinarily, the decisions of a board of directors, even to decline a merger proposal, are reviewed under the business judgment rule.<sup>61</sup> The board's fiduciary duty changes—that is, *Revlon* is triggered—only when a company embarks on a transaction (either on its own initiative or in response to an unsolicited proposal from another party) that will result in a change of control,<sup>62</sup> typically a cash-out merger. What triggers *Revlon*, therefore, is a certain kind of *decision* by the board.

This has not always been perfectly clear. *Revlon* itself concerned a leveraged, cash-out, bust-up merger, and in that case the Delaware Supreme Court spoke about the change in the board's fiduciary duty occurring when “it became apparent to all that the break-up of the company was inevitable” and the board “recogni[z]ed that the company was for sale.”<sup>63</sup> This language made it seem as if changes in circumstances beyond the board's control could trigger *Revlon*. The court inadvertently confirmed this view a few years later in the *Time-Warner* case.<sup>64</sup> In that case, Chancellor Allen in the opinion below gave exactly the correct analysis: it was the board's decision to pursue a change-of-control transaction that triggered *Revlon*.<sup>65</sup> The Supreme Court, however, although stating that Chancellor Allen's “conclusion [was] correct as a matter of law,”<sup>66</sup> declined to follow it. Rather, it “premise[d] [its] rejection of the plaintiff's *Revlon* claim on different grounds, namely, the absence of any substantial evidence to conclude that Time's board . . . made the dissolution or the breakup of the corporate entity inevitable, as was the case in *Revlon*.”<sup>67</sup> This was a muddle and a mistake, and just four years later, in *Paramount v. QVC*, the Supreme Court returned to this issue and expressly adopted the standard Chancellor Allen had articulated in his opinion in *Time-Warner*.<sup>68</sup>

Historically, the most important issue concerning the triggering of *Revlon* has been whether the transaction the board has embarked upon does indeed effect a change of control. Most famously, after holding that the cash-out merger in *Revlon* triggered the change in fiduciary duties now named for the case, the Delaware Supreme Court went on to hold that although a

stock-for-stock merger in which control of the combined entity remained in the market did *not* work a change of control and so did *not* trigger *Revlon*,<sup>69</sup> a stock-for-stock merger in which the combined entity was controlled by a controlling stockholder *did*.<sup>70</sup> In *Lyondell*, there was never any question that, if Basell acquired Lyondell, the transaction would be a cash merger and thus involve a change of control. The issue in *Lyondell*, therefore, was not *whether Revlon* was triggered but *when*, i.e., at what point in the sequence of events leading to the sale of control did *Revlon* start to apply. I shall return to this issue in Section III below.

### B. The Content of Revlon

Once *Revlon* is triggered, the board has a fiduciary obligation to get “the best price for the stockholders at a sale of the company.”<sup>71</sup> The Delaware Supreme Court has elaborated on this standard, holding that the “key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing.”<sup>72</sup> The inquiry thus has both procedural aspects (concerning whether the board was adequately informed before making a decision) and substantive aspects (concerning “the reasonableness of the substantive merits of [the] board's action”).<sup>73</sup> In this latter aspect, *Revlon* review thus goes beyond the ordinary business judgment rule, which concerns only the decision-making processes of the board and not the substantive merits of its decisions.<sup>74</sup>

The Delaware courts have never been quite clear, however, as to the exact standard of care to which directors will be held in performing their duty under *Revlon*—i.e., whether it is a gross negligence standard or a simple negligence standard.<sup>75</sup> The argument for the former is that such is the standard under the ordinary business judgment rule.<sup>76</sup> The argument for the latter is that review under *Revlon* is supposed to be “enhanced” judicial scrutiny<sup>77</sup> and so a ratcheting up of the level of care required is appropriate.<sup>78</sup> The language of the various opinions does little to settle this issue, for although the courts speak of the directors' *Revlon* duty in terms of *reasonability*,<sup>79</sup> which may seem to imply a simple negligence standard (“reasonable” being the opposite of “negligent”), nevertheless the ordinary business judgment cases also speak in such terms,<sup>80</sup> and there the standard is clearly one of gross negligence.<sup>81</sup> However this may be, although the Delaware Supreme Court has often urged boards to be especially diligent in fulfilling their duties under *Revlon*,<sup>82</sup> the court has also emphasized that in reviewing the board's performance under *Revlon* the Chancery Court “should be deciding whether the directors made a reasonable decision, not a perfect decision,” and so “if a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination.”<sup>83</sup> Perhaps as a result of such language, in practice the standard under which courts have reviewed the performance of boards under *Revlon* has tended towards gross negligence.

In applying *Revlon*, the Delaware courts have generally focused on whether the board reasonably believes that a transaction it has approved and recommended to its shareholders represents the best value reasonably available for the company. Not surprisingly, therefore, the inquiry has often concerned such things as whether the board conducted an auction for the company or some more-limited form of market check,<sup>84</sup> what kinds and how much information the board had about the value of the company (including valuation studies prepared by management or outside financial advisors),<sup>85</sup> what actions the board may have taken to encourage (or discourage) competing offers for the company,<sup>86</sup> whether the board negotiated aggressively with potential buyers,<sup>87</sup> and whether the board favored one bidder over another to the detriment of its shareholders.<sup>88</sup> In keeping with the trend towards applying the *Revlon* duty of care in a gross negligence sense, however, the Delaware Supreme Court has stated that “there is no single blueprint that a board must follow to fulfill its duties,”<sup>89</sup> and the Court of Chancery has often relied on this statement in concluding that a board’s sales process has not violated *Revlon*.<sup>90</sup>

### III. Good Faith in *Revlon*-Land

Since, as I noted above, Lyondell’s certificate of incorporation included a Section 102(b)(7) provision, the issue in the case was not whether the Lyondell directors had breached their duty of care under *Revlon* but whether they had breached their duty of good faith—whether they not only breached their duty of care but knew they were breaching it, i.e., *consciously disregarded* it. Thus, while conceding that his initial opinion “perhaps did not expound in sufficient detail upon [his] reasons for denying the directors protection” under the 102(b)(7) provision, nevertheless Vice Chancellor Noble said in *Lyondell II* that his “concern about the applicability of a Section 102(b)(7) defense . . . is whether . . . the [directors] may have exhibited a ‘conscious disregard’ for their known fiduciary obligation in a sale scenario” under *Revlon*.<sup>91</sup> Likewise, the Supreme Court said that “the issue is whether the directors failed to act in good faith,” which would be the case “if a fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.”<sup>92</sup>

Thus agreeing on the law, the Chancery Court and the Supreme Court reached opposite results. How, then, did that happen? There is a twofold answer. Less importantly, the Chancery Court erroneously concluded that the Lyondell board’s *Revlon* duties were triggered earlier than they in fact were, and, examining conduct by the board during this earlier period under *Revlon*, the Chancery Court found a violation. The Supreme Court, holding that *Revlon* was not triggered till later in time than Chancery supposed, naturally found there could be no violation of *Revlon* based on events prior to its triggering. More importantly, there was a significant—and largely tacit—disagreement between the Chancery Court and the Supreme Court about when it is permissible for a court to infer from the (alleged) fact that a board has breached its *Revlon* duty of care that the board *consciously disregarded* that duty. I shall call these two issues the *triggering issue* and the *inference issue*, and I treat them seriatim.

#### A. The Disagreement About the Triggering Issue

In explaining in *Lyondell II* his holding in *Lyondell I* denying the directors summary judgment on the plaintiff’s claim that they consciously disregarded their *Revlon* duties, Vice Chancellor Noble wrote, “There is where the 13D filing in May 2007 and the subsequent two months of (apparent) Board inactivity become critical,” for

the Directors made *no apparent effort* to arm themselves with *specific knowledge* about the present value of the Company in the May through July 2007 time period, despite *admittedly knowing* that the 13D filing in May 2007 effectively put the Company “in play” . . . It is these facts that raise the specter of “bad faith.”<sup>93</sup>

If the Lyondell board could have violated its *Revlon* obligations starting when Basell’s Schedule 13D was filed, the implication, of course, is that the board’s knowledge (or perhaps the market’s knowledge) that there was a reasonable probability that the company may be sold in the foreseeable future (i.e., that Lyondell was “in play”) triggered the Lyondell board’s *Revlon* duties.

This conclusion is certainly the most surprising aspect of the Chancery Court’s opinion. As I explained above in Section II.A, the Delaware Supreme Court has repeatedly said that what triggers *Revlon* is the board’s decision to embark upon a change-of-control transaction. An announcement by a third party, whether publicly or privately, whether in a Schedule 13D or otherwise, that it is interested in acquiring the company is not a decision by the board to sell control. For twenty years prior to *Lyondell*, this issue was, it appears, well-settled in Delaware law. For, all the way back in the *Time-Warner* case, Paramount had argued that the announcement of Time’s merger agreement with Warner had put Time in play and that this fact triggered the Time board’s *Revlon* duties.<sup>94</sup> Both Chancellor Allen in his opinion below<sup>95</sup> and the Delaware Supreme Court rejected this view, the Supreme Court stating explicitly that “we decline to extend *Revlon*’s application to corporate transactions simply because they might be construed as putting a corporation ‘in play’ or ‘up for sale.’”<sup>96</sup>

Not surprisingly, therefore, the Supreme Court disposed of this issue quite quickly in *Lyondell III*, referring to its holding in *Time-Warner* and stating that “[t]he problem with the trial court’s analysis is that *Revlon* duties do not arise simply because a company is ‘in play.’”<sup>97</sup> Rather, the “duty to seek the best available price applies only when a company embarks on a transaction—on its own initiative or in response to an unsolicited offer—that will result in a change of control.”<sup>98</sup> Since *Revlon* was not triggered, the board’s decision not to respond to Basell’s Schedule 13D and to adopt a wait-and-see approach was reviewable only under the business judgment rule and “was an entirely appropriate exercise of the directors’ business judgment.”<sup>99</sup>

#### B. The Disagreement About the Inference Issue

The Supreme Court’s reaffirming its *Time-Warner* holding that a company’s being “in play” does not trigger the board’s *Revlon* duties mooted the issue in *Lyondell* of whether the board’s conduct between the filing of Basell’s 13D and

its decision to pursue a transaction with Basell satisfied those obligations. The question remained, however, as to whether the facts as disclosed in the complaint permitted an inference that, after it had decided to sell the company and so triggered *Revlon*, the Lyondell board had consciously disregarded its duty to take reasonable steps to get the best price for the company reasonably available.<sup>100</sup>

Clearly, Vice Chancellor Noble was inclined to believe that, on the facts as he was required to understand them for purposes of the defendants' summary judgment motion, it was quite possible that the directors had breached their *Revlon* duty of care.<sup>101</sup> On appeal, the Supreme Court noted that it was not inclined to agree that the directors had breached even their duty of care but that it would not have reversed a ruling denying the directors summary judgment on this issue.<sup>102</sup> This disagreement between the courts, however, is a relatively minor point. The key issue in the whole case, in my view (for neither court so formulates it), is *whether the court may permissibly infer from the mere fact that a board breached its Revlon duty of care that it consciously disregarded that duty*. The Chancery Court believed that, at least sometimes, this inference was permissible, perhaps if the breach of the duty of care looks sufficiently egregious. The Delaware Supreme Court's opinion stands for the proposition that (with a very limited exception discussed below) this inference is impermissible.

One reason for this disagreement between the two courts is that Vice Chancellor Noble insisted on thinking about breaches of a board's *Revlon* duties as falling on a spectrum from less serious violations to more serious violations. For example, in *Lyondell II*, he writes that

on a motion for summary judgment, it is not necessary (or prudent) for the Court to determine precisely where, on these facts, the line falls between exculpable [i.e., under a Section 102(b)(7) provision], "bad faith" conduct (i.e., gross negligence amounting only to a violation of the duty of care) and a non-exculpable, knowing disregard of the directors' known fiduciary obligations in a sale scenario.<sup>103</sup>

Although based on the Delaware Supreme Court's discussion of directorial good faith in *Disney*,<sup>104</sup> viewing gross negligence and conscious disregard of duty as points along a spectrum is not the best way of conceptualizing the problem.

The reason is that the spectrum metaphor encourages the running together of at least two quite different things: (a) the degree of negligence involved in the breach (e.g., in standard law-and-economic terms, just how much less is *B* than *LP*),<sup>105</sup> and (b) whether the board *knew* that it was being negligent in committing the breach. These are separate issues. For example, it is possible for a board to do something very negligent indeed (*B* very much less than *LP*) without knowing that its action is negligent; in such a case, the board would breach its duty of care but would not consciously disregard that duty and so would not breach its duty of good faith. Conversely, it is also possible for the board to do something only slightly negligent (*B* only slightly less than *LP*) and nevertheless know that its action is negligent; in such a case, the board breaches its duty

of care and, by consciously disregarding that duty, breaches its duty of good faith as well. While thus separate, however, the two issues of (a) the degree of negligence, and (b) the board's knowledge of its negligence, are often related in that, generally speaking, the higher the degree of negligence involved in the breach of the duty of care, the more likely it is that the board knew that its conduct was negligent. That is, the more negligent a person is being, the more likely it is that he realizes he is being negligent.

Now, the inference from the proposition that (a) a certain action involves a high degree of negligence, to the proposition that (b) the particular actor performing the action knew that the action was negligent is sometimes appropriate in the common law of torts.<sup>106</sup> As I indicated above, however, the Delaware Supreme Court in *Lyondell III* effectively held that the inference is generally *not* permissible in a *Revlon* context: the mere fact that the board violated its *Revlon* duty of care will not, without more, support an inference that the board was *consciously disregarding* that duty. The court may not infer conscious disregard solely on the basis of even an egregious breach of the duty of care. Presumably some additional evidence about the board's state of mind—some kind of plus factor, like a smoking-gun email—would be needed to support an inference that the board *knew* that it was not complying with its *Revlon* duties.

There is, however, one important but very limited exception to this conclusion. For, after holding that "if the directors failed to do all that they should have under the circumstances, they breached their duty of care"<sup>107</sup> and not their duty of good faith, the court added that, with respect to a potential breach of the duty of good faith by a possible conscious disregard of duty, "the inquiry should have been whether [the] directors utterly failed to attempt to obtain the best sales price."<sup>108</sup> The clear implication is that, if the directors *utterly fail even to attempt* to get the best price, then an inference that they consciously disregarded their duty of care would be permissible. The theory here seems to be that only on the most extreme sets of facts imaginable will the court permit the inference of conscious disregard—that is, only when the board did nothing at all to fulfill its duty of care will the violation of that duty, standing alone, permit an inference that the board consciously disregarded its duty. In all other circumstances, presumably some additional evidence (e.g., something directly related to the directors' state of mind) will be required.

There is an important analogy here to the Delaware Supreme Court's directorial oversight jurisprudence. In *Stone v. Ritter*,<sup>109</sup> which expressly approved the Chancery Court opinion in *Caremark*,<sup>110</sup> the court held that directors would be liable for failing to monitor the activities of corporate employees only if, *either* "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations."<sup>111</sup> "In either case," the court held, "imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations."<sup>112</sup> On the most natural reading of this language, the idea is that, if the directors utterly fail to implement a reporting or information system, then the court may infer that the directors were consciously disregarding their duties and



so find a violation of the duty of good faith.<sup>113</sup> The purpose of this rule seems to be to allow a finding of director liability on truly extreme facts such as those in *Francis v. United Jersey Bank*,<sup>114</sup> where the defendant director did literally nothing at all to monitor the business. Thus, as under *Stone*, so under *Lyondell*: there is a very limited way of moving from a violation of the duty of care to a violation of the duty of good faith—not a failure, even an egregious one, to fulfill the duty of care but only *an utter failure even to attempt* to comply with the duty of care will support an inference to conscious disregard of that duty and so a breach of the duty of good faith.

Why would the Delaware Supreme Court adopt a rule, first in *Stone* in the oversight context and now in *Lyondell* in the *Revlon* context, that, the extreme case of utter failure aside, the inference common in tort law from highly negligent behavior to knowledge of such negligence on the part of the tortfeasor will be blocked in Delaware corporate law? The rationale offered by the Supreme Court in *Lyondell* is cryptic. Referring to its own often-quoted holding in *Barkan* that “there is no single blueprint that a board must follow to fulfill its duties”<sup>115</sup> under *Revlon*, the court writes that because “there are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties,” “the directors’ failure to take any specific steps during the sales process could not have demonstrated a conscious disregard of their duties.”<sup>116</sup> The most natural reading of this, I think, is that, since there is no step the board is always required to take to satisfy *Revlon*, no particular omission could ever be a violation of the duty of care and so, *a fortiori*, not a conscious violation of that duty so as to constitute bad faith.

If this is its meaning, then the argument is fallacious, for the *Barkan* holding about the absence of a blueprint required to be followed by boards in all cases is merely a recognition of the fact that change-of-control transactions occur in a wide variety of evolving circumstances,<sup>117</sup> and given this wide and ever-changing variety of circumstances, there is no action such that, in every case, the board must take that action. Rather, in different circumstances, different actions will be required. Hence, in given circumstances, a board’s failure to take a particular action may breach its *Revlon* duty of care, even though, in other circumstances, omitting that action would not breach its duty.<sup>118</sup> This is quite different from saying, as the court’s argument in *Lyondell* seems to assume, that in every case, while some action or other may be required, there is no particular action that is required—in other words, the circumstances *never* dictate which actions are required, but rather, in every circumstance, the board will have a choice of several actions that will satisfy its *Revlon* duties, none of these being individually required. *That* is a much stronger claim than the holding in *Barkan*.<sup>119</sup>

If the Supreme Court’s rationale for the rule in *Lyondell* fails, there may be a better one. In ordinary tort cases, when we infer knowledge from conduct, there is often also evidence to suggest why the tortfeasor would want to harm the victim.<sup>120</sup> There is no analogue in the *Revlon* situations at issue here. For here we are considering cases in which there is no allegation that the directors are engaged in self-dealing or otherwise interested in the transaction. In those situations, the business judgment rule would be defeated immediately, and the directors

would be required to prove that the transaction is entirely fair to the corporation and its shareholders.<sup>121</sup> The rule at issue, therefore, applies only in very limited circumstances—the cases in which, when not affected by self-interest, directors nevertheless knowingly breach their duty of care. Since the usual reasons for such a breach are absent here, such cases are presumably very rare. In all probability, therefore, an inference to conscious disregard is more likely to be wrong than right. Hence, allowing such inferences to defeat motions to dismiss or motions for summary judgment would tend on balance to produce wasteful litigation, and allowing such inferences in final judgments would tend on balance to produce erroneous results. It may well make sense, therefore, to block such inferences entirely, to hold, in other words, that absent some additional evidence directly bearing on the directors’ state of mind, evidence showing a breach of the duty of care, no matter how egregious, will not support an inference of conscious disregard of duty. The Delaware Supreme Court’s rule—which allows the inference only in the most extreme circumstances, i.e., when the board utterly fails even to attempt to comply with its obligations—thus cabins the inference to a very small set of cases where it is likely to be correct.

#### IV. Concluding Observations

The Delaware Supreme Court’s decision in *Lyondell* thus carries forward the holdings in *Disney* and *Stone* limiting actions based on an alleged violation by a board of its duty of good faith. As I noted at the outset, in all these cases the claim of bad faith was only minimally plausible and was primarily designed by plaintiffs and their attorneys to circumvent the protection offered directors under the corporation’s Section 102(b)(7) charter provision. To the extent that the argument for 102(b)(7) provisions eliminating personal liability for directorial breaches of the duty of care is convincing, protecting the efficacy of such provisions by strictly limiting claims of directorial bad faith not involving self-dealing or other interested conduct is very strong, and such claims should be permitted only in the most extreme cases.

Indeed, perhaps they should not be permitted at all, at least in *Revlon* contexts. For, when directors not motivated by a conflict of interest and not otherwise interested in the change-of-control transaction at issue consciously disregard their fiduciary duties in approving a sale of the company, the danger is that the target corporation shareholders will be harmed by receiving too low a price for their shares. In such cases, however, the shareholders of the *acquiring corporation* will receive a corresponding benefit—their company will in effect purchase the target company on the cheap. For diversified shareholders invested in a broad array of companies, this will be a wash: sometimes they will be harmed by directors consciously disregarding their fiduciary duties in *Revlon* contexts, and sometimes they will be benefited.<sup>122</sup> If directors are subject to liability for conscious disregard of their duties, however, many cases will be brought, including many that the directors will win, albeit at considerable expense—an expense that will be borne by the corporation and so by the shareholders under provisions of the Delaware General Corporation Law that allow corporations to indemnify directors for such unsuccessful suits.<sup>123</sup> If all this



is right, then the only net beneficiaries of such suits may be the attorneys who bring them.

## Endnotes

1 More precisely, Section 102(b)(7) provides that a Delaware corporation's certificate of incorporation may contain

[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under §174 of [the Delaware General Corporation Law]; or (iv) for any transaction from which the director derived an improper personal benefit.

DEL. CODE. ANN. tit. 8, §102(b)(7) (2009).

2 65 DEL. LAWS c. 289 (1986).

3 488 A.2d 858 (Del. 1985). For the now-standard criticisms of the opinion, see Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437 (1985). See generally E. Norman Veasey, Jesse A. Finkelstein & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399 (1987). All of the states (but not the District of Columbia) have enacted provisions more-or-less analogous to Section 102(b)(7). See MARK A. SARGENT & DENIS R. HONABACH, D & O LIABILITY HANDBOOK (2009) (citing and discussing the laws of various states).

4 Assuming that the challenged transaction has been completed and so cannot be addressed by equitable means (e.g., an injunction), a board protected by a Section 102(b)(7) provision is effectively immune. *Malpiede v. Townson*, 780 A.2d 1075, 1093 (Del. 2001) (holding that a complaint that unambiguously and solely asserts only a due care claim is dismissible once the corporation's Section 102(b)(7) provision is invoked).

5 *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 699-740 (Del. Ch. 2005).

6 *Id.* at 750-756.

7 *Stone v. Ritter*, 911 A.2d 362, 365-366 (Del. 2005).

8 *Id.* at 367.

9 It is plausible, but not quite conceptually necessary, that conduct "not in good faith" is the same as conduct "in bad faith." In *Lyondell Chemical Co. v. Ryan*, 970 A.2d 235 (Del. 2009), the Delaware Supreme Court, although noting that the concepts have been distinguished in other contexts, decided to use the terms interchangeably, at least for the purposes of the case at hand. *Id.* at 240 n.8. I shall do likewise.

10 *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 753-756 (Del. Ch. 2005) (discussing various meanings of "bad faith" in the context of directors' fiduciary duties), *aff'd*, 906 A.2d 27 (Del. 2006).

11 *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64-65 (Del. 2006).

12 *Id.* at 64 (holding that "fiduciary conduct motivated by an actual intent to do harm" is "classic, quintessential bad faith"). Compare the famous formulation from *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), that the business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation" (emphasis added). *Id.* at 812.

13 *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006).

14 2008 WL 2923427 (Del. Ch.).

15 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985).

16 2008 WL 2923427, at \*11 (Del. Ch.) (Ryan's claims regarding alleged

breaches by the board of its *Revlon* duties "relate primarily to the Board's fiduciary duty of care, and on summary judgment the Court cannot conclude that Ryan would be unable to prove a breach of that duty at trial. If he only succeeded in that endeavor, however, the Lyondell stockholders would not be entitled to money damages, the only remedy now otherwise available [the merger had already closed, making equitable relief impossible], because Lyondell had an exculpatory charter provision adopted in accordance with 8 Del. C. §102(b)(7). Accordingly, Ryan can only prevail on his *Revlon* claims by overcoming the protection afforded to the Board by Lyondell's exculpatory charter provision; in other words, . . . Ryan must demonstrate that the Board either failed to act in good faith in approving the Merger or otherwise acted disloyally.") (footnotes omitted).

17 2008 WL 2923427 (Del. Ch.).

18 2008 WL 4174038 (Del. Ch.).

19 970 A.2d 235 (Del. 2009).

20 *Id.* at 237.

21 *Lyondell I* at \*4.

22 *Lyondell III* at 237; see also *Lyondell I* at \*4.

23 See *Lyondell I* at \*4 (describing Basell's expression of interest in acquiring Lyondell in 2006 and the Lyondell board's rebuffing of the offer).

24 *Lyondell III* at 237; *Lyondell I* at \*5.

25 *Lyondell I* at \*5.

26 *Id.*

27 *Lyondell III* at 237.

28 *Lyondell I* at \*5.

29 *Lyondell III* at 242.

30 *Id.* at 237; *Lyondell I* at \*5.

31 *Lyondell I* at \*5.

32 *Id.*

33 *Id.*

34 *Lyondell II* at \*4,

35 *Lyondell III* at 237; *Lyondell I* at \*6.

36 *Lyondell III* at 237; *Lyondell I* at \*6. The Hexion-Huntsman transaction, too, would lead to litigation in Delaware. See *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008), as well as my discussion in Robert T. Miller, *Canceling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 CARDOZO L. REV. 99, 147-155 (2009).

37 *Lyondell III* at 237-238; *Lyondell I* at \*6.

38 *Lyondell III* at 237-238; *Lyondell I* at \*6.

39 *Lyondell III* at 237; *Lyondell I* at \*5.

40 *Lyondell III* at 238; *Lyondell I* at \*6.

41 *Lyondell III* at 238; *Lyondell I* at \*6-7.

42 *Lyondell III* at 238; *Lyondell I* at \*7.

43 *Lyondell III* at 238; *Lyondell I* at \*7.

44 *Lyondell III* at 238; *Lyondell I* at \*7.

45 *Lyondell III* at 238; *Lyondell I* at \*7.

46 That is, a provision that would authorize Lyondell, post-signing, to solicit other offers to acquire the company on terms superior to those in the Basell-Lyondell merger agreement. See *Lyondell III* at 238 n.2. See generally Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729 (2008).

47 *Lyondell III* at 238; *Lyondell I* at \*7.

48 *Lyondell III* at 238; *Lyondell I* at \*7. As Vice Chancellor Noble notes, the breakup fee was about three percent of the equity value of the transaction and about two percent of the enterprise value. *Lyondell I* at \*8 n.35.

49 *Lyondell III* at 238; *Lyondell I* at \*8.

50 *Lyondell III* at 238; *Lyondell I* at \*8.

51 *Lyondell III* at 238-239; *Lyondell I* at \*8.

52 *Lyondell III* at 238-239. In particular, Deutsche Bank used two sets of financial projections in its analyses: more bullish projections prepared by management and more conservative ones based on a consensus of industry analysts. Under the more bullish management projections, the discounted cash flow and leveraged-buyout analyses yielded values of \$37 to \$47 per share and \$44.75 to \$51.50 per share, respectively. Using the more conservative analyst projections, the values were \$30 to \$39 per share and \$32.25 to \$38.50 per share. The highest value obtained came from a sum-of-the-parts comparable company analysis made with certain *pro forma* adjustments. See *Lyondell I* at \*8. Probably the key point here is that, under what is usually the most important form of analysis (the discounted cash flow analysis) and using the most bullish assumptions (management's cash flow projections), the value of the company did not reach the deal price. See generally Robert T. Miller, *Canceled the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 CARDOZO L. REV. 99, 167-169 (2009) (discussing importance of discounted cash flow models in valuing corporate acquisitions and citing sources related thereto). The richness of the \$48 per share was abundantly confirmed by subsequent events, for about a year after the deal closed, the combined company, now called LyondellBasell Industries, sought Chapter 11 bankruptcy protection, largely because of the immense amounts of debt it took on to fund the acquisition. Ana Campoy and Marie Beaudette, *Lyondell's U.S. Arm in Chapter 11*, WALL ST. J. ONLINE, Jan. 6, 2009, available at <http://online.wsj.com/article/SB123127968554958711.html>. In fact, the company's unsecured creditors in bankruptcy challenged the secured loans Lyondell took to fund the merger as fraudulent transfers. See David McLaughlin, *Lyondell Creditors Seek Probe of Merger*, WALL ST. J., Mar. 11, 2009, at B2; David McLaughlin, *Lyondell Creditors Seek Approval to File Lawsuit Over \$22B Buyout*, Daily Bankruptcy Review, June 17, 2009. The company, as debtor-in-possession, subsequently settled the suits against its lenders, but the secured creditors objected to the settlement. Andrew Longstreth, *Lyondell Creditors Vow to Fight Chemical Company's 'Outrageous and Reprehensible' Settlement of Fraudulent Conveyance Claims Against Bank Lenders*, AmericanLawyer.com, Dec. 7, 2009. As this article goes to print, the matter is still being litigated in the bankruptcy court in the Southern District of New York. Andrew Longstreth, *Creditors Lose Another Battle in Lyondell Bankruptcy*, AmericanLawyer.com, Jan. 20, 2010.

53 *Lyondell III* at 238; *Lyondell I* at \*8.

54 *Lyondell III* at 238; *Lyondell I* at \*8.

55 *Lyondell I* at \*9.

56 *Lyondell III* at 239; *Lyondell I* at \*9.

57 *Lyondell I* at \*9. The consummation of the merger was key to this case because, once the merger was completed, the Court of Chancery would virtually never grant equitable relief undoing the merger. See *Gimbel v. Signal Cos.*, 316 A.2d 599, 603 (Del. Ch. 1974), *aff'd* 316 A.2d 619 (Del. 1974) (noting the impracticability of "unscrambling the eggs"), which leaves monetary damages from the directors as the only potential remedy—a remedy from which the directors are shielded by the 102(b)(7) provision if the breach was of the duty of care but not if the breach was of the duty of good faith.

58 See generally *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985). The origin of the picturesque term "Revlon-land" is obscure. It was definitely in common use among mergers-and-acquisitions lawyers as early as 1993 when Viacom's attorney used it in oral argument before the Delaware Supreme Court in *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994), earning a rebuke from Justice Andrew Moore (who had authored the *Revlon* opinion) to the effect that "the Court doesn't use those kinds of terms" (quoted in Lawrence A. Cunningham & Charles M. Yablon, *Delaware Fiduciary Duty Law After QVC and Technicolor: A Unified Standard (and the End of Revlon Duties?)*, 49 BUS. LAW. 1593, 1593 (1994)). Justice Moore notwithstanding, the Delaware Court of Chancery occasionally uses the term, even in its written opinions. *E.g.*, *ACE, Ltd. v. Capital Re Corp.*, 747 A.2d 95, 107 (Del. Ch. 1999) (V.C. Strine).

59 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985); *Paramount Commc'ns., Inc. v. QVC Network, Inc.*, 637 A.2d 34, 43 (Del. 1993); *Lyondell III* at 242.

60 Although mergers-and-acquisitions lawyers commonly refer to *Revlon*

duties (in the plural), the Delaware courts, at least after some initial confusion, have emphasized that there is only one duty under *Revlon*, to wit, to take reasonable steps to get the best price reasonably available for the stockholders. *E.g.*, *Lyondell III* at 242 ("There is only one *Revlon* duty.").

61 *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1148-1150 (Del. 1989).

62 *E.g.*, *In re Santa Fe Pac. Corp. S'holders Litig.*, 699 A.2d 59, 71 (Del. 1995); *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 46-48 (Del. 1993).

63 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985).

64 *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989).

65 1989 WL 79880, at \*23 (Del.Ch.) ("[A] corporate transaction that does represent a change in corporate control does place the board in a situation in which it is charged with the single duty to maximize current share value.").

66 *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1989).

67 *Id.*

68 *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 46-48 (Del. 1993). Acknowledging some of the questionable language in its precedents, the Supreme Court insisted that it "does not follow, however, that a 'break up' must be present and 'inevitable' before directors are subject to enhanced judicial scrutiny and are required to pursue a transaction that is calculated to produce the best value reasonably available to the stockholders." *Id.* at 46. Rather, such scrutiny and such an obligation apply "when there is a pending sale of control, regardless of whether or not there is to be a break-up of the corporation." *Id.* See also *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1988) (stating that "in a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders"); *Barkan v. Amsted Indus. Inc.*, 567 A.2d 1279, 1286 (Del. 1989) (stating that "the general principles announced in *Revlon* . . . govern this case and every case in which a fundamental change of corporate control occurs or is contemplated").

69 *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989).

70 *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993). See also *In re Santa Fe Pac. Corp. S'holders Litig.*, 699 A.2d 59, 71 (Del. 1995) (complaint that alleged that target board was firmly committed to a stock-for-stock merger with potential acquirer and failed to allege that control of target company would not remain in the market failed to state a claim under *Revlon*).

71 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985).

72 *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45 (Del. 1993). The court also held that, contrary to the rule in the ordinary business judgment context, the burden of proof on these issues rests with the defendant board. *Id.* ("The directors have the burden of proving that they were adequately informed and acted reasonably.").

73 *Id.*

74 *E.g.*, in *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), the Delaware Supreme Court stated that, although "in making business decisions, directors must consider all material information reasonably available, and . . . the directors' process is actionable only if grossly negligent," *id.* at 259, nevertheless "substantive due care . . . [is] a concept . . . foreign to the business judgment rule," for courts "do not measure, weigh or quantify directors' judgments" and "do not even decide if [such decisions] are reasonable." *Id.* at 264. Hence, in the business judgment context, "[d]ue care in the decisionmaking context is *process* due care only." *Id.*

75 In dicta in *Lyondell I*, Vice Chancellor Noble asserts confidently that the standard is gross negligence ("The Court's ordinary measuring sticks for violations of the duty of care (i.e., gross negligence) and the duty of loyalty (e.g., impermissible interest, lack of independence, or 'bad faith') still apply.") in the *Revlon* context, but he cites no authority for this proposition. *Lyondell I* at \*12 n.70.

76 See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("[U]nder the business judgment rule director liability is predicated upon concepts of

gross negligence.”); *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) (“We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one.”).

77 *E.g.*, *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45 (Del. 1993) (discussing “enhanced judicial scrutiny of a sale or change of control transaction”).

78 *E.g.*, the Delaware Supreme Court has said that, in seeking to maximize value for the shareholders in a *Revlon* context, “the directors must be especially diligent.” *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1993).

79 *E.g.*, *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45 (Del. 1993) (stating that enhanced judicial scrutiny under *Revlon* includes a “judicial examination of the reasonableness of the directors’ action in light of the circumstances then existing”).

80 *E.g.*, in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), the court stated that, under the business judgment rule, the “determination of whether a business judgment is an informed one turns on whether the directors have informed themselves, prior to making a business decision, of all material information *reasonably* available to them.” *Id.* at 872 (emphasis added; internal quotation marks omitted).

81 *See* *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) (“We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one.”).

82 *E.g.*, *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1993).

83 *Id.* at 45.

84 *E.g.*, *id.* at 44 (mentioning auctions and canvassing the market).

85 *E.g.*, *Barkan v. Amsted Indus. Inc.*, 567 A.2d 1279, 1287 (Del. 1989) (holding that directors need not conduct a market check if they have a reliable basis for believing that the transaction accepted represents the best price reasonably available).

86 *E.g.*, *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 199 (Del. Ch. 2007) (finding a violation of *Revlon* because the board solicited offers only from private equity buyers and neglected to consider strategic acquirers).

87 *E.g.*, *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1276-1277 (Del. 1988) (faulting the board for not attempting to negotiate an increase in the price offered by a bidder).

88 *Id.* at 1281 (faulting the board for permitting an auction process that was “clandestinely and impermissibly skewed in favor” of one bidder who “repeatedly received significant material advantages to the exclusion and detriment” of another bidder “to stymie, rather than enhance, the bidding process”).

89 *Barkan v. Amsted Indus. Inc.*, 567 A.2d. 1279, 1286-1287 (Del. 1989).

90 *E.g.*, *In re Pennaco Energy, Inc. S’holders Litig.*, 787 A.2d 691 (Del. Ch. 2001) (denying a preliminary injunction to plaintiff, who alleged that the board had breached its *Revlon* duties, although the board approved the sale of the company without performing a market check and relied only on a post-signing go-shop provision).

91 *Lyondell II* at \*1.

92 *Lyondell III* at 243.

93 *Lyondell II* at \*2 (emphases in original).

94 *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1151 (Del. 1989).

95 *Paramount Commc’ns, Inc. v. Time, Inc.*, 1989 WL 79880, at \*21-\*25 (Del.Ch.).

96 *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1151 (Del. 1989).

97 *Lyondell III* at 242.

98 *Id.*

99 *Id.*

100 In *Lyondell I*, the Vice Chancellor does not clearly distinguish between alleged violations of *Revlon* occurring in the two periods, saying, for example, that the “record does not demonstrate that the Board engaged in an active sales process; in fact, to the contrary, it made no discernible effort at salesmanship either before or after the Merger was announced.” *Lyondell I* at \*18. Similarly, in *Lyondell II*, the Vice Chancellor faults the *Lyondell* board not only for inaction following the filing of Basell’s Schedule 13D but because it “did *nothing* (or virtually nothing) pre-signing to confirm that a better deal could not be obtained . . . did nothing (or virtually nothing) to negotiate Basell’s offer . . . and . . . did nothing (or virtually nothing) post-signing to verify that a better deal could not have been obtained.” *Lyondell II* at \*1 (emphases in original). This may make it sound as if, in the Vice Chancellor’s view, the board violated (and perhaps consciously disregarded) its *Revlon* duties *both* during period from the filing of the 13D to the decision to sell the company *and* during the period from that decision to the execution of the merger agreement. In *Lyondell II*, however, the Vice Chancellor concentrates heavily on the earlier period. *See Lyondell II* at \*2 (stating that in inferring bad faith conduct by the board, “the 13D filing in May 2007 and the subsequent two months of (apparent) Board inactivity become critical”). Indeed, the Vice Chancellor concedes that “[i]n the seven days during which the board considered Basell’s offer, the Defendants’ argument may be correct that only their duty of care is implicated,” *Lyondell II* at \*4, but he never actually says that the facts concerning the board’s conduct during this latter period do *not* support an inference that the board consciously disregarded its *Revlon* duties during this period. Rather, he seems to try to piggy-back a claim of conscious disregard during the later period onto a claim of conscious disregard during the earlier period, stating that it is “these facts [about the period following the filing of the 13D] that raise the specter of ‘bad faith’ . . . which, in turn, colors the Court’s view . . . of the directors’ later ‘negotiations’ with Basell.” *Lyondell II* at \*2. Given all this, it is unclear just what the Vice Chancellor would have said had he come to the Supreme Court’s view regarding when the board’s *Revlon* duties had actually been triggered.

101 Thus, he says, “The record, as it presently stands, does not, as a matter of undisputed material fact, demonstrate the *Lyondell* directors’ good faith discharge of their *Revlon* duties.” *Lyondell I* at \*19.

102 *Lyondell III* at 243.

103 *Lyondell II* at \*4.

104 *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64-67 (Del. 2006) (discussing various kinds of fiduciary misconduct as falling along points “on a spectrum”).

105 I refer, of course, to the Hand formula in which *B* is the cost of a precaution that will avert a loss costing *L* that would, absent the precaution, come about with probability *P*. *United States v. Carroll Towing, Inc.*, 159 F.2d 169, 173 (2d Cir. 1947). *See generally* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 167-171 (7th ed. 2007).

106 *See* W. Page Keeton et al., *Prosser and Keeton on Torts* 36 (5th ed., 1984).

107 *Lyondell III* at 243.

108 *Id.* at 244.

109 *Stone v. Ritter*, 911 A.2d 362 (Del. 2005).

110 *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch.1996).

111 *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2005).

112 *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2005).

113 That is, the text quoted from *Stone* says that a violation of the duty of good faith may occur in the oversight context in either of two ways (i.e., utter failure to implement an information and reporting system *or* a conscious failure to utilize such a system once implemented), but only in its description of the latter does the court mention consciousness on the part of the board. When the text goes on to say that “in either case” imposition of liability requires a showing that the board knew it was not discharging its fiduciary obligations, I read the text as meaning that, when the board utterly failures to implement an information and reporting system, it follows that (i.e., it may be inferred that) the board knew it was violating its duty.

114 432 A.2d 814 (N.J. 1981) (holding liable for officer's looting of the company a director who never attended meetings, never reviewed financial statements, and lacked even a rudimentary understanding of the corporation's business). Compare *ATR-Kim Eng Financial Corp. v. Araneta*, 2006 WL 3783520 (Del.Ch.) (same for directors who failed to take any steps to monitor officer and controlling shareholder and prevent his self-dealing). See my discussion of this and related issues in Robert T. Miller, *Wrongful Omissions by Corporate Directors: Stone v. Ritter and the Process Model of the Delaware Business Judgment Rule*, 10 U. Pa. J. Bus. & Emp. L. 783 (2008).

115 *Barkan v. Amsted Indus. Inc.*, 567 A.2d. 1279, 1286 (Del. 1989).

116 *Lyondell III* at 243.

117 The very next sentence in *Barkan*, after the famous language about the absence of a single blueprint, is as follows: "A stereotypical approach to the sale and acquisition of corporate control is not to be expected in the face of the evolving techniques and financing devices employed in today's corporate environment." *Barkan v. Amsted Indus. Inc.*, 567 A.2d. 1279, 1286 (Del. 1989).

118 *E.g.*, *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 199 (Del. Ch. 2007) (finding a violation of *Revlon* because, in the particular circumstances of a small-cap company, the board had neglected to solicit offers from strategic acquirers, a step that might not have been required if the target were a large-cap company).

119 The distinction is difficult to draw clearly in English but easy to see in a formalized language such as those used in philosophical logic. The difference is that between, (a) "There is no action  $x$  such that, in every circumstance  $y$ , the board is required in  $y$  to perform  $x$ ," and (b) "In every circumstance  $y$ , there is no action  $x$  such that, the board is required in  $y$  to perform  $x$ ." In symbols, this is the difference between (a)  $\neg\exists x\forall y(Fxy)$ , and (b)  $\forall y\neg\exists x(Fxy)$ , which are logically equivalent to (a')  $\forall x\exists y\neg(Fxy)$ , and (b')  $\forall x\forall y\neg(Fxy)$ . Clearly, (b) implies (a), but (a) does not imply (b). Compare: "No one is the father of everyone" (an instance of (a)) and "Everyone has no father" (an instance of (b)). Inferring (b) from (a) is the kind of fallacy logicians call an *operator shift*.

120 *E.g.*, *Lambrecht v. Schreyer*, 152 N.W. 645 (Minn. 1915) (holding that the intent of the alleged tortfeasor could be inferred when one of two neighbors who "had not been on good terms for some time" struck the other neighbor's horse, causing a runaway and resulting injuries).

121 *E.g.*, *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995) (noting that when a majority of directors are affected by actual self-interest in the challenged transaction, the court will review the transaction under the entire-fairness standard).

122 Obviously, the argument in the text is analogous to the well-known argument about securities fraud actions under Rule 10b-5. *E.g.*, Richard A. Booth, *The End of Securities Fraud Class Action As We Know It*, 4 BERKELEY BUS. L.J. 1 (2007); DAVID D. FRIEDMAN, *LAW'S ORDER* 34-35 (2000). The germ of the argument goes back at least to Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHICAGO L.REV. 611, 640 (1985).

123 DEL. CODE. ANN. tit. 8, §145 (2009) (authorizing corporations to indemnify directors and officers for certain expenses).





---

# CRIMINAL LAW & PROCEDURE

## MCDONALD V. CHICAGO, THE MEANING-APPLICATION DISTINCTION, AND “OF” IN THE PRIVILEGES OR IMMUNITIES CLAUSE

By Christopher R. Green\*

---

In *McDonald v. Chicago*,<sup>1</sup> the Supreme Court will consider whether the Second Amendment right of armed self-defense found in *District of Columbia v. Heller*<sup>2</sup> applies to states under the Fourteenth Amendment. Significantly, the question presented<sup>3</sup> addresses not only the Due Process Clause, but also the Privileges or Immunities Clause, which has lain mostly dormant since the *Slaughterhouse Cases* in 1873.<sup>4</sup> Whether armed self-defense is a privilege of citizens of the United States is, of course, an important question. But more fundamental is *why*, exactly, particular rights count as privileges of citizens of the United States. Many different answers might be used to strike down Chicago’s gun ban, but with very different implications for other cases. There are four main possible reasons armed self-defense might count as a privilege of citizens of the United States: such a right (a) is in the Bill of Rights, (b) was traditionally respected in 1868, (c) is generally respected today, or (d) is a natural right. Even if these four questions—“Is it in the Bill of Rights?” “Was it widely respected in 1868?” “Is it widely respected today?” and “Is it a natural right?”—all produce a “yes” for armed self-defense, they will certainly diverge in other cases, because not all traditional liberties are listed in the Bill of Rights, the American tradition of civil liberty has changed between 1868 and today, and neither the Bill of Rights nor our traditions track natural rights perfectly.

### I. MEANING V. APPLICATION, ANALYTIC V. SYNTHETIC

Recent originalist constitutional theory has repeatedly distinguished the original *meaning* expressed by the constitutional text—i.e., the constitutional categories that, as part of “this Constitution,” bind those under the Article VI oath<sup>5</sup>—from originally-intended or originally-understood *application*—i.e., the set of tangible outcomes falling under those categories, which are not binding, but offer merely persuasive authority.<sup>6</sup> If this emphasis on original meaning is right, then originalists can and must admit that Fourteenth-Amendment founders like John Bingham or Jacob Howard could, in principle, be wrong about the *application* of the Fourteenth Amendment, even though they could not, except in very odd circumstances,<sup>7</sup> be wrong about the *meaning* expressed by the Fourteenth Amendment’s language. Put another way, the founders’ *analytic* judgments—judgments true in virtue only of the meaning of their language—are binding, but the founders’ *synthetic* judgments—judgments true in part because of how the world is—are not.<sup>8</sup> An analytic judgment is like “all bachelors are unmarried” or “all cars are vehicles,” but synthetic judgments are like “there are no bachelors on the Supreme Court” or “there are over two million cars in Mississippi.” Building cars does not

change the *meaning* of “car,” but it can change the partly-fact-based *application* of the phrase “the cars in Mississippi.” Justice Souter’s retirement did not change the *meaning* of “bachelor,” but it does change the partly-fact-based *application* of the phrase “the bachelors on the Supreme Court.”

A simple example of founders’ non-binding mistaken synthetic constitutional judgments is Article I, section 2, which apportions representatives “according to their respective Numbers.” Until the first census, however, the Constitution had an interim rule, obviously reflecting the Founders’ judgments of states’ relative populations and expectations for the first census. As it turns out, the founders mistook the relative populations of North Carolina and Maryland—the interim rule gave North Carolina 5 representatives and Maryland 6 for the first two Congresses, but after the census North Carolina received 10 representatives and Maryland 8.<sup>9</sup> Obviously, the meaning expressed in the constitutional text—“according to their respective Numbers”—is binding, not the expected application.

Because the Founders’ synthetic judgments are defeasible, it is not enough simply to examine whether the Founders of the Fourteenth Amendment thought that armed self-defense was a privilege of citizens of the United States.<sup>10</sup> That sort of evidence is important, but it is not, strictly speaking, conclusive. We must instead ask what the Founders thought the phrase “privileges or immunities of citizens of the United States” *expressed*, and then answer whether that criterion, applied to the actual facts, encompasses armed self-defense.

In assessing founding-era evidence, then, a sophisticated originalist does not simply ask how John Bingham or Jacob Howard or Thaddeus Stevens would resolve a particular controversy, but will classify some of the founders’ views as non-binding, partly-fact-based synthetic judgments. In *McDonald*, the Court should consider whether privileges in the Bill of Rights are privileges of citizens of the United States analytically (just by definition) or synthetically, in virtue of some other property of those rights (because they are natural rights, or because they are deeply rooted in the American tradition of civil liberty today, or because they were deeply rooted in the American tradition of civil liberty in 1868).<sup>11</sup> Answering the analytic-versus-synthetic-incorporation question is critical if we are to find out exactly what a resurrected Privileges or Immunities Clause would look like.

### II. WHY “PRIVILEGES OR IMMUNITIES” IS NOT THE PUZZLE

At first glance, we might think that the key words of the Privileges or Immunities Clause are “privileges or immunities.” However, a great amount of material, even from people who disagree sharply over the meaning of the clause, takes them to refer generally to rights. Consider, for instance, the February 1872 dispute between Senators Allen Thurman and John

---

\* Assistant Professor, University of Mississippi School of Law. Thanks to Josh Blackman, Kyle Duncan, Alan Gura, Andrew Hyman, Larry Solum, and the Lamar Order of the University of Mississippi.

Sherman, the Democratic and Republican Senators from Ohio. Thurman argued against the constitutionality of what became the Civil Rights Act of 1875 by taking the incorporation-only view later championed by Justice Hugo Black, while Sherman, prefiguring Justice Goldberg's concurrence in *Griswold*, argued that the Ninth Amendment's intimation of important civil rights outside the Bill of Rights suggested that common-law or traditional rights, like the right to attend school or ride on common carriers, were also included.<sup>12</sup> But both Thurman and Sherman equated "privileges or immunities" with rights. Sherman referred to "privileges, immunities, and rights . . . I do not distinguish between them, and cannot do it,"<sup>13</sup> while Thurman said, "Every right, every privilege, every immunity that belongs to a man as a citizen of the United States is found in the Constitution."<sup>14</sup> Their dispute was not over the meaning of "privileges or immunities," but over the *relationship* that a right must bear to "citizens of the United States" to count—which is to say, over the meaning of "of."<sup>15</sup>

### III. SOME KEY EVIDENCE OF ORIGINAL MEANING

Before considering the various readings of "of" in the Privileges or Immunities Clause, I will set out four historical data points.

*Corfield*. First, many founders—most prominently, Senator Jacob Howard introducing the Fourteenth Amendment to the Senate in May 1866, and John Bingham, explaining the Amendment on behalf of the House Judiciary Committee in January 1871, use *Corfield v. Coryell* to explain the privileges of citizens of the United States.<sup>16</sup> *Corfield*, of course, was an 1823 trial-court opinion by Justice Bushrod Washington, explaining why the right to fish for oysters was not among the "privileges and immunities of citizens in the several states" protected by Article IV, section 2. Washington wrote:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.<sup>17</sup>

This language is itself not perfectly clear. The first phrase ("which are, in their nature, fundamental") leaves open what exactly makes a right fundamental: is the inquiry moral or historical? The second ("which belong, of right, to the citizens of all free governments") suggests natural rights, while the third ("which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign") suggests an analysis of tradition and custom.<sup>18</sup>

In interpreting *Corfield* and its use by Fourteenth Amendment founders, we do well to keep the analytic-synthetic distinction in mind. There are three ways to reconcile the dual reference to history and to natural rights. First, we could take the "and" very seriously—a right only counts if it is *both* among those which "belong, of right, to the citizens of all free governments" *and* among those which "have, at all times, been

enjoyed by the citizens of the several states." We might, however, impute to Washington the view that these two concepts pick out the same set of rights—that the American tradition protects natural rights. If such an imputation is plausible, we can then read Washington as making one analytic judgment and one synthetic judgment. We can read him as saying that "privileges and immunities of citizens in the several states" *means* "privileges belonging of right to citizens of free governments" (the analytic judgment), and that "privileges and immunities of citizens in the several states" *designates, in point of fact*, "privileges that have traditionally been enjoyed by citizens of the several states" (the synthetic judgment). Alternatively, we can read him as saying that "privileges and immunities of citizens in the several states" *means* "privileges that have traditionally been enjoyed by citizens of the several states" (the analytic judgment), and that "privileges and immunities of citizens in the several states" *designates, in point of fact*, "privileges belonging of right to citizens of free governments" (the synthetic judgment).

**Incorporation.** Second, both Howard (in the same May 1866 speech) and Bingham (in a speech in March 1871) refer to the Bill of Rights as a paradigm of privileges of citizens of the United States. Howard, after quoting *Corfield*, said, "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution."<sup>19</sup> Bingham said in the debates leading to the Civil Rights Act of 1871 that "the privileges or immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States," which he then read.<sup>20</sup>

**Antidiscrimination.** Third, the Civil Rights Act of 1866, which Section 1 of the Fourteenth Amendment was intended to constitutionalize to some extent,<sup>21</sup> guaranteed racial equality in land-ownership rights for citizens, but aliens were uncontroversially (at the time) denied equal land-ownership rights on racial grounds, even though the Equal Protection Clause applied to aliens as well.<sup>22</sup> This evidence suggests an antidiscrimination, equal-citizenship interpretation of the Privileges or Immunities Clause, leaving the Equal Protection Clause as a guarantee of "protection of the laws," i.e., government's remedial and enforcement functions.<sup>23</sup>

**Lack of Moral Theory by Interpreters.** Fourth, the debates leading to the Civil Rights Act of 1875 do not feature moral theorizing as a means of explaining the exact content of the Privileges or Immunities Clause, but instead involve a careful examination of the common law. Charles Sumner's proposal aimed to ensure, not equality with respect to *natural* rights, but only "equal enjoyment of all institutions, privileges, advantages, and conveniences *created or regulated by law*."<sup>24</sup> Senator John Sherman said, "The great fountain head, the great reservoir of the rights of the American citizen is in the common law."<sup>25</sup> Sherman thought the proper sources for investigating the privileges of citizens were very broad, but they were all historical—"every scrap of American history"—not natural-rights theory as such.<sup>26</sup> The fact that advocates of a broad reading of the Fourteenth Amendment did not use moral theory as an

interpretive tool strongly suggests that they did not think the Fourteenth Amendment protected natural rights as such.

#### IV. “OF”: SIX POSSIBLE BASIC MEANINGS

So, what relationship *does* a right need to bear to “citizens of the United States” to be protected under the Privileges or Immunities Clause? I will isolate six basic readings of “of” before considering combinations.

**Basic Option (A): “Possessed in virtue of the Union by.”** This is the *Slaughterhouse* theory—privileges “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”<sup>27</sup> In *Cruikshank*, the Court noted that general rights of armed self-defense did not count under this test, because the right *not to be disarmed by the federal government*, which the Second Amendment protected, was distinct from a right *not to be disarmed by states*, which did not depend on citizens’ relationship to the federal government.<sup>28</sup> The oft-noted fatal flaw with this theory is that it renders the Privileges or Immunities Clause largely or entirely superfluous; rights that really exist in virtue of the existence of the federal government or its national character were already binding on the states by Article VI. *Slaughterhouse* lists the right to visit the capital protected before the Fourteenth Amendment by *Crandall v. Nevada*,<sup>29</sup> the right to federal protection on the high seas, and dormant-commerce-clause-style rights to use navigable waterways.<sup>30</sup> Even if there are *some* such non-superfluous rights—the right against new-residency welfare-benefits discrimination in *Saenz v. Roe*<sup>31</sup> might count—they are utterly unlike any historic explanation of the Fourteenth Amendment by its proponents.

**Basic Option (B): “Possessed under the Constitution against the federal government by.”** This is analytic incorporation. As noted above, Senator Thurman adopted it as an exclusive reading in 1872, as did Justice Hugo Black in his *Adamson* and *Griswold* dissents and *Duncan* concurrence.<sup>32</sup>

**Basic Option (C): “Generally possessed under state constitutions, statutes, and common law by.”** As noted above, Senator Sherman criticized Senator Thurman by urging that the common law, not just the federal constitution, is the great source of the privileges of citizens of the United States; the Privilege or Immunities Clause protects the “common privileges of every English subject and American citizen, however humble he may be.”<sup>33</sup> Sherman, however, thought that the Bill of Rights was an important expression of common-law liberties.<sup>34</sup> Further, the earliest prominent arguments for incorporation of the Bill of Rights rely on a common-law definition as primary, seeing the Bill of Rights as an application of such a standard. J. Randolph Tucker’s 1887 argument in *Spies v. Illinois* argued that the rights in the Bill of Rights were incorporated against states because they were common law rights:

Though originally the first ten Amendments were adopted as limitations on Federal power, yet *in so far as they secure and recognize fundamental rights—common law rights—of the man*, they make them privileges or immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment . . . [A]ll the declared privileges and immunities in these

ten Amendments *of a fundamental nature and of common law right*, not in terms applicable to Federal authority only, are privileges and immunities of citizens of the United States, which the Fourteenth Amendment forbids every State to abridge.<sup>35</sup>

**Basic Option (D): “Generally possessed in 1868 under state constitutions, statutes, and common law by.”** This variation on option (C) would freeze the privileges of citizens of the United States in 1868 amber. Earl Maltz, Steven Calabresi and Sarah Agudo each suggest such a view,<sup>36</sup> and *Slaughterhouse* suggested that it was the main alternative to (A).<sup>37</sup>

**Basic Option (E): “Possessed as a matter of natural right by.”** A natural-rights “moral reading”<sup>38</sup> of the Privileges Fourteenth Amendment could build on the natural-rights parts of *Corfield* and other material suggesting natural-rights definitions of the privileges of citizens. In such a case, the Privileges or Immunities Clause delegates to future interpreters, such as the judiciary, the task of assessing natural rights as such. Under such a reading, interpreters should cite philosophers who best assess our natural rights (John Locke, Immanuel Kant, John Rawls, or Robert Nozick, say), rather than the legal theorists most representative of the Anglo-American tradition (Edward Coke, William Blackstone, Joseph Story, or Thomas Cooley, say), as would be proper under a tradition-based definition like (C) or (D). Of course, a constitution might say more or less explicitly, “No state shall invade citizens’ natural rights,” even if such a provision would expand federal judicial power far beyond its traditional scope.

**Basic Option (F): “Possessed locally by.”** This sort of interpretation makes the Privileges or Immunities Clause an anti-discrimination provision, allowing the Equal Protection Clause to be limited, as its text says, to “protection of the laws.” John Harrison, building on evidence such as that in my fourth point above, defends such a view,<sup>39</sup> as do I in my work on the Equal Protection Clause.<sup>40</sup> The idea is that the Privileges or Immunities Clause may allow states to refuse to provide certain privileges to any of its citizens—a law school, for instance, or certain recreational facilities—but once it provides such privileges to citizens in general, it may not make such privileges whites-only. As Matthew Carpenter put it, “the privileges and immunities of all citizens must be the same.”<sup>41</sup>

#### V. DISJUNCTIVE AND CONJUNCTIVE THEORIES OF “OF,” AND THE ANTI-GRUESOMENESS PRINCIPLE

To these six possibilities we must add their combinations. A right might count as a privilege of citizens of the United States, for instance, if it is *either* in the Bill of Rights *or* a natural right;<sup>42</sup> a right might count if it is *both* a natural right *and* customarily recognized. Such disjunctive or conjunctive theories are one way to accommodate multiple data historical points—a (B)-or-(C)-or-(F) view that the privileges of citizens of the United States are (a) traditional privileges, plus (b) privileges in the Bill of Rights, plus (c) locally-given privileges, for instance, would accommodate the four main data points above (on a tradition-as-primary reading of *Corfield*). Indeed, because none of the six basic options can alone accommodate all four basic historical data points—*Corfield*, incorporation, antidiscrimination, and



the absence of moral theory among early interpreters—we must combine them to some extent.

On the other hand, the more complicated a definition becomes, the less likely it was really expressed by the little word “of” when the Fourteenth Amendment was enacted. Philosophers have devoted a great deal of attention to explaining how, exactly, we manage to use the same concepts even though two different concepts might equally cover all of the same past data points. For instance, Nelson Goodman proposed “grue,” defined as “green and discovered before time *t*, or blue and discovered after time *t*,” and noted that, on certain superficially-plausible accounts of confirmation, “all emeralds are grue” is just as well-confirmed as “all emeralds are green.”<sup>43</sup> Saul Kripke discusses the “quus” function, which means the same as “plus,” but only for previously-encountered numbers; for previously-unencountered numbers, the function returns an answer of five.<sup>44</sup> Part of the answer to these puzzles is to point out the natural human tendency to eschew overly-complicated concepts—“gruesome gerrymanders,” as David Lewis’s pun puts it.<sup>45</sup> Not just complication, but heterogeneity—a big difference between the basic nature of the different disjuncts or conjuncts—counts heavily against an interpretation.

Which of the six basic options should make the cut? Only basic option (F) can accommodate the antidiscrimination reading of the Privileges or Immunities Clause which a duty-to-protect-based reading of the Equal Protection Clause requires; while it is of course controversial, (F) has to be an ingredient of the proper definition of “of.” Basic option (A), of course, explains nothing. While there is some evidence of the natural-rights reading of (E), the absence of such a reading among proponents of the Civil Rights Act is telling, as well as the *prima facie* implausibility that the founders meant for judicial interpretations of the privileges of citizens to examine natural rights and moral reality, as such, to assess such privileges. Accordingly, one could accommodate *Corfield* evidence with either basic reading (C) or (D).

Two questions remain: whether to include (B), and whether to pick (C) or (D).

The inclusion of (B) may make our resulting definition too heterogeneous. Because at least the vast bulk of rights in the Bill of Rights would also qualify as privileges under (C) or (D), those readings can accommodate much of the pro-incorporation evidence without making incorporation analytic. Future-Justice Woods’s 1871 trial opinion in *United States v. Hall*, for instance, saw incorporation as the application of a *Corfield* standard.<sup>46</sup> Further, if we include reading (F)—*local* privileges—it would be odd for the fact that a right is in the federal bill of rights, protected against infringement by the *federal* leviathan, to be particularly significant. (B)’s attraction is that it fits with the distinction made in *Slaughterhouse* between state and federal citizenship, reading the Privileges or Immunities Clause to protect only the latter. But if the clause already protects local minorities’ rights to things like law schools or municipal parks, that distinction is untenable; (F) undermines the main selling point of (B). Finally, Bingham’s use of *Corfield* in January 1871 does not mention incorporation as a separate way to qualify as a privilege of citizens of the United States; the *Corfield* standard

there stands alone as an account of the substantive privileges protected by the Privileges or Immunities Clause. I therefore take the *Corfield* definition as analytic, and incorporation as synthetic.

There are three reasons to favor (C) over (D). First, there is no explicit time reference in the Privileges or Immunities Clause. The Constitution refers at one point, for instance, to states “now existing,”<sup>47</sup> but does not protect only “*current* privileges or immunities of citizens of the United States.” Second, even Justice Scalia has understood the tradition-based requirements of procedural due process not to be fixed for all time in 1791 or 1868, but to allow emergent constitutional rights: “Nothing we say today prevents individual States from limiting or entirely abandoning the in-state service basis of jurisdiction. And nothing prevents an overwhelming majority of them from doing so, with the consequence that the ‘traditional notions of fairness’ that this Court applies [with Scalia’s approval] may change.”<sup>48</sup> Third, a time-bound protection for substantive rights seems too different from the local-right antidiscrimination (F) component to be components of the single word “of.” Because *local* privileges protected against discrimination cannot sensibly be embedded in 1868 amber—a state that founded its law school in 1880 could not make it whites-only—it would unduly awkward if national-tradition-based privileges were so embedded.

The (C)-or-(F) reading would protect rights that states generally give to citizens, either locally, as in (F), or nationally and historically, as in (C). While disjunctive, such a reading of “of” in the Privileges or Immunities Clause has had adherents.<sup>49</sup> If followed in *McDonald*, such an interpretation would require an analysis very like the Ninth Circuit’s approach in *Nordyke v. King*.<sup>50</sup> Incorporation would not be automatic, but, given the place of armed self-defense in the American tradition of civil liberty, it would be very likely.

## Endnotes

1 130 S.Ct. 48 (2009).

2 128 S.Ct. 2783 (2008).

3 The question presented is “Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment’s Privileges or Immunities or Due Process Clauses.” The Supreme Court did not rewrite the question presented, as it did, for instance, in *Heller* itself. See *District of Columbia v. Heller*, 552 U.S. 1035 (2007).

4 83 U.S. 36 (1873). *Slaughterhouse* was followed by three decisions following its analysis and finding against Second-Amendment incorporation: *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894). Some scholars and some of the briefs in *McDonald* have argued that the standard anti-incorporationist readings of *Slaughterhouse*, and even of *Cruikshank*, *Presser*, and *Miller*, are wrong or are dicta. Briefly, the suggestions are that *Slaughterhouse*’s reference to privileges “which owe their existence to the Federal government, its National character, its Constitution, or its laws,” 83 U.S. at 79, might include privileges in the Bill of Rights, see, e.g., 2009 WL 4099517, \*24 (amicus brief of Arms Keepers); 2009 WL 4099513, \*11-13 (amicus brief of American Civil Rights Union), *Cruikshank* had an alternative no-state-action holding, because during the Colfax massacre, a private mob was disarming freedmen, not the state of Louisiana, 92 U.S. at 553, *Presser* held against a right of a militia to drill corporately in public, which could be consistent with individual gun rights, 116 U.S. at 264-65, and the claim in *Miller* was not preserved in the trial court, 153 U.S. at 538-39.



The Privileges or Immunities Clause has only been deployed twice by the Supreme Court. *Saenz v. Roe*, 526 U.S. 489 (1999), used the Privileges or Immunities Clause to house the new-residents-discrimination line of cases begun in *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Colgate v. Harvey*, 296 U.S. 404 (1935), used the clause to protect the interstate sale of insurance, but was overruled in *Madden v. Kentucky*, 309 U.S. 83 (1940).

5 For an argument that “this Constitution” in Article VI refers to the textual expression of meaning (in philosophical guise, Gottlob Frege’s “sense” or *Sinn*, Rudolph Carnap’s “intension,” or John Stuart Mill’s “connotation”), rather than the founders’ expected application (Fregean “reference” or *Bedeutung*, Carnapian “extension,” or Millian “denotation”), see Christopher R. Green, “*This Constitution*”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1648-56 (2009).

6 For my contribution, drawing on the philosophy of language, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L. REV. 555 (2006); see also *id.* at 567-69 n.36 (listing many people making similar distinctions); Mitchell N. Berman, *Originalism and its Discontents (Plus a Thought Or Two About Abortion)*, 24 CONST. COMM. 383, 385-89 (2007) (providing a compelling refutation of Jack Balkin’s assertion that originalists “have tended to conflate two different ideas—the expected application of constitutional texts, which is not binding law, and the original meaning, which is”); *Euclid v. Ambler Realty*, 272 U.S. 365, 387 (1926) (“[W]hile the meaning of constitutional guaranties [sic] never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise . . . [A] degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles . . .”); *Ex Parte Professional Engineers’ Association*, 107 C.L.R. 208, 267 (Austl. 1959) (“We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known. But in the interpretation of the Constitution the connotation or connotations of its words should remain constant. We are not to give words a meaning different from any meaning which they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes.”).

7 These would be cases in which a speaker uses a term idiosyncratically, or is somehow unaware of the exact meaning that others use a term to express.

8 The coherence of the meaning-application distinction thus depends on the coherence of the analytic-synthetic distinction, which some philosophers have questioned, e.g., W.V.O. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20 (1951). For two of the many responses to Quine, see H.P. Grice & P.F. Strawson, *In Defense of a Dogma*, 65 PHIL. REV. 141 (1956); Hilary Putnam, *The Analytic and the Synthetic*, 3 MINN. STUD. PHIL. SCI. 358 (1962). A recent survey of philosophers by Australian philosophers David Chalmers and David Bourget finds a sizable majority (604 of 931 target faculty, or 64.8%, and 1886 of 3226 total respondents, or 58.4%) either accept the distinction or lean toward it. See <http://philpapers.org/surveys/results.pl>.

9 See Green, *supra* note 5, at 1623 n.41.

10 See, e.g., Freedmen’s Bureau Act, 14 Stat. 173, 176 (July 16, 1866) (referring to “all laws and proceedings for the security of person and estate, including the constitutional right to bear arms”).

11 The distinction between analytic incorporation and synthetic incorporation is not quite the same as the debate between “total incorporation” and “selective incorporation” in cases like *Adamson v. California*, 332 U.S. 46 (1947). Compare *id.* at 65 (Frankfurter, J., concurring) (noting that history suggests “merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment”) with *id.* at 71-72 (Black, J., dissenting) (“[O]ne of the chief objects that the provisions of the Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.”). Analytic incorporation would be one way to accomplish total incorporation, but not the only way. Synthetic incorporation would make room for total incorporation if the criterion for privileges of citizens of the United States were in fact satisfied by all of the rights in the Bill of Rights.

12 See CONG. GLOBE, 42nd Cong. 2nd Sess. app. 25-30 (1872) (Thurman’s incorporation-only view); *id.* 842-46 (Sherman’s tradition-based definition);

*id.* app. 26 (Sherman interrupting Thurman to make Ninth Amendment argument); *Griswold v. Connecticut*, 381 U.S. 479, 487-99 (1965) (Goldberg, J., concurring); *id.* at 507-27 (Black, J., dissenting).

13 CONG. GLOBE, 42nd Cong. 2nd Sess. 844 (1872).

14 *Id.* app. 26.

15 The only explicit discussion of “of” I have seen is Larry Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEG. ISSUES 409, 424-28 (2009).

16 See CONG. GLOBE, 39th Cong. 1st Sess. 2765 (1866); H.R. REP. NO. 41-22, at 2 (1871) (response by Bingham on behalf of the House Judiciary Committee to Virginia Woodhull’s petition for women’s suffrage); see also CONG. GLOBE, 42nd Cong. 2nd Sess. 844 (1872) (Senator Sherman indicating his agreement with Bingham’s report). Reconciling Bingham’s January report and March speech is difficult. Bingham said in January, “The clause of the Fourteenth Amendment . . . does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2.” H.R. REP. NO. 41-22, at 1. But he said in March, after discussing the very same authorities he cited in the January report (*Corfield*, Webster’s argument in *United States v. Primrose* (a companion to *Bank of Augusta v. Earle*, 38 U.S. 519 (1839)), and Story’s commentary), “Is it not clear that other and different privileges and immunities than those to which a citizen was entitled are secured by the [Privileges or Immunities Clause]?” CONG. GLOBE, 42nd Cong. 1st Sess. app. 84 (1871). One imperfect attempt at reconciliation of January’s “not . . . other” with March’s “other and different” is that the underlying basic rights might be the same, but different rules might apply to them (for Article IV, interstate comity, but for the Privileges or Immunities Clause, absolute protection). The privileges are the same in one sense, and different in another. Bingham does not say so explicitly, though.

17 *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.Pa. 1823). Washington continued:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”

*Id.*

18 With most of those who use *Corfield* to interpret the Fourteenth Amendment, I take “all” with a grain of salt. If Article IV required utter, complete unanimity for a right to be protected, a single instance in which a single state failed to protect a right would render it non-fundamental. But because Article IV is to be enforced against states who fail to provide the relevant privileges, that reading cannot be right. Similarly in the Fourteenth Amendment context, a single state’s actions in failing to provide a right at a particular time cannot be fatal to a claim under the Privileges or Immunities Clause. There will, of course, be difficult borderline cases in deciding exactly how many states must protect a right to render it fundamental, but the general inquiry under a tradition-based reading seems clear enough.

19 CONG. GLOBE, 39th Cong. 1st Sess. 2765 (1866).

20 CONG. GLOBE, 42nd Cong. 1st Sess. app. 84 (1871). It is worth pointing out that John Bingham's 1866 references to the "Bill of Rights" were an explanation of an earlier proposal—"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"—not the Fourteenth Amendment itself. *See, e.g.*, CONG. GLOBE, 39th Cong. 1st Sess. 1088 (1866) ("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."). This language, called the Bingham Amendment, was discussed in February 1866, and its Globe page numbers are in the low 1000s, while the Fourteenth Amendment itself was discussed in May and June, and its page numbers are in the mid- and late 2000s and low 3000s. Many of the *McDonald* briefs have assumed that Bingham was talking about the Fourteenth Amendment itself. *See, e.g.*, 2009 WL 3844394, \*45-\*46 (brief by nominal respondent NRA); 2009 WL 4099512, \*8-\*9 (anti-Charles-Fairman-and-Raoul-Berger brief by CalGuns Foundation); 2009 WL 4099522, \*12 n.4 (Paul Clement on behalf of majority of Congress); 2009 WL 4049145, \*3 (Maryland Arms Collectors); 2009 WL 4099518, \*25, \*28 (Academics for the Second Amendment, first applying Bingham's February speech to the Fourteenth Amendment, then suggesting that the change in language is significant); 2009 WL 4099513, \*31 (American Civil Rights Union).

21 For a summary of the evidence approximating Section One with the Civil Rights Act of 1866, noting that it generally did not indicate whether the Equal Protection or Privileges or Immunities Clause accomplished that result, see Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 24-27 (2008).

22 *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1442-47 (1992); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 266-70 (2009). Not all aliens were denied the right to own land on racial grounds, but those who were racially ineligible to become citizens were.

23 Other important evidence of an antidiscrimination reading of the Privileges or Immunities Clause is the fact that it alone—not the Equal Protection Clause—was invoked in early antidiscrimination disputes over black voting, women practicing law, women voting, and school segregation. Green, *supra* note 22, at 271-77. For other equal-citizenship readings of the Privileges or Immunities Clause, *see, e.g.*, CONG. GLOBE, 39th Cong. 1st Sess. 2511 (Representative Thomas Eliot) (restating Privileges or Immunities Clause as banning "State legislation discriminating against classes of citizens"); *id.* 3034 (Senator John Henderson) (quoting Alexander Stephens) ("Their conclusions are right if their premises are; they assume that the negro is equal, and hence conclude that he is entitled to equal privileges with the white man."); *id.* 2891 (Senator John Conness) (citizens are "entitled to equal civil rights with other citizens of the United States"); CONG. GLOBE, 42nd Cong., 1st Sess. app. 71 (1871) (Rep. Samuel Shellabarger) ("This provision requires that the laws on their face shall not 'abridge' the privileges or immunities of citizens. It secures equality toward all citizens on the face of the law. It provides that those rights shall not be 'abridged;' in other words, that one man shall not have more rights upon the face of the law than another man. By that provision equality of legislation, so far as it affects the rights of citizenship, is secured."); *id.* 505 (Representative Daniel D. Pratt) ("[T]his humble race is raised by the supreme decree of the nation to the full level of civil and political equality. We cannot, if we would, discriminate against them by law. Their privileges and immunities can never be abridged."); CONG. GLOBE, 42nd Cong. 2nd Sess. 385 (1872) (Senator Charles Sumner) (saying of the freedmen, "Our rights are his rights; our equality is his equality; our privileges and immunities are his great possession."); *id.* 762 (Senator Matthew Carpenter) ("If no State can make or enforce a law . . . to abridge the rights of any citizen it must follow that the privileges and immunities of all citizens must be the same."); Slaughterhouse Cases, 83 U.S. 36, 100 (Field, J., dissenting) (Privileges or Immunities Clause provides "protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others"); *id.* at 113 (1873) (Bradley, J., dissenting) ("Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in every State in this Union"); *cf.* Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting) ("But what was secured to colored citizens of the United States—as between them and their respective

states—by the grant to them of state citizenship? With what rights, privileges, or immunities did this grant from the nation invest them? There is one, if there be no others—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same state."); *Plessy v. Ferguson*, 163 U.S. 537, 538 (1896) (argument of petitioner) (Homer Plessy "was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race by its constitution and laws."); *id.* at 559 (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

24 CONG. GLOBE, 42nd Cong. 2nd Sess. 381 (1872).

25 *Id.* 843.

26 *See id.* 844 ("There may be sometimes great dispute and doubt as to what is a right, immunity, or privilege conferred upon a citizen of the United States. That right must be determined from time to time by the judicial tribunals, and in determining it they will look first at the Constitution of the United States as the primary fountain of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of Independence, to every scrap of American history, to the history of England, to the common law of England, the old decisions of Lords Mansfield and Holt, and so back to the earliest recorded decisions of the common law. There they will find the fountain and reservoir of the rights of American as well as English citizens.").

27 83 U.S. at 79.

28 92 U.S. 542 (1876).

29 73 U.S. 35 (1867).

30 83 U.S. at 79-80.

31 526 U.S. 489 (1999).

32 *Adamson v. California*, 332 U.S. 46, 91 (1947) (Black, J., dissenting) ("[T]o pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another."); *Griswold v. Connecticut*, 381 U.S. 479, 525 (1965) (Black, J., dissenting) (quoting this passage from *Adamson* dissent); *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring) ("[T]he words 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.").

At first glance, John Bingham's speeches in 1866 and 1871 might seem to support this view as well. However, his 1866 speech concerned an earlier proposal, not the Fourteenth Amendment. *See supra* note 20. Bingham's March 1871 speech, in which he quotes the entire Bill of Rights, says only that privileges of citizens of the United States are chiefly defined in the Bill of Rights, a critical qualification. Finally and most decisively, *Corfield*, which Bingham used to explain the Privileges or Immunities Clause in January 1871, plainly goes beyond the Bill of Rights.

33 CONG. GLOBE, 42nd Cong. 2nd Sess. 843 (1872).

34 *Id.* 844 (for privileges of citizens of the United States, interpreters should "look first at the Constitution of the United States").

35 *Spies v. Illinois*, 123 U.S. 131, 151-52 (1887) (argument of counsel) (emphasis added). Tucker's argument in *Spies* was later adopted by Justices Field, Harlan, and Brewer in *O'Neil v. Vermont*, 144 U.S. 323, 361 (1892) (Field, J., dissenting); *id.* at 370 (Harlan, J., dissenting).

36 *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869, at 109 (1990) ("[T]he privileges or immunities clause . . . was perceived as guaranteeing a relatively small set of rights which, though somewhat unclear at the margins, were nonetheless fixed for all time in 1866."); Steven Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 13 (2008) ("[I]f one assumes . . . that the Fourteenth Amendment protects only those rights that are deeply rooted in history and tradition, then one plausibly good place to look for such rights is in state constitutions in 1868"); *id.* at 14 ("Focusing on *current* state constitutional law to determine what rights are deeply rooted in our history and tradition as a matter of substantive due process would clearly be mistaken"); *see also* Josh Blackman & Ilya Shapiro,

Opening Pandora's Box? Privileges or Immunities, *The Constitution in 2020, and Properly Incorporating the Second Amendment*, 8 GEO. J. L. & PUB. POL'Y 1, 8 (2010) (placing focus on "how privileges or immunities were understood in 1868"). Clint Bolick's amicus brief in *McDonald* suggests another version of the fixed-in-1868 theory, according to which rights embedded in federal statutes in 1868 (as well as federal constitutional rights) count. See 2009 WL 4247970, \*23 (amicus brief of Goldwater Institute) (arguing that the Privileges or Immunities Clause protects "explicit guarantees of personal rights found in federal law when the Fourteenth Amendment was adopted on July 9, 1868").

37 See 83 U.S. at 78 (stating that reversal "would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment") (emphasis added).

38 Cf. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION* 7 (1996) (asserting that constitutional provisions "refer to abstract moral principles and incorporate these by reference").

39 See Harrison, *supra* note 22.

40 See Green, *supra* note 21; Green, *supra* note 22.

41 CONG. GLOBE, 42nd Cong. 2nd Sess. 762 (1872).

42 The McDonald petitioners, for instance, suggest such a theory. Brief of Petitioners, *McDonald v. Chicago*, 2009 WL 4378912, \*7 (2009) ("the pre-existent natural rights of the sort identified in *Corfield* and the personal rights guaranteed by the Bill of Rights").

43 NELSON GOODMAN, *FACT, FICTION, AND FORECAST* (1955).

44 SAUL KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1980).

45 DAVID LEWIS, *Attitudes De Dicto and De Se*, in 1 *PHILOSOPHICAL PAPERS* 135 (1983).

46 26 Fed. Cas. 79, 81 (C.C.S.D.Ala. 1871) ("What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. [*Corfield*.] Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble.") (emphasis added).

47 See U.S. CONST. art. I, § 9, cl. 1 ("Migration or Importation of such Persons as any of the States now existing shall think proper to admit"); for an argument that the existence of this clause compellingly disproves intergenerational constitutional authorship, see Green, *supra* note 5, at 1662-64.

48 *Burnham v. Superior Court*, 495 U.S. 604, 627 (1990) (Scalia, J., plurality opinion).

49 Justices Bradley, Field, and Harlan all seemed to wed a tradition-based approach to protecting common-law rights with an equal-citizenship local-rights approach. See *supra* notes 23 and 35.

50 *Nordyke v. King*, 563 F.3d 439, *vacated*, 575 F.3d 890 (9th Cir. 2009) (considering whether a right to armed self-defense satisfies the tradition-based standard for substantive due process in *Washington v. Glucksberg*, 521 U.S. 702 (1997)).





---

# ENVIRONMENTAL LAW & PROPERTY RIGHTS

## THE RECORD OF THE ROBERTS COURT IN ENVIRONMENTAL CASES: PRO-BUSINESS OR PRO-GOVERNMENT?

By Jonathan H. Adler\*

---

The Supreme Court's October 2008 Term was not particularly good for environmentalist groups. Indeed, it was their "worst term ever," according to Georgetown University law professor Richard Lazarus.<sup>1</sup> The Court heard five environmental law cases that Term.<sup>2</sup> In each case, the side favored by environmentalist groups had prevailed below, and in each case the Supreme Court reversed. According to Richard Frank of the University of California at Berkeley's Boalt Hall, it was "a miserable year for the environment in the Supreme Court."<sup>3</sup>

It is unusual for the Supreme Court to take five environmental cases in a single Term.<sup>4</sup> It is even more unusual for the Court to side uniformly against environmental interests. Was the October 2008 Term an outlier? Or was it an indication of a newfound hostility to environmental protection on the Supreme Court?

Many commentators rushed to embrace the latter conclusion. Environmental attorney Glenn Sugameli of Earthjustice accused the Court of adopting "pro-business blinders."<sup>5</sup> *Slate's* Dahlia Lithwick wrote that "environmentalists are always buried" by the Roberts Court.<sup>6</sup> Douglas Kendall of the Constitutional Accountability Center told the *National Law Journal* that the Roberts Court "is chipping away at the very foundations of environmental law in this country."<sup>7</sup>

Concerns that the Roberts Court is hostile to environmental protection draw upon a larger narrative that the Roberts Court is both more conservative and more favorably disposed to business interests than its predecessors.<sup>8</sup> Chief Justice Roberts and Justice Alito had yet to sit on the Court for two full Terms before commentators began to accuse the Court of a "pro-business" bias.<sup>9</sup> In March 2008, the *New York Times Magazine* published a lengthy article by George Washington University law professor Jeffrey Rosen, "Supreme Court, Inc.," making the case that the Supreme Court had undergone an "ideological sea change," shifting its allegiance from "progressive and consumer groups" to the business community.<sup>10</sup> The paper itself accused the Court of "a knee-jerk inclination to rule for corporations over workers and consumers"<sup>11</sup> and decried the Court's "reputation for being reflexively pro-business."<sup>12</sup> Other news organizations repeated the claim that President George W. Bush's Supreme Court nominations had helped to create a "pro-business judiciary."<sup>13</sup>

Legal scholars debate whether the Roberts Court has, in fact, been "pro-business" during its first several terms.<sup>14</sup> While

the Court appears to have taken a greater interest in business-related cases, particularly in terms of the percentage of its smaller docket, it is unclear that the Court has been any more "pro-business" than its predecessors in any meaningful sense. While business litigants have had their share of victories over the past several terms, they have also had more than a few stinging and far-reaching defeats, particularly in the area of preemption. While business groups won nearly every preemption case between 2006 and 2009, it has since lost several important preemption cases, including *Wyeth v. Levine*<sup>15</sup> and *Cuomo v. Clearing House Association*.<sup>16</sup>

I conducted a preliminary analysis of the Roberts Court's decisions in environmental cases for a January 2009 *Santa Clara Law Review* symposium on "Big Business and the Roberts Court."<sup>17</sup> In this analysis, I concluded that there was no evidence of a "pro-business" tilt in the Roberts Court's environmental decisions. If anything, the Court's decisions in environmental cases suggested a tendency to side with government agencies and state interests, and not any particular hostility to regulation or sympathy for business litigants. In the intervening months, little has changed. Taking into account those decisions handed down since that symposium does not alter the conclusions. The remainder of this article summarizes the Roberts Court's approach to environmental cases, drawing upon the research and analysis contained in my prior article, and explains the basis for these conclusions.

### WHAT IS "PRO-BUSINESS" OR "ANTI-ENVIRONMENT"?

Court commentaries routinely slap labels on Court decisions—"pro-business," "pro-consumer," "anti-environment," etc.—without providing any meaningful context or discussion for what such labels mean. It certainly appears the Roberts Court is more interested in business-related cases than its predecessors, insofar as the Court appears to have taken more such cases, even as its docket has shrunk. "The Court's increased attention to business related cases—even as its overall docket has continued to shrink—is indeed eye-catching," according to Michael Greve of the American Enterprise Institute.<sup>18</sup> Business-related cases have accounted for one-third to one-half of the Court's docket in recent years, depending on how one defines the term.<sup>19</sup>

The phrase "pro-business court" is undoubtedly intended to signify more than the Court's increased willingness to consider complex legal questions of great importance to the business community. It is a phrase that signifies a substantive inclination, if not necessarily an actual bias, to decide cases in a particular way. But what is this inclination or bias? Is it a preference for business litigants? Or a preference for legal outcome that "business" prefers? And what outcomes are these? In many areas of the law, businesses are on both sides. Does

---

\* Professor of Law and Director of the Center for Business Law and Regulation, Case Western Reserve University School of Law. Portions of this article are adapted from Jonathan H. Adler, Business, the Environment, and the Roberts Court: A Preliminary Assessment, 49 *SANTA CLARA L. REV.* 943 (2009).



“pro-business” mean a preference for a freer or less regulated marketplace? But this is not always good for businesses—pro-market and pro-business are not the same thing.

The identities of the litigants are poor proxies for the underlying merits, as well as whether a given result benefits a broader group or interest. That an individual corporation or business group is on one side or another of a case does not mean that it represents what is good for “business.” Business-related cases regularly pit businesses against one another, and many businesses benefit from legal rules that might be harmful to business activity more broadly.

In his *New York Times Magazine* article, Rosen reported that “the Roberts Court has heard seven [antitrust cases] in its first two terms—and all of them were decided in favor of the corporate defendants.”<sup>20</sup> This is true, and Rosen presented it as evidence in support of his thesis that the Roberts Court is “pro-business.” Yet the plaintiffs in all but one of these cases were businesses as well. So in all but one of the Roberts Court’s antitrust cases in its first two Terms, “business” won and “business” lost. So whether the prevailing party was a business tells us very little.

Because the Roberts Court has tended to side with *defendants* in antitrust cases, perhaps it would be fair to label these decisions as “pro-business” insofar as these decisions have made it more difficult to challenge established business practices as anti-competitive. Perhaps, but this is still overly simplistic, as focusing on whether plaintiffs or defendants won more cases reveals very little about the underlying merits of the cases.<sup>21</sup> Only a handful of cases are at issue. Unless one makes the improbable assumption that the cases represent a random and representative sample of available cases, any effort to determine whether these decisions reveal a “pro-business” inclination have to address the underlying merits of the specific claims considered by the Court. Reversing an outlying pro-plaintiff Ninth Circuit opinion so as to create greater uniformity and consistency within the case law is quite different from overturning decades of precedent or turning the law in a decidedly more “pro-defendant” direction.

Several antitrust scholars have argued that the underlying theme of the Roberts Court’s antitrust decisions is not that the Court is “pro-business” but that it is “pro-consumer welfare.”<sup>22</sup> From this perspective, the Roberts Court has internalized the insights of the Chicago School of antitrust analysis and seeks to prevent legal challenges to pro-competitive business arrangements. As Judge Douglas Ginsburg and Leah Brannon wrote recently, the Roberts Court appears to be “methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding.”<sup>23</sup> From this perspective, it would be more accurate to call the Roberts Court’s antitrust decisions “pro-consumer” or “pro-market” than “pro-business.” Among other things, the Court’s antitrust decisions could make it more difficult for businesses to use antitrust law to hobble more efficient competitors.

The same caution is due when seeking to characterize environmental decisions as “pro-business” or even “anti-environment.” It is overly simplistic to characterize environmental cases as contests between “business” and “the environment.” Environmental policy decisions tend to benefit some business

interests even as they may impose costs on others. Enactment of some federal environmental laws was actively supported by some corporate interests. Indeed, the federalization of environmental law was driven, in part, by national firms that sought to displace variable and potentially more stringent state standards.<sup>24</sup> In some cases, business interests have sought to use regulatory policy as a means of achieving comparative advantage, often by disadvantaging competitors.<sup>25</sup> Environmental controversies often pit one set of industry groups against another, as when incinerators and cement kilns face off on air emission standards or oil and agribusiness fight over energy policy.<sup>26</sup> This was also true in the Roberts Court’s most high profile environmental case, *Massachusetts v. EPA*, as businesses hoping to gain financially from the imposition greenhouse gas controls supported the petitioners, while most business groups lined up on the other side.<sup>27</sup> Indeed, one of the firms seeking greater environmental regulation in *Massachusetts* was before the Roberts Court two years later seeking less stringent environmental regulation in another context.<sup>28</sup>

Although business interests are not uniform or monolithic, it is nonetheless possible to identify a particular side in a given case with business interests generally. That is, in some cases it is relatively clear which side is more in line with the majority of business interests. In the environmental context, while there are businesses that stand to benefit from increased regulation, the “pro-business” position is usually (if not exclusively) the position that is more resistant to regulation.

Even if we can identify the “pro-business” side in a given case, not all “pro-business” positions or decisions are the same. There is a meaningful difference between a court decision that maintains a status quo favored by business interests and a decision that shifts the law in a “pro-business” direction. Ratifying a legislative deal or administrative ruling supported by business interests is quite different from judicial invalidation of regulatory initiatives. Adopting a narrow interpretation of a federal statute creating private rights of action against corporations is quite different from imposing constitutional limits on punitive damages or regulatory impositions. The latter may be evidence of an actual “pro-business” tilt, while the former may illustrate nothing more than deference to the political branches, and may only yield “pro-business” outcomes so long as the political branches are sufficiently sympathetic to business interests. And insofar as the vast majority of cases in which the Roberts Court has adopted “pro-business” outcomes are of the former variety, this should inform our assessment of the extent to which it is a meaningfully “pro-business” court, particularly as recent political shifts may portend a less business-friendly legislative and executive branch.

#### THE ROBERTS COURT’S ENVIRONMENTAL DECISIONS

Accepting the qualifications outlined above, is it fair to characterize the Roberts Court as “pro-business” in environmental cases? And what does this tell us about the Roberts Court more broadly? Since John Roberts became Chief Justice, the Court has decided 10 of its 18 environmental cases in a “pro-business” way. At the same time, the federal government’s position has prevailed in 10 of the 15 cases in which it took a position, and government positions prevailed

against private challenges in 11 of 16 cases. This is an admittedly small set of cases from which to draw definitive conclusions, but they can form the basis of a preliminary assessment: the Roberts Court's decisions in environmental cases show little evidence of any pro-business orientation and the Court appears to be more deferential to governmental interests than it is solicitous of business concerns.

If we step back from the numbers, and consider the substantive effects of the cases, there is even less evidence of a "pro-business" inclination on the Court. Most of the business wins occurred in relatively narrow cases that had little effect on pre-existing law, while several of the losses are quite dramatic and will have profound effects on economic interests. The aggregate effect of the pro-business decisions on environmental law and future environmental litigation has been quite meager, while the less business-friendly decisions could have substantial legal and practical consequences for many years to come.

Consider the four most significant victories for business interests in environmental cases during the Roberts Court era: *Exxon Shipping v. Baker*,<sup>29</sup> *National Association of Home Builders v. Defenders of Wildlife*,<sup>30</sup> *Rapanos v. United States*,<sup>31</sup> and *Burlington Northern & Santa Fe Railway Co. v. United States*.<sup>32</sup> In *Exxon Shipping v. Baker*, the Court struck down a multi-billion-dollar punitive damage award against Exxon but also unanimously rejected the oil giant's claim that punitive damage awards were preempted by federal law, and the majority confined its holding limiting punitive damage awards to cases arising under the federal common law of maritime.<sup>33</sup> The Court's decision in *NAHB v. Defenders of Wildlife* imposed a significant limitation on the application of the Endangered Species Act to pre-existing statutory obligations, but in doing so it affirmed historical agency practice and long-standing lower court decisions on the question. In *Rapanos*, the Court adopted a potentially significant limitation on federal jurisdiction over wetlands lacking a "significant nexus" to navigable waters but also reaffirmed that the U.S. Army Corps of Engineers and Environmental Protection Agency retain substantial authority to define "substantial nexus" so as to reclaim much of the jurisdictional ground that was lost.<sup>34</sup>

*Burlington Northern & Santa Fe Railway v. United States*, which narrowed the scope of "arranger" liability and clarified the standards for apportioning cleanup costs among potentially responsible parties under Superfund, could be more significant, even if only due to the dollar amounts at stake in some Superfund cleanups. Justice Stevens' decision for an eight-justice majority may have unsettled some environmentalist expectations, but the holding rested squarely on a plain reading of the statutory text. Concluding that "arranger" liability only applies to those who take actions directed at the disposal of hazardous waste and cannot be applied to anyone who sells or transfers a product with knowledge that it might be mishandled, the opinion is hardly evidence of judicial hostility to regulation of private business. In *United States v. Atlantic Research Corp.*, a private firm won another Superfund case against the federal government, but this was a Superfund cost-recovery action and the business position was also supported by environmentalists.

Contrast these decisions with those cases in which the Court sided against business interests. The most important

environmental case decided by the Roberts Court—indeed, one of the most important cases of any sort decided in the past several years—was *Massachusetts v. EPA*, in which the Court both loosened the standing requirements for litigants seeking greater federal regulation and expanded the scope of the Clean Air Act to cover greenhouse gases, including carbon dioxide, the most ubiquitous by-product of industrial civilization.<sup>35</sup> As a substantive matter, this case alone is more adverse to business interests than all of the business "wins" put together.

As a legal matter, the most significant aspect of *Massachusetts v. EPA* may be its treatment of standing. Not only did the Court apply the traditional requirements for Article III standing in a particularly undemanding fashion, it also announced a new rule of "special solicitude" for states and potentially expanded the ability of citizen-suit plaintiffs to meet Article III's causation and redressability requirements. The Court subsequently rejected environmentalist standing claims in *Summers v. Earth Island Institute*,<sup>36</sup> but there is nothing in *Summers* that qualifies the expansive approach to standing adopted in *Massachusetts*.

As a practical matter, *Massachusetts v. EPA* is particularly important because it will trigger the federal regulation of greenhouse gases, most notably carbon dioxide. While the Court specifically eschewed directly mandating that the EPA regulate greenhouse gases, remanding the matter back to the Agency for further proceedings given the Agency's failure to offer a "reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change,"<sup>37</sup> there is little doubt that such regulation will result. Indeed, at the time of this writing, regulation has already begun. Relying upon *Massachusetts v. EPA*, the EPA has made a formal finding that greenhouse gas emissions from motor vehicles cause or contribute to air pollution "which may reasonably be anticipated to endanger public health or welfare."<sup>38</sup> This finding triggers regulation of motor vehicle emissions under Section 202 of the Act and sets in motion other regulatory requirements as well.<sup>39</sup>

*Massachusetts v. EPA* was not the only loss for the business community. The Court rebuffed challenges to the application of environmental laws to various business activities, as in *S.D. Warren v. Maine Board of Environmental Protection*<sup>40</sup> and *Environmental Defense v. Duke Energy*.<sup>41</sup> *S.D. Warren* was a rather straightforward case in which the Court unanimously rejected S.D. Warren's contention that a hydroelectric dam that removes and then redeposits water from a river results in a "discharge into the navigable waters" requiring state certification under the Clean Water Act. *Environmental Defense*, on the other hand, is a potentially significant case in which the Court strengthened the EPA's hand in a series of enforcement actions against utilities under the Clean Air Act New Source Review program. In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*,<sup>42</sup> the Court took a small step back from protecting private waste management firms from solid waste flow control ordinances and government-sanctioned monopolies, potentially clearing the way for the creation of government-run monopoly waste processing services and the balkanization of interstate markets in waste management services. In other cases, the Court either expanded the government's ability to impose on

business interests or limited the ability of businesses to challenge government regulations.<sup>43</sup>

#### THE OCTOBER 2008 TERM

Five of the Roberts Court's environmental decisions came in the October 2008 Term. As noted above, the side favored by business, and disfavored by environmentalists, prevailed in each case. But here again there may be less than meets the eye. Environmentalists may have gone 0-for-5, but this could say more about the cases under review than the Supreme Court.

Four of the five environmental cases heard by the Court in the October 2008 term came from the U.S. Court of Appeals for the Ninth Circuit. In these cases, the Court voted 25-15 to overturn the Ninth Circuit's decisions. Only one of the cases, *Summers v. Earth Island Institute*, was decided 5-4. *Burlington Northern* was decided 8-1, while the other two (*Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* and *Winter v. Natural Resources Defense Council*) were decided 6-3. Given how closely-divided the Supreme Court is on so many hot-button issues, it is notable that only one of the five environmental cases was decided by a 5-4 vote. This could just as easily show that the Ninth Circuit is environmentally extreme as that the Supreme Court is hostile to environmental protection or particularly "pro-business" in environmental cases.

As noted above, the Roberts Court's record in environmental cases is but one piece of the larger narrative that the Court has become significantly more conservative with the confirmations of Chief Justice Roberts and Justice Alito. Yet there is scant evidence that Roberts and Alito have made the Court particularly more conservative or pro-business on environmental issues, even if one focuses exclusively on the October 2008 term.

A *New York Times* story on how environmentalist groups lost all five environmental cases before the Court last term quoted Temple University law professor Amy Sinden saying that the cases this Term "could all have come out very differently if we still had O'Connor on the court."<sup>44</sup> This is quite doubtful. As already noted, only one of the cases, *Summers v. Earth Island Institute*, was decided 5-4. It is certainly plausible that Justice O'Connor might have voted to confer standing on the environmentalist plaintiffs in this case, thus producing an environmentalist win, but it's far from certain. Justice O'Connor dissented in *Lujan v. Defenders of Wildlife*,<sup>45</sup> but she joined the majority opinion in the earlier case of *Lujan v. National Wildlife Federation*<sup>46</sup> and wrote a restrictive standing opinion in *Allen v. Wright*.<sup>47</sup> But even if she would have voted differently from Justice Alito in this case, there's substantial reason to doubt she would also have voted any differently in the remaining four cases—and, even if she had, her vote would not have changed the outcome. In all likelihood, no more than one of the October 2008 cases could have come out any differently were Justice O'Connor still a member of the Court.

#### CONCLUSION: PRO-BUSINESS OR PRO-GOVERNMENT?

There is little evidence of any "pro-business" orientation in the environmental cases decided by the Roberts Court to date, but there may be evidence of something else. Business interests did not prevail as often as governmental interests did.

The federal government's position prevailed in ten of the fifteen cases in which it took a position, including some in which the federal government took the "pro-business" position. In an eleventh case—*United Haulers Association*—local governments prevailed against private parties.<sup>48</sup> Thus, in eleven of sixteen cases, the government position prevailed. The remaining cases pitted two states against each other and two private parties against each other, respectively.<sup>49</sup>

This pattern is even more striking when one considers the cases in which the federal government lost. In *Massachusetts v. EPA*, the Court rejected the position advocated by the federal government. Yet the case's outcome can still be considered "pro-government" in many respects. Massachusetts and other state governments were among the prevailing parties, and the Court stressed the importance of that fact in resolving the standing issue. It announced that state governments, as sovereign entities, were entitled to a "special solicitude" in the standing inquiry, thereby privileging state litigants over others.

*Massachusetts v. EPA* is "pro-government" in another respect: the outcome of the case is greatly-expanded federal regulatory authority. Further, in holding that greenhouse gases are subject to regulation as "pollutants" under the Clean Air Act and forcing the EPA to base its decision on whether to regulate such emissions upon its assessment of existing climate science, the Court effectively ensured that the EPA will regulate greenhouse gas emissions from motor vehicles, as well as from stationary sources, including many emission sources which have never before been regulated under federal law.

*Rapanos* and *Burlington Northern* are the only cases in which the Roberts Court imposed any meaningful limit on federal regulatory authority. Yet it would be easy to overstate the impact of these cases. *Rapanos* in particular leaves the federal government with ample room to impose extensive regulation on wetlands should the EPA and Army Corps of Engineers elect to revise their regulations.<sup>50</sup> The Court certainly hinted that federal regulation of private land use is subject to federalism limitations, but it refrained from explicitly imposing such a limit, further blunting the impact of the holding.

If the Roberts Court is, in fact, more solicitous of governmental authority than business or environmental interests, this should become evident in the years to come. The Bush Administration was inclined to support the same position favored by business interests in some environmental cases, as it did in *Massachusetts*, *Winter*, *Entergy*, *NAHB*, and *Summers*. If, as expected, the Obama Administration is more supportive of increased environmental regulation and less supportive of business concerns, the Department of Justice will side with business concerns less often, thereby forcing the Court to choose, and providing a test of the hypothesis that the Roberts Court is more deferential to government authority than it is supportive of business interests.

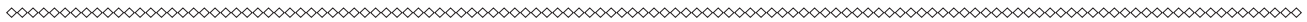
A few final caveats are in order. First, the Roberts Court has considered only eighteen environmental cases in its first four terms. This is a small number of cases upon which to arrive at any definitive conclusion about its approach to environmental—or any other—types of cases. As the Court hears more cases, it will become easier to see whether there is

a discernible trend or inclination, or whether these tentative conclusions were an artifact of the specific cases heard over the past few years. Finally, and perhaps most importantly, whether a given case embodies a “pro-business” outcome is an entirely different question from whether the decision was

substantively correct. The aim of this paper has not been to make any judgments about the correctness of the Court’s various decisions, but rather to assess claims about what the pattern of decisions to date reveal.

<u>Case</u>	<u>Cite</u>	<u>Issue</u>	<u>Vote</u>	<u>Pro-Business Outcome</u>	<u>Pro-Government Outcome</u>
<i>S.D. Warren Co. v. Maine Board of Environmental Protection</i>	547 U.S. 370 (2006)	Whether hydroelectric dam causes “discharge into the navigable waters” requiring state certification under Clean Water Act	9-0	No	Yes
<i>Rapanos v. United States</i>	547 U.S. 715 (2006)	Whether (and when) wetlands adjacent to tributaries of navigable waters are “waters of the United States” under the Clean Water Act and applicable federal regulations	5-4	Yes	No
<i>BP America Production Co. v. Burton</i>	549 U.S. 84 (2006)	Whether six-year statute of limitations for government contract actions applies to administrative payment orders for gas royalty underpayments issued by the Minerals Management Service	7-0*	No	Yes
<i>Rockwell International Corp. v. United States</i>	549 U.S. 457 (2007)	Whether “original source” requirement of False Claims Act is jurisdictional	6-2**	Yes	No
<i>Massachusetts v. EPA</i>	549 U.S. 497 (2007)	Whether EPA has authority to regulate greenhouse gas emissions under the Clean Air Act	5-4	No	No
<i>Environmental Defense v. Duke Energy Corp.</i>	549 U.S. 561 (2007)	Whether EPA is required to apply same definition of “modification” for promulgation of PSD and NSPS standards under Clean Air Act	5-4	No	Yes
<i>United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority</i>	550 U.S. 330 (2007)	Whether county flow control ordinances requiring use of state-owned waste facilities violate the Dormant Commerce Clause.	6-3	No	Yes
<i>United States v. Atlantic Research Corp.</i>	127 S.Ct. 2331 (2007)	Whether CERCLA provides potentially responsible party a cause of action to recover costs of voluntary cleanup	9-0	Yes	No





<i>National Ass'n of Home Builders v. Defenders of Wildlife</i>	127 S.Ct. 2518 (2007)	Whether consultation requirements under Endangered Species Act apply to non-discretionary federal agency decisions governed by explicit statutory criteria.	5-4	Yes	Yes
<i>Wilkie v. Robbins</i>	127 S.Ct. 2588 (2007)	Whether landowner has private cause of action against Bureau of Land Management officials for effort to extort easement	7-2	No	Yes
<i>John R. Sand &amp; Gravel Co. v. United States</i>	128 S.Ct. 750 (2008)	Whether statute of limitations for takings claims against federal government is jurisdictional	7-2	No	Yes
<i>New Jersey v. Delaware</i>	128 S.Ct. 1410 (2008)	Whether interstate compact granted New Jersey exclusive jurisdiction over riparian improvements extending beyond low-water mark	6-2**	No	N/A
<i>Exxon Shipping Co. v. Baker</i>	128 S.Ct. 2605 (2008)	Whether federal maritime common law limits amount of punitive damages awarded in suit for oil spill	5-3***	Yes	N/A
<i>Winter v. Natural Resources Defense Council</i>	129 S.Ct. 365 (2008)	Whether court of appeals erred in affirming preliminary injunction against use of naval sonar for failure to comply with National Environmental Policy Act	6-3	Yes	Yes
<i>Summers v. Earth Island Institute</i>	129 S.Ct. 1142 (2009)	Whether environmental organization's challenge to Forest Service regulations is justiciable	5-4	Yes	Yes
<i>Entergy Corp. v. EPA</i>	129 S.Ct. 1498 (2009)	Whether EPA may use cost-benefit analysis in determining what constitutes the "best technology available" to limit environmental effects of cooling water intake structures under the Clean Water Act	6-3	Yes	Yes
<i>Coeur Alaska, Inc. v. Southeast Alaska Conservation Council</i>	129 S.Ct. 2458 (2009)	Whether the U.S. Army Corps of Engineers may issue a permit under Section 404 for discharge of fill material otherwise subject to effluent limitations under the Clean Water Act	6-3	Yes	Yes

<i>Burlington Northern &amp; Santa Fe Railway Co. v. United States</i>	129 S.Ct. 1870 (2009)	Whether (and when) it is appropriate to impose joint and several liability or apportion damages and scope of arranger liability under CERCLA	8-1	Yes	No
--	-----------------------	--	-----	-----	----

\* Chief Justice Roberts and Justice Breyer did not participate.

\*\* Justice Breyer did not participate.

\*\*\* Justice Alito did not participate

## Endnotes

1 Adam Liptak, *Environment Groups Find Less Support on Court*, N.Y. TIMES, July 3, 2009 (quoting Richard Lazarus).

2 Winter v. Natural Res. Def. Council, 129 S.Ct. 365 (2008); Summers v. Earth Island Inst., 129 S.Ct. 1142 (2009); Entergy Corp. v. Riverkeeper Inc., 129 S.Ct. 1498 (2009); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S.Ct. 2458 (2009); Burlington N. & Santa Fe Ry. Co. v. United States, 129 S.Ct. 1876 (2009).

3 Lawrence Hurley, *Environmental Issues Lose in Supreme Court: Mining Decision is Fifth to Disappoint Activists This Term*, DAILY JOURNAL, June 25, 2009.

4 The number of environmental cases decided in the October 2008 term is even more notable given the substantial decline in the number of cases heard by the Court each term.

5 Hurley, *supra* note 3.

6 Dahlia Lithwick, *Spoonfuls of Sugar: Americans' Continued Love Affair with the John Roberts Court*, SLATE, Sept. 26, 2009, available at <http://www.slate.com/id/2229517/pagnum/all/>.

7 Marcia Coyle, *High Court Losses Stun Environmentalists*, NAT'L L. J., June 29, 2009.

8 See generally Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947 (2008) (arguing that the Roberts Court is the most conservative and most "pro-business" Supreme Court since the 1930s). For a counterargument, see Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983 (2008).

9 See, e.g. Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 432-37 (2007) (asserting that the "conservatism" of the Roberts Court was "manifest in its being more protective of business interests than its recent predecessors"); see also Erwin Chemerinsky, *The Supreme Court: Sharp Turn to the Right*, CAL. BAR. J., August 2007; Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, Jun. 22, 2007, at D1; Nick Timiraos, *Roberts Court Unites on Business*, WALL ST. J., Jun 30, 2007 ("The first full term of the Roberts Court ended this past week with rulings that pushed the law in a direction favored by business."); Steven Pearlstein, *Business Reigns Supreme*, WASH. POST, Jul. 1, 2007; Tony Mauro, *High Court Reveals a Mind for Business*, LEGAL TIMES, Jul. 2, 2007.

10 Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG., Mar. 16, 2008. See also Jeffrey Rosen, *Keynote Address: Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929 (2009) (defending the initial thesis with some qualifications). Rosen's initial article provoked substantial commentary and criticism, much of which is discussed in a series of posts at the Volokh Conspiracy blog at [http://volokh.com/posts/chain\\_1205805605.shtml](http://volokh.com/posts/chain_1205805605.shtml).

11 Editorial, *A Verdict for Workers, for a Change*, N.Y. TIMES, Mar. 2, 2008.

12 Editorial, *The Court and Workers*, N.Y. TIMES, Jun. 21, 2008.

13 Jonathan Crawford, *Bush's Lasting Legacy: A Pro-Business Judiciary*, KIPLINGER BUS. LETTERS, Mar. 10, 2008, available at [http://www.kiplinger.com/businessresource/forecast/archive/Bush\\_Leaves\\_a\\_Last\\_Leaving\\_Legacy\\_080310.html](http://www.kiplinger.com/businessresource/forecast/archive/Bush_Leaves_a_Last_Leaving_Legacy_080310.html).

14 See generally *Santa Clara Law Review Symposium: Big Business and the*

*Roberts Court*, 49 SANTA CLARA L. REV. 943-1122 (2009).

15 129 S. Ct. 1187 (2009).

16 129 S.Ct. 2710 (2009).

17 See Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009).

18 Michael Greve, *Does the Court Mean Business?* FEDERALIST OUTLOOK No. 26, Sept. 2007, at 1.

19 See Rosen, *supra* note 10 ("Forty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years."); Greve, *Does the Court Mean Business?*, *supra* note 18, at 1 ("In the 2006 term, twenty-five of sixty-seven cases dealt with business-related issues."); Mauro, *High Court Reveals Mind for Business*, *supra* note 9 ("Fully half of the Court's 71 cases involved business."). But see Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997, 1000-02 (2009) (suggesting there has been no appreciable increase in the proportion of the Court's docket devoted to business-related cases).

20 Rosen, *supra* note 10.

21 See Posting of Josh Wright to Truth on the Market, *Abuse of Plaintiff Win Rates as Evidence that Antitrust Law Is Too Lenient*, <http://www.truthonthemarket.com/2008/10/14/abuse-of-plaintiff-win-rates-as-evidence-that-antitrust-law-is-too-lenient/> (Oct. 14, 2008, 12:22 EST).

22 See, e.g., Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, GLOBAL COMPETITION POL'Y, Vol. 3, No. 2 (2007).

23 See Douglas H. Ginsburg & Leah Brannon, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, GLOBAL COMPETITION POL'Y, Vol. 3, No. 2 (2007).

24 See, e.g., E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON & ORG. 313, 326-9 (1985); David Schoenbrod, *Why States, Not EPA, Should Set Pollution Standards*, in ENVIRONMENTAL FEDERALISM 259, 260-62 (Terry L. Anderson & P.J. Hill eds., 1997).

25 See generally Jonathan H. Adler, *Clean Politics, Dirty Profits: Rent-Seeking Behind the Green Curtain*, in POL. ENVIRONMENTALISM (Terry Anderson ed., 2000); Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845 (1999); ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith Jr. eds., 1992).

26 See Adler, *Clean Politics*, *supra* note 25.

27 Among those businesses and trade associations that supported the state and environmental petitioners in *Massachusetts v. EPA* were the Aspen Skiing Corporation, Calpine, and Entergy. Various trade associations and groups representing renewable energy interests also supported the imposition of greenhouse gas controls. See *Massachusetts v. EPA*, 549 U.S. 497, 511 n.15 (2007). See also generally Stuart Buck & Bruce Yandle, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177 (2002).

28 See Entergy Corp. v. Riverkeeper Inc., 129 S.Ct. 1498 (2009).

29 128 S.Ct. 2605 (2008).

30 127 S.Ct. 2518 (2007).

31 547 U.S. 715 (2006).

32 129 S.Ct. 1870 (2009).

33 128 S.Ct. 2605, 2618-19 (2008).

34 See Jonathan H. Adler, *Reckoning with Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L. & POL’Y REV. 1 (2006); Jonathan H. Adler, *Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, in THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 81 (L. Kinvin Wroth ed., 2007).

35 For more on the implications of *Massachusetts v. EPA*, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. BRIEF 63 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler.pdf>; Jonathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less Than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 NW. U. L. REV. COLLOQUY 32 (2007), available at <http://www.law.northwestern.edu/lawreview/Colloquy/>

2007/20/LRColl2007n20Adler.pdf.

36 129 S.Ct. 1142 (2009).

37 127 S.Ct. at 1463.

38 Section 202(a)(1) of the Clean Air Act provides, in relevant part:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1).

39 See Jonathan H. Adler, *The EPA’s Carbon Footprint*, REASON (March 2010).

40 547 U.S. 370 (2006).

41 549 U.S. 561 (2007).

42 550 U.S. 330 (2007).

43 See, e.g., *BP America Production Co. v. Burton*, 549 U.S. 84 (2006); *John R. Sand & Gravel Co. v. United States*, 128 S.Ct. 750 (2008).

44 See Liptak, *supra* note 1.

45 504 U.S. 555 (1992).

46 497 U.S. 871 (1990).

47 467 U.S. 737 (1984).

48 The remaining cases, *New Jersey v. Delaware*, 128 S.Ct. 1410 (2008), and *Exxon Shipping v. Baker*, 128 S.Ct. 2605 (2008), pitted two states against each other and two private parties against each other respectively.

49 *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008); *New Jersey v. Delaware*, 128 S.Ct. 1410 (2008). Note in the latter case, however, that the Court adopted a “pro-government” position insofar as it adopted a compact interpretation that provides for overlapping and duplicative government jurisdiction.

50 See *supra* note 34 and the sources cited therein.



JUNK SCIENCE AND CLIMATE CHANGE: THOUGHTS FROM THE FEDERALIST SOCIETY'S 1997 COLLOQUIUM ON "JUNK SCIENCE, THE COURTS, AND THE REGULATORY STATE"

Foreword by Mark C. Rutzick\*

In recent months global climate change has once again taken center stage in the public policy arena. In December 2009 world leaders gathered in Copenhagen for a long-anticipated summit meeting. The U.S. Environmental Protection Agency (EPA) announced on December 7, 2009 its formal "Endangerment Finding" that greenhouse gases, including carbon dioxide, constitute air pollution that endangers public health and welfare under section 202(a) of the Clean Air Act. In November 2009 the unauthorized disclosure of e-mail communications among leading climate-change scientists at the University of East Anglia's Climate Research Unit in Britain suggested that some scientists may have had an intent to manipulate scientific data. Just days later anti-regulatory activists uncovered the past destruction of some raw data used by the same scientists to provide the statistical underpinning for climate-change models that the U.N.'s Intergovernmental Panel on Climate Change (IPCC) employed in 2007 to anchor its case for anthropogenic climate variability.

The IPCC's 2007 Report has enormously influenced the climate-change debate. EPA relied on that document as one of three sources that provided the "primary scientific and technical basis" for the endangerment finding,<sup>1</sup> along with the June 2009 Report of the U.S. Global Change Research Program<sup>2</sup> (USGCRP) (a federal advisory group) and various reports of the National Research Council (NRC).<sup>3</sup> Both of the other two sources rely heavily on the 2007 IPCC Report's analysis and conclusions.<sup>4</sup>

The public policy resolution to the climate change issue involves a possible commitment of resources unparalleled by any other governmental decision in world history. Policy-makers will allocate trillions of dollars world-wide, and hundreds of billions in the U.S. alone, as they determine whether and to what extent to seek greenhouse-gas reductions. As with all key U.S. policy issues, the courts are certain to have a major, and perhaps decisive, role in determining the ultimate policy direction.

The current confluence of policy, law, and science developments adds several new dimensions to the multifold legal issues already surrounding the climate issue:

1. To what extent should judicial review of EPA's endangerment finding, and future agency science-based decisions, employ the "junk science" tests set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*?<sup>5</sup> Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has observed that even though the *Daubert* standard is based on the Federal Rules of Evidence and therefore does not directly apply to

federal agency decisions, "the spirit of *Daubert* does apply to administrative proceedings," and "[j]unk science' has no more place in administrative proceedings than in judicial ones."<sup>6</sup>

The *Daubert* issue is raised by recent events because one of the tests for junk science is whether a scientific conclusion can be replicated, and the partial loss of the data set underlying the IPCC's climate-change models may mean it is no longer possible to replicate those model results. Were opinions based on those models to be offered in a jury trial in federal court, they would likely be challenged under *Daubert*, and potentially could be excluded from consideration. These circumstances lead to two related questions: Can a federal agency rely on opinions that are insufficiently reliable to be admitted in a trial court? Can a court conducting Administrative Procedure Act (APA) or comparable judicial review uphold a federal agency decision based on opinions that are inadmissible under *Daubert*?

2. The data loss presents an additional legal issue. The U.S. Court of Appeals for the District of Columbia Circuit held that "under APA notice and comment requirements, among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies in its rulemaking."<sup>7</sup> Can an agency meet its APA disclosure obligations where (presumably) the agency never had the underlying "technical studies and data," portions of those data may no longer exist, and the public is therefore unable to evaluate and comment upon the missing information? Further, may an agency lawfully rest a decision on data it never possessed and could not verify?

3. Government officials are entitled to a presumption of good faith in their decisions,<sup>8</sup> and this presumption can be rebutted "only upon a strong showing of bad faith or improper behavior."<sup>9</sup> "[M]ore exacting review may be required when the presumption of regularity is rebutted."<sup>10</sup>

The recently-revealed e-mail evidence that IPCC climate-change scientists discussed manipulation of data and censorship and suppression of opposing views might be sufficient to rebut the presumption of good faith as to those individuals. EPA became aware of that controversial evidence before making its endangerment finding in principal reliance on the IPCC's conclusions.

Some case law suggests agency reliance on third-party scientific opinions known to have been potentially reached in bad faith may constitute bad faith on the part of the agency, sufficient to render an agency decision arbitrary and capricious under the APA. A federal agency has been held to a duty to assure that statistical information upon which it relies is unbiased.<sup>11</sup> "[A] decision made in reliance on false information, developed without an effort in objective good faith to obtain accurate information, cannot be accepted as a 'reasoned' decision."<sup>12</sup>

The legal intersection of junk science and federal agency decisionmaking is not a new subject to the Federalist Society.

\* Mark C. Rutzick is the President of Mark C. Rutzick, Inc. in Fairfax County, Virginia, and is admitted to practice in the District of Columbia, Oregon, and Washington. He has practiced federal environmental litigation and administrative law for more than twenty-five years. He is a member of the Executive Committee of the Federalist Society's Environmental Law and Property Rights Practice Group.





are of a consistently high quality and are much more provocative than standard bar fare.

The morning session began with a panel entitled “Junk Science: The Interplay Between Risk Regulation and the Torts System.” Panelists included: Arthur Bryant, Executive Director, Trial Lawyers for Public Justice; Dr. George Ehrlich, University of Pennsylvania Medical School; Alan Raul, Sidley & Austin, Chairman of the E.L. Wiegand Practice Group in Environmental Law & Property Rights; Edward Warren, Kirkland & Ellis, Chairman of the E.L. Wiegand Practice Group in Administrative Law & Regulation; James Gauch, as moderator, Jones, Day, Reavis & Pogue, Vice Chairman of Programs for the E.L. Wiegand Practice Group in Administrative Law & Regulation.

James Gauch introduced the morning’s panelists and noted that it was his intention to place the spotlight on neglected topics—should courts exercise the same gatekeeping function over the uses of science by administrative agencies that they now serve over science in the courtroom, and is science consumed by agencies in the same way it is consumed by the courts? Gauch began by introducing Edward Warren and commending to the audience Warren’s article bearing on these questions—*Judge Leventhal’s Revenge: The Courts as “Gatekeepers” of “Good Science” After Daubert*, 1994 Pub. Int. L. Rev. 93 (1994) (arguing that Daubert was similar to former D.C. Circuit Judge Harold Leventhal’s “hard-look” brand of judicial review of technical and scientific agency decisionmaking). Gauch then noted that Dr. George Ehrlich has been an advisor to the FDA and consultant to the manufacturers of breast implants. Gauch said Alan Raul planned to focus on relevant lessons from tobacco-related regulation. Lastly, Gauch introduced Arthur Bryant as a champion of the plaintiffs’ bar who would do his best to rebut what other panelists would say.

Alan Raul, partner at Sidley & Austin and Chairman of the practice group in Environmental Law & Property Rights, made the first presentation. Holding up his pocket computer, Raul joked that it was only a matter of time before he became a member of a class action involving radio emissions or carpal-tunnel syndrome. Throughout his presentation, Raul peppered his analysis with examples drawn from his experience with the regulatory treatment of and science surrounding so-called “environmental tobacco smoke” (ETS) or “second-hand smoke.” Raul’s thesis was that *Daubert* should be applied “actively and aggressively” by federal judges reviewing the scientific underpinnings of agency action. Acknowledging the “[anti-]democratic risk” of his approach, Raul cautioned that he was not advocating the substitution by judges of their own preferences for those of Congress or for the preferences of agencies legitimately delegated lawmaking authority. What he *was* advocating and what deeply troubled him was the tendency he perceived for agencies to make rules and other decisions based on various assumptions, default principles, and “fudge factors” that often remain undisclosed to the regulated public. According to Raul, federal judges should follow the example of *Daubert* in the tort context by excising such unexamined and unscientific regulatory assumptions with the scalpel of searching judicial review.

Raul recommended that the audience read Wendy E. Wagner’s article, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (1995). Though it approached the issues posed by regulatory science from a liberal perspective, Raul argued that the article’s observation that agencies were deliberately obfuscating their *modus operandi* by calling it “science” rather than naked “policymaking” was correct and should be taken to heart. Raul apparently parts company with Wagner’s follow-up argument that agencies shouldn’t have to pretend and thus should be allowed to make policy openly. In Raul’s view, the problem in the regulatory context in most cases isn’t “junk science,” it’s “junk policy.” The science is fine; it’s what the agency does with the science that’s invalid. In the ETS context, for example, perfectly valid epidemiologic studies establish that ETS increases the risk of certain diseases by a factor of 1.19. According to Raul, however, epidemiologists are in general agreement that such a factor would have to exceed at least 2 and possibly 3 before there was any cause for alarm, yet ETS studies far below that threshold are currently being cited by regulators to justify administrative action.

In Raul’s view, agencies regulating on the basis of unarticulated assumptions become essentially a “farm team” for the plaintiffs’ bar. Whenever an agency takes action or does a study suggesting that a product or service causes harm and there is a “deep pocket” anywhere in the vicinity, litigation is inevitable. For support, Raul ticked off the examples of Love Canal, the “junk science” behind banning asbestos in building materials, the baselessness of breast-implant litigation, and the dioxin scare. To his recommended reading list Raul added a publication by the American Council on Science and Health, *Facts vs. Fears*, which reviews the twenty greatest modern health scares perpetrated in our country.

To solve the problems he identified, Raul advocated using the *Daubert*-like approach to judicial review of regulation described above, an approach that Raul believes Judge Leventhal would have applauded. Unfortunately, Raul noted that the only court to address this question explicitly, the Seventh Circuit, has rejected a similar argument. See *Sierra Club v. Marita*, 46 F.3d 606, 621-22 (7th Cir. 1995) (“While such a proposal might assure better documentation of an agency’s scientific decisions, we think that forcing an agency to make such a showing as a general rule is intrusive, undeferential, and not required.”).

The next to speak was Dr. George Ehrlich from the University of Pennsylvania Medical School. Dr. Ehrlich explained that he was a man of “strong opinions,” as reflected in his television appearances concerning breast-implant litigation and science. He noted that it is inevitable that as a new medical product or service becomes more widely used in society, the segment of the population using the new product or service will begin to show some incidence of the rare diseases that manifest themselves in the population at large. Breast implants are only one example of this phenomenon. Dr. Ehrlich suggested that the recent uproar over the weight-loss drug fen-phen was another.

Given this rather obvious statistical fact, Dr. Ehrlich posed the question of how it is that widespread claims of rare diseases being caused by medical products or services are taken seriously in the courts and by doctors, even though the science supporting

such claims is flimsy or nonexistent. He believes the answer lies in “Bergson’s fallacy.” Dr. Ehrlich explained that Bergson was a statistician at the Mayo Clinic who was often being asked by his doctor colleagues how it could be that they were seeing more and more patients with rare diseases unless the incidence of such diseases was truly increasing. The answer, Bergson explained, was that the doctors at the Mayo Clinic were super-specialists. Patients with rare diseases were concentrated at the Mayo Clinic because of its world-renowned reputation. (Psychologists Kahneman and Tversky have labeled the phenomenon also identified by Bergson the “availability heuristic”—people tend to generalize inappropriately from what is common or rare in their own experience (including media reports) to conclusions about what is common or rare in the world as a whole. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in Daniel Kahneman, et al., eds., *Judgment under Uncertainty: Heuristics and Biases* 166 (Cambridge 1982).) As an example, Dr. Ehrlich pointed out that many doctors practicing on the West Coast of Florida became convinced that breast implants were causing various health problems because they were seeing a lot of women with breast implants who had such problems. Of course, those doctors had fallen into Bergson’s fallacy by failing to consider that breast implants were especially common in that part of the country and that women conscious of their appearances enough to obtain implants were more likely to search out doctors for any health problems they were experiencing.

Further elaborating on the example of breast implants, Dr. Ehrlich explained that the mine run of epidemiologic studies demonstrate consistently that breast implants do not cause diseases such as scleroderma or rheumatoid arthritis. (Dr. Ehrlich is a rheumatologist.) Thus, breast-implant plaintiffs have resorted to arguing that they suffer from what Dr. Ehrlich called “fake” illnesses, such as “atypical connective-tissue disease.” The problem with these diseases is that they are non-falsifiable because they rely on subjective expressions of pain—that is why the list of symptoms for these kinds of “diseases” is at 150 and growing. In the same category Dr. Ehrlich put other so-called diseases such as “fibromyalgia,” “chemical sensitivity syndrome,” and “repetitive-strain syndrome.”

In contrast to Raul’s observation that regulatory action tends to spur litigation, Dr. Ehrlich seemed more concerned that agency mandates have expanded because of action by an aggressive plaintiffs’ bar. He described how the Food and Drug Administration’s (FDA’s) powers to regulate have expanded from the power to ensure safety to include powers to ensure efficacy. In Dr. Ehrlich’s view, these new powers give regulators the ability to impose the impossible burden on manufacturers to prove scientifically that their products are absolutely safe.

Dr. Ehrlich also argued that the proliferation of spurious science is not entirely the fault of plaintiffs themselves. Dr. Ehrlich lays blame at the feet of both plaintiffs’ attorneys and doctors. Many of the plaintiffs in breast-implant cases are proceeding in good faith, according to Dr. Ehrlich—it’s simply that their doctors and lawyers have convinced them that inside their breasts wait ticking time bombs and therefore that they should sue now before the inevitable illnesses arrive.

Moderator James Gauch next introduced Edward Warren, a partner at Kirkland & Ellis and Chairman of the Administrative Law & Regulation practice group. Borrowing the thesis of an obscure article written at the turn of the century in the *Albany Medical Journal*, Warren argued that *Daubert* was a second-best solution to a very old legal problem. Turns out that the article was written by none other than the famed jurist Learned Hand and reprinted shortly thereafter in the *Harvard Law Review*. See *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1902). In Warren’s view, Judge Hand’s analysis of the problems posed by expert scientific testimony were “prescient” and so fresh they “could have been written yesterday.”

In his article, Judge Hand analyzed a long line of common-law decisions to make the point that it was an anomaly in Anglo-Saxon jurisprudence for witnesses to be allowed to testify to opinions. The liberal treatment of experts in this regard was thus an exception to that general rule. Judge Hand thought that this exception was totally unwarranted. The usual trope advanced to justify this exception even in Judge Hand’s day was that juries were incapable of applying scientific learning to pure facts to draw valid inferences because such learning was outside their experience or maybe beyond their ken. But Judge Hand emphasized that this same problem also clearly counseled against allowing juries to weigh the opinions of conflicting experts at all. The solution to the problem of jury incompetence in this area, according to Judge Hand, was to treat scientific knowledge in the same way courts are accustomed to treating something else universally acknowledged to be beyond the jury’s powers—the law. Thus, juries should be instructed about scientific conclusions as if they were law. In Judge Hand’s schema, either judges or expert panels of neutral scientists would be tasked with crafting the “science instructions” in a particular case. Warren subscribes fully to Judge Hand’s view as the “first-best” approach that is correct as a matter of logic and law.

Turning from the ideal world to the existing one dominated by *Daubert*’s schema, Warren noted that the lower federal courts have by and large applied *Daubert* faithfully. The most glaring exception to that trend has been the Eleventh Circuit’s decision in *Joiner v. General Elec. Co.*, 78 F.3d 524 (11th Cir. 1996) (Barkett, J.), cert. granted, 117 S. Ct. 1243 (1997), a case in which the plaintiff alleged that his lung cancer was caused by PCBs and the court reasoned, despite a careful district court opinion to the contrary below, that two mouse studies and the mere credentials of the plaintiff’s experts were enough to allow the case to go to a jury. The Supreme Court has granted certiorari in *Joiner*, and in Warren’s view, the Court did not take that step with an eye to affirm. Therefore, Warren expects that *Daubert* will be strengthened in some way or confirmed in the Court’s next term. Alternatively, the Court could choose to use the case as a vehicle to explore the powers of the courts of appeals to reverse evidentiary rulings excluding experts, but at the very least that approach would leave *Daubert* intact.

Expanding on the analysis he advanced in his piece in the *Public Interest Law Review*, Warren next explored the differences between how science is used by agencies and how science is used by courts. By contrast to Raul, Warren thinks that agencies should be given a wider latitude in their use of science than



courts. This is because it is the task of agencies to regulate in a forward-looking, prophylactic manner, while courts are tasked with deciding individual cases under the backward-looking standard of whether a plaintiff can show that his particular injury was more likely than not caused by a defendant's actions. Warren then expressed his view that Judge Alex Kozinski properly emphasized the point on remand in *Daubert* that the "more likely than not" standard is a "pretty tough test." See *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir.), cert. denied, 116 S. Ct. 189 (1995). Because agencies use science in a different way than courts, Warren concluded by arguing that courts should not defer to agencies whenever agencies decide that the risks warrant taking administrative action. On the other hand, if an agency, with the broader scope of action entrusted to it, decides *not* to regulate, then courts should in most cases defer to the expert agency's determination and thus block lawsuits running contrary to such an agency's effective determination that a product or service is safe.

The last panelist to make a presentation in the morning was Arthur Bryant, Executive Director of Trial Lawyers for Public Justice. Bryant joked that he felt like the man invited to a barbecue only to find out that he was the main course. Bryant predicted that the audience would be shocked by his exclamation: "Ich bin ein Federalist." Bryant chastised other panel members for advocating an expanded role for federal judges and agencies to control "junk science" as anti-Federalist and argued that because of the more liberal treatment trial lawyers champion for expert testimony in the law they are actually more in line with Federalist principles than the Federalist Society.

The theme of Bryant's presentation was that there were no easy answers—each case had to be decided on its facts and each agency possessed unique problems and capabilities that needed to be considered. Bryant also argued that the problem of "junk science" cuts both ways—that corporate defendants often deploy "junk science" in order to ward off valid claims. He pointed to a Title IX case that he recently litigated against Brown University in which Brown attempted to cut its female gymnastics and volleyball programs costing about \$60,000 annually. Brown paid \$100,000, however, to commission a study designed to show that men are generally more interested in participating in college-sports programs than women. In Bryant's view, that study was a prime example of "junk science." Continuing with his "complexity" theme, Bryant asked whether defendant tobacco manufacturers would agree with him that *Daubert* bars them from presenting an expert to testify before a jury that smoking does *not* cause lung cancer, despite the current scientific consensus to the contrary.

According to Bryant, there are two reasons why plaintiffs are commonly perceived as being more set back by *Daubert* than defendants: (1) plaintiffs have the burden of proof, and if all scientific evidence is excluded when scientific evidence is in fact necessary to establish liability, then plaintiffs obviously lose; and (2) Peter Huber successfully framed the issue this way in his book, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books 1991). Liking Huber's method to the Spanish Inquisition (proving only what it set out to prove), Bryant

accused Huber of ironically providing no scientific basis for the claims he made in that book. For Bryant, Huber has claimed the commanding heights on this issue only because of a vigorous public-relations campaign to promote the book conducted by the Manhattan Institute.

Pushing his oversimplification thesis, Bryant argued that "eggshell" plaintiffs deserve protection by our tort system, and that *some* breast implants cause *some* diseases, but not others. He explained his point that not all agencies are created equal by pointing to the example of the FDA, which lacks subpoena powers and thus was apprised of some of the evidence available to buttress claims of breast-implant risk only by plaintiffs' lawyers, sometimes in violation of judicial protective orders. In Bryant's view, truth isn't absolutely knowable and unchangeable and thus, while cases must be decided at a specific point in time, courts should never crystallize the prevailing view of mainstream science in the law. To support this claim he relied on the Supreme Court's rejection of the asbestos class-action settlement in *Amchem Prods., Inc. v. Windsor*, No. 96-270, 1997 WL 345149 (June 25, 1997), where a district court was reversed for binding future asbestos claimants to the settlement, despite the possibility that their claims might be different from those of current plaintiffs and that the ability of future plaintiffs to prove their claims might similarly be different in light of subsequent advances in science. Bryant also noted that many of the proposals for reform advanced by other panelists relied on giving a freer rein to judges, though in some cases the judiciary inspires less confidence than juries. Summing up, Bryant cautioned everyone to "be more skeptical" of attacks on "junk science" because "science is about as an efficient search for truth as the legal system is an efficient search for justice."

When initial morning presentations concluded, Gauch gave each of the panelists a chance to react to their fellow panelists' arguments. Raul began by turning around Bryant's point about public relations. He argued that in reality the so-called public interest groups have been far more effective in playing the public-relations game than those of Peter Huber's persuasion. He pointed out that a single person can place a call to the Larry King Live cable-television program claiming that his wife died of brain cancer because she frequently used a cellular telephone and soon there is a national panic. Raul did give credit to agencies here in rejecting calls to regulate cellular telephones on the ground their use causes physical harm, however. On the whole, though, Raul thought that Bryant had been quite reasonable, noting that both sides in the debate are sometimes prone to oversimplification. In reality, subtle questions, not easy questions, are involved in this issue.

Dr. Ehrlich agreed with Bryant's point that courts should never freeze current scientific views into the law, quoting Captain Cook's quip that "There are no black swans until you encounter your first one." He disagreed with Bryant's point that there are two sides to science, however. He argued that there is always only one side that is currently supportable and, thus, the other side must be presumed to engage in speculation. Case reports and the like can provide useful signals that the current orthodoxy should be changed, but case studies alone cannot be the basis for doing so. He referenced the principles



of bacteriology that maintain that even epidemiologic evidence not be taken as conclusive until medical science has established the causal links in a chain operating at the cellular level.

Returning to the subject of breast implants, Dr. Ehrlich pointed out that the types of silicone used in such implants are safe and inert. In fact, silicone is used to coat needles and to make artificial limbs, in pacemakers, in devices like Norplant, and even in anti-flatulence drugs and in breakfast cereals. The only silicone ever shown to cause health problems according to Dr. Ehrlich is a type of silicone that Japanese prostitutes injected into their breasts in the aftermath of WWII.

Responding to criticisms on federalism grounds of his recommendations for reforming the problems associated with “junk science,” especially to his arguments that courts should defer to agencies that decide not to regulate, Warren indicated that he was not at that point arguing for the preemption of state lawsuits, merely that a flexible principle of deference should be voluntarily recognized and applied. Warren also stated his opinion that “junk science” is the symptom of a much larger problem and not the cause. In this vein he argued that there is too much dual regulation between the federal agencies and the tort system and thus that *Congress* should explicitly preempt more tort law. (The implementation of Judge Hand’s solution would also require legislative action.) He applauded the Supreme Court’s recent ruling in *Metro-North Commuter R.R. Co. v. Buckley*, No. 96-320, 1997 WL 338550, (June 23, 1997) (rejecting a fear-of-cancer tort under the Federal Employers’ Liability Act (FELA)). Like Bryant, Warren also referred to the Supreme Court’s rejection of the asbestos class action in *Windsor*, but as an example of the rampant abuse of the rules of civil procedure by plaintiffs. Finally, Warren decried unbelievable punitive-damage awards and the rise of a “discovery tort” used by the plaintiffs’ bar to shift the focus from the reality of cases of dubious scientific merit to alleged misconduct by products-liability defendants, who are often crushed by oppressive discovery requests in multiple fora.

Bryant responded to his critics by noting that there was little disagreement with his “oversimplification” thesis. He then recounted how the first breast implant case settled for a sizable sum in exchange for a sealing of the record, suggesting that “there must have been something there.” Dr. Ehrlich couldn’t help but exclaim that it’s often cheaper for defendants to settle than to litigate. Bryant then moved to a different subject, agreeing with Warren’s claim that science is and should be used in different ways in the regulatory and judicial contexts. In Bryant’s words, “the agencies work wholesale, while the courts work retail.” He took issue, however, with Dr. Ehrlich’s point that there is only one side to science. Bryant said the scientists he talks to tell him that there is plenty of room for disagreement on many scientific questions. Finally, Bryant attacked Warren’s claim that courts should defer to agencies when they decide not to regulate. He suggested that embedded within any such argument is an ideological assumption that the agencies always do their best to assert that a potentially regulable product or service causes harm. He did not dispute that deference was appropriate in some cases, but argued that plaintiffs should be able to present evidence to a jury that an agency decision not

to regulate was caused by a lack of information or by political concerns.

The first question from the audience was put to Raul and focused on whether institutional pressures creating a “flight from science and reason” turned too many scientists into cowards. Raul acknowledged that it is dangerous for a scientist to be caught outside the mainstream—that even scientists can fall prey to “political correctness” because they fear losing the right to compete on a level playing field for future grants. Raul was considerably more sanguine than the questioner that good science could win out, however, because the light of full disclosure is a powerful medicine. He pointed to the example of the Congressional Research Service’s unmasking of the fact that EPA reduced the standards for statistical significance when reviewing the studies on ETS.

Warren primarily fielded a question arguing that it was ironic for Federalists to be advocating giving judges more power in order to solve the problem of “junk science.” Warren responded that, as Judge Hand had recognized, allowing expert witnesses to testify to opinions is a rule at war with our legal tradition. Therefore, any qualms Federalists have with fixing the problems of “junk science” by strengthening the role of the judiciary operates from an incorrect legal baseline. The best solution to the problem of “junk science” is for courts to impanel expert advisory panels in Warren’s view. (As additional support for Warren’s argument that Judge Hand’s solution is not radical, consider the fact that Lord Mansfield, to cite the practice of only one eminent common-law judge, convened expert juries to address complex questions arising under the commercial law. See 1 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 93-99 (1992)). Warren also agreed with Raul that while there is a price to be paid for speaking out against “junk science” we should be optimistic that scientists generally have enough courage to do so. In particular, Warren argued that reputable scientists would participate in the expert panels he recommended be utilized because this move would free them from the taint associated with being labeled “hired guns.”

#### Luncheon Address by Peter Huber

After the morning session had ended and lunch was nearly complete, Peter Huber rose to give his keynote address. Huber tried to flesh out what he viewed as the two most important words in the Daubert opinion: “falsifiability” and “reliability.” At times, however, Huber could not help but comment on certain portions of the morning session that had aroused his interest.

Huber began by analyzing the word “falsifiability.” He was struck by the fact that Chief Justice Rehnquist, in his dissent in Daubert, claimed not to know what the word meant. Therefore, Huber thought it might be profitable to explore the meaning of this word drawn from the philosophy of science espoused by Sir Karl Popper. See Daubert, 509 U.S. at 600 (Rehnquist, C.J., concurring in part and dissenting in part) (“I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its “falsifiability,” and I suspect some of them will be, too.”); Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th

ed. 1989). Huber mused that Justice Blackmun, the author of Daubert, may also not have known what the word meant and it was likely that neither Justice Blackmun nor his clerks have ever read Popper's principal works, at least not in their entirety. Huber, an MIT-trained engineer as well as a lawyer, set out to bridge the gap. In the simplest terms possible, Huber said that what Popper meant by "falsifiability" was that in order for a theory to qualify as science it must make predictions that are concrete enough to be proved wrong. Huber also traced Popper's insights to Popper's impatience with the unfalsifiable claims of contemporaries Marx and Freud.

Huber then quoted from the affidavit of one of the plaintiffs' expert in Daubert, Dr. Shanna Swan. Huber mused that Dr. Swan had likely not written that affidavit herself because it was phrased in "lawyer-speak." After reading a 71-word passage containing a lot of double-negatives, Huber said it was time for the lawyer to "invite Popper in." Applying Popper's falsifiability analysis, Huber demonstrated that Dr. Swan's assertions were not science because they could not be proven wrong. Echoing a point made earlier by Dr. Ehrlich, Huber argued that it is impossible for science to prove ultimate negatives. Thus, it should come as little surprise that Jason Daubert and his parents eventually lost their case against Merrell Dow, making the positive spin put on Daubert by the plaintiffs' bar right after the case was decided ring hollow. (On a lighter, but practical note, Huber explained that he had personally spoken to the Dauberts and that their name was pronounced /Daw-bert/ not /Dow-bert/ or /Do-bear/.)

Taking up the challenge laid down by Bryant, Huber asserted that he was perfectly content to have Daubert's test to exclude junk science be applied in a totally neutral fashion, so that defendant experts were just as susceptible of being excluded. He had never maintained anything to the contrary, he retorted. Huber also responded to Bryant's charge that Galileo's Revenge was unscientific. "It's true," said Huber. As if to say that Bryant's point were irrelevant, Huber said that Galileo's Revenge was merely "a polemic sold in bookstores."

Moving on to the second important word from Daubert, "reliability," Huber argued that this term was not equivalent to the term "validity." To understand the true meaning of "reliability," according to Huber, one must consult the eighteenth-century mathematician, Thomas Bayes. Huber explained "Bayes theorem" with a simple example. Suppose your grandma's eyesight is 80 percent accurate (valid) and grandma tells you that she saw a yellow taxicab. Should grandma be allowed to testify to the taxicab's color in court? Most judges (and most people) approach this question in the following way: 80 percent is pretty good accuracy—I would allow grandma to testify; now maybe 60 percent or less would be too low. Such thinking misses half of what is important, as Bayes has demonstrated. Suppose your grandma told you she saw a yellow lion outside, would you still let her testify in court? Suppose your grandma told you she saw a yellow stegosaurus? Under Bayes theorem, what's important to judging overall "reliability" is not just the characteristics of the observer ("validity") but the likelihood that what an observer claims he has seen is true in the world at large.

Huber then posed the question of how we obtain information about the extrinsic likelihood that observed (or predicted) events are true. In the case of grandma and the yellow taxicab, the Division of Motor Vehicles can give us information about what proportion of taxicabs are yellow. But in cases where new scientific issues are under consideration, there is no Division of Motor Vehicles to consult. What to do? According to Huber, at this point we have to make an estimate of extrinsic likelihood. How do we make such an estimate? The best estimate of extrinsic likelihood is derived from a range of observations, or in terms of the grandma analogy, by looking at what the whole gamut of grannies have to say about the color of the taxicab. Turns out that under Bayes theorem that comes down to doing something that looks a whole lot like assessing whether scientific theories have achieved general acceptance. Ironically, the Daubert decision, which held that the Federal Rules of Evidence had abrogated the general-acceptance test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), has merely recreated Frye and to that requirement added the further requirement of falsifiability. For Huber, the Court has essentially come full circle and gone the older law one better.

Turning to questions, Huber at first first faced some skepticism about the Bayes theorem. Huber did his best to explain that the Bayes theorem really was true, although he acknowledged that it sometimes produces counter-intuitive results. As an example, he used the fact that although the current HIV test is 99.8% valid, seven out of ten people without the virus currently get false-positive test results because the disease is so rare in the population as a whole. This "cries out against my intuition," admitted Huber, but it is true nonetheless.

The same federalist difficulty put forth in the morning session was also served up to Huber. Huber's response was: "You have to choose your poisons," implying that in this case, it is simply worse from a conservative perspective to allow juries to pass on whether theories qualify as real science than to give judges greater powers as gatekeepers to do the same. Sounding a variation on Judge Hand, Huber asked the rhetoric question of why we don't put legal questions to juries—"Ladies and Gentlemen of the jury, here is the text of Rule 10b-5. Please tell us what it means."

Lastly, I asked Huber the purely legal question of whether his reading of the meaning of "reliability" in Daubert was justified since Daubert specifically makes general acceptance a single factor in the determination of what is truly scientific rather than a determinative one and because the opinion appears to use the words "reliability" and "validity" interchangeably. Huber acknowledged the latter difficulty, but seemed to say that his reading of Daubert was plausible and that it made for better policy. "Who knows what the Court really meant by the term?," asked Huber.

Many of the ideas Huber expressed at lunch are contained in his new book, *Judging Science: Scientific Knowledge and the Federal Courts* (MIT Press 1997), and Huber recommended that Federalist Society members pick up a copy.

#### **Afternoon Session on Science and Toxic Torts: Who Decides and How**

Panelists included Professor David Bernstein, George Mason Law School, co-editor of *Phantom Risk: Scientific*





See Joiner, 78 F.3d at 537 (Smith, J., dissenting) (citing Daubert.)

Professor Bernstein also added to his reading list in this area the Ninth Circuit's decision in *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994), cert. denied, 513 U.S. 1082 (1995). The district judge in *Hopkins* should have excluded the plaintiffs' experts according to Professor Bernstein. (It will come as little surprise to Federalists that the district judge in *Hopkins* was Thelton Henderson, the same judge who struck down the California Civil Rights Initiative on logic that was tantamount to arguing that affirmative action is not only constitutionally permissible but constitutionally compelled. See *Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480, rev'd 110 F.3d 1431 (9th Cir. 1997).)

Continuing with his attack on the absent Roisman, Professor Bernstein turned to Roisman's assertion that cases are sometimes ahead of the curve. Professor Bernstein was willing to entertain the possibility that a few true Galileos might somehow find their way to testifying for plaintiffs. The problem, Professor Bernstein argued, is a practical one—most of the new "scientific" theories advanced in the courtroom turn out to be wrong. Perhaps a different set of legal rules should obtain if the opposite were true, but it is not. Thus, keeping a few Galileos out of the courtroom is a small price to pay to obtain the benefits of excluding a host of quacks.

Professor Bernstein associated Roisman's approach with that of fellow Professor E. Donald Elliott. Particularly irksome to Professor Bernstein is Professor Elliott's assertion that "Toxic tort cases are about good and evil, about corporate greed and indifference, and about risk of the unknown. But above all, toxic tort cases are about redefining our public morality for a new era in which we must confront the troubling truth that we do not fully comprehend the relationships between the things that we have made and our health and well-being." *Planning and Managing Mass Toxic Tort Cases*, C534 ALI-ABA 605, 611 (1990). "Redefining our public morality" "is a bit much to ask of our tort system," Professor Bernstein maintained. Professor Bernstein also found Professor Elliott's pioneering sense of justice questionable since Professor Bernstein believes that plaintiffs should have to establish that there has truly been a victim before being allowed to secure a recovery from a potentially blameless party. Mere status as a corporation and the environmental track record of corporations generally should never be enough to change the normal rules of evidence.

Sharman then put his own question to Professor Bernstein before opening up the floor more generally. In Sharman's view, since most juries approach cases in good faith and do their best to muddle through even complicated scientific issues, the problem in this area of the law is judges who allow "junk science" to go to juries and thereby either confuse them or provide them with a handy justification for indulging their prejudices. Implying that the presentations of the day had operated on perhaps too theoretical a plane, Sharman asked Professor Bernstein for practical advice on to deal with judges like Judge Billy Bob, who often say that Daubert-like arguments are really arguments about the sufficiency of the evidence. Given that perspective, such judges are unwilling to "cut the legs out from under" plaintiffs at an early stage of the litigation.

Professor Bernstein could only reiterate his point that the falsifiability prong of Daubert is easily translatable into a plea to a judge to force the side propounding "junk science" to "give us something we can cross examine." Professor Bernstein conceded, however, that the admissibility and sufficiency inquiries in this area of the law were intertwined to such a degree, however, that it is hard to give simple advice about how to sway judges inclined to frame admissibility issues as matters of sufficiency.

The next question to Professor Bernstein came from an audience member who was troubled by the reality that much of the science bearing on commonly litigated issues is performed by the corporate defendants themselves or by other industry-affiliated scientists rather than pure academics. Don't plaintiffs in toxic tort cases superficially appear to have a point when they advance claims of bias? To this Professor Bernstein suggested that expanded use of neutral scientific panels should be investigated, such as Warren had advocated in the morning session. (It appears to the author that a further useful response to overly-simplistic arguments for even-handed application of Daubert is that there are solid reasons for judges (and juries) to give more credence to corporate science over plaintiff-generated science. While completely neutral science is the ideal, corporate science is at least monitored in many areas by federal or state regulators. Much corporate science is in fact performed to satisfy regulatory requirements. The extensive testing required by the Federal Insecticide, Fungicide, and Rodenticide Act comes to mind readily. Plaintiff-driven science is far more questionable because there really are no external checks on its validity other than judges who faithfully apply Daubert (or in the state courts that have not followed Daubert, Frye). Many hired-gun experts can make a good enough living as frequent witnesses that they cease even to guard their professional reputations.) Professor Bernstein also referenced a work in the *Federalist Society's* anchor journal by audience member, Paul Taylor, who explored the common-law self-critical analysis privilege, which prevents voluntarily performed corporate investigations from being used by plaintiffs against the corporations that generated the information. See Note, *Encouraging Product Safety Testing by Applying the Privilege of Self-Critical Analysis When Punitive Damages Are Sought*, 16 *Harv. J. L. & Pub. Pol'y* 769 (1993).

Another of the positions advanced by Professor Elliott that Professor Bernstein criticized was the suggestion that the burden on Daubert-like questions of admissibility should be shifted to defendants when plaintiffs can show that there was some effort by a defendant to conceal material information (usually through the mechanism of the "discovery tort" discussed in the morning) from past or present plaintiffs. One audience member intrigued by this concept asked Professor Bernstein whether he took his distaste for this burden-shifting idea so far as to reject the doctrine of spoliation, which applies a judicial inference that destroyed evidence was damaging to the responsible party's case. Professor Bernstein responded in the negative—there is an important difference between withheld evidence that is eventually turned over and evidence that is destroyed. Sharman agreed with Professor Bernstein and echoed Warren's concerns in the morning session about the rise of the "discovery tort."





---

# FEDERALISM & SEPARATION OF POWERS

## THE INDIVIDUAL HEALTH INSURANCE MANDATE AND THE CONSTITUTIONAL TEXT

By Ilya Somin\*

---

The health care bill recently passed by Congress includes an “individual mandate” requiring most Americans to purchase health insurance. Beginning in 2014, most citizens and permanent residents will either be required to purchase health insurance that meets federally-mandated standards or pay a fine of up to \$95 per year, which by 2016 will rise to a maximum of \$750 per year.<sup>1</sup>

There is a heated debate over whether such a mandate is constitutional. Unfortunately, both sides have focused mostly on the implications of recent Supreme Court decisions. Critics argue that the mandate falls outside the scope of Congress’ authority under those precedents,<sup>2</sup> while supporters claim that the case law supports their position.<sup>3</sup> Neither side has seriously considered the text and original meaning of the Constitution. Ultimately, however, the Constitution is more than what the Supreme Court says it is. Even if the text and original meaning aren’t the only relevant considerations, they should be a part of the discussion. In this essay, I argue that the individual mandate goes beyond Congress’ powers under the text and original meaning of the Constitution.

Since the 1930s, the Supreme Court has interpreted Congress’ powers under the Commerce Clause in ways that go far beyond the text. However, courts could invalidate an individual health insurance mandate without upsetting longstanding major institutions of American government. Although it may be impossible or unwise to fully enforce textual limits on congressional power, we can prevent further undermining of constitutional constraints.

### I. THE HEALTH CARE MANDATE AND THE COMMERCE CLAUSE

Defenders of the mandate’s constitutionality usually cite Congress’ powers under the Commerce Clause as the main support for their position.<sup>4</sup> The text of the interstate Commerce Clause grants Congress the power to regulate “Commerce . . . among the several states.”<sup>5</sup> In ordinary usage, the word “commerce” generally refers to the exchange of goods or services, not to any and all activity that might have an effect on such exchange.<sup>6</sup>

Various Supreme Court precedents hold that Congress has broad power to regulate activities that have a “substantial effect” on interstate commerce, even if they don’t count as interstate commerce themselves.<sup>7</sup> The purchase of health insurance clearly has an impact on interstate commerce, and thus might fall within the scope of the “effects test.” However, the test is at odds with the constitutional text. If the Commerce Clause really gave Congress the power to regulate any activity that merely affects interstate commerce, most of Congress’ other powers listed in Article I of the Constitution would be redundant. For example, the very same phrase that enumerates Congress’ power to regulate interstate commerce also gives it the power to regulate “Commerce with foreign Nations” and

“with the Indian tribes.” Foreign trade and trade with Indian tribes (which were a much more important part of the economy at the time of the Founding than they are today) clearly have major effects on interstate trade. Yet these two powers are separately enumerated, which strongly suggests that the power to regulate interstate commerce doesn’t give Congress the power to regulate any activity that merely has an effect—substantial or otherwise—on that commerce.

The original understanding of the Commerce Clause is consistent with this common-sense interpretation of the text. In every instance where the word “commerce” was used at the Constitutional Convention, the ratification debates, and in the *Federalist Papers*, it was in the narrow sense indicating trade or exchange.<sup>8</sup> Even Alexander Hamilton, one of the Founding Fathers most committed to a broad interpretation of federal power, repeatedly construed the meaning of “commerce” in this way.<sup>9</sup>

The individual health insurance mandate violates the text and original meaning of the Commerce Clause in two ways. First, nearly all purchases of health insurance take place within the confines of a single state. Indeed, a combination of state and federal law makes it illegal to purchase health insurance across state lines.<sup>10</sup> Thus, the health insurance market, as currently regulated, is not “Commerce . . . among the *several* states,” but merely commerce within a *single* state.<sup>11</sup>

Second, and even more important, the health insurance mandate goes beyond “regulating” preexisting “commerce” by forcing people to engage in commercial transactions even if they had made no previous effort to buy health insurance. The power to regulate a preexisting activity X is not the same thing as a power to force people to engage in X when they weren’t doing so before. This simple textual point is also supported by the original meaning; there is no evidence that the framers or ratifiers of the Constitution ever envisioned that the power to regulate interstate commerce could be used to force people to engage in commerce, interstate or otherwise. If they had attributed such a meaning to the Clause, the Constitution would probably never have been ratified, since many state governments would have feared that Congress could force their residents to purchase the products of other states, thus creating monopolies over important markets.

This crucial distinction undercuts claims that the individual mandate is similar to decisions upholding Congress’ power to forbid racial discrimination by commercial establishments such as restaurants and hotels.<sup>12</sup> These federal antidiscrimination laws applied to preexisting businesses already engaged in commercial activity in the regulated industry. By contrast, individuals who do not choose to purchase health insurance are not thereby participating in the insurance business. The health insurance mandate is more analogous to a statute that requires individuals to patronize a restaurant or hotel even if they had no previous intention of doing so.

Some argue that those who choose not to purchase health insurance are not simply “doing nothing.” For example, Jack Balkin writes that:

Critics charge that . . . people [who do not buy insurance] are not engaged in any activity that Congress might regulate; they are simply doing nothing. This is not the case. Such people actually self-insure through various means. When uninsured people get sick, they rely on their families for financial support, go to emergency rooms (often passing costs on to others), or purchase over-the-counter remedies. They substitute these activities for paying premiums to health insurance companies.<sup>13</sup>

However, the individual mandate is not contingent on engaging in any of these alternative activities. It applies even to those uninsured individuals who never get sick enough to rely on their families or go to emergency rooms. In addition, people who do these other things (with the possible exception of purchasing over-the-counter remedies) are still not engaged in commercial activity.

Congress could potentially have strengthened the bill’s constitutional standing by limiting the mandate only to those people who get sick and report to emergency rooms or purchase over-the-counter medicine.<sup>14</sup> But that approach would almost certainly have been a political nonstarter since it could easily have been denounced by opponents as a cruel imposition on the sick.

## II. THE SPENDING CLAUSE

Some argue that the constitutionality of the individual mandate is justified by the Spending Clause, which gives Congress the power to impose taxes to “pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>15</sup> They contend that a mandate could be justified as a “tax” authorized by the clause’s provision allowing taxes to provide for “the general welfare” because it imposes a financial penalty on those who refuse to comply.<sup>16</sup>

This argument is vulnerable to many of the same textual objections as the Commerce Clause claim. If accepted, it renders most of the rest of Congress’ powers under Article I redundant because it would enable Congress to control virtually any activity merely by imposing a financial penalty on anyone who refuses to comply. Presumably, it could then impose criminal sanctions on anyone who refused to pay the penalty. Thus, there would be no need for a congressional power to regulate interstate or foreign commerce, because Congress could regulate them under the Spending Clause. Indeed, this broad interpretation of “general welfare” even renders the rest of the Spending Clause itself superfluous. If the General Welfare Clause gives Congress the power to tax and spend for any purposes it likes, surely that includes the power to do so for purposes of providing for “the common defence” and paying the national debt. Yet these powers are separately enumerated, which implies that the General Welfare Clause must not be interpreted so broadly as to make these other powers redundant.<sup>17</sup>

Interestingly, President Obama appears to disagree with academic defenders of the mandate who claim that it is a tax.

In a September ABC News interview, he emphasized that “for us to say that you’ve got to take a responsibility to get health insurance is absolutely not a tax increase.”<sup>18</sup> Unlike some of his defenders, the President appears to believe that the individual mandate is not a tax, but a penalty for noncompliance with a regulatory requirement.

Defenders of the health insurance mandate’s constitutionality generally ignore the text and original meaning of the Constitution, relying almost entirely on precedent to bolster their position.<sup>19</sup> Yet the President, members of Congress, and Supreme Court Justices have taken oaths to uphold the Constitution, not merely what judicial precedent says it means.

## III. STRIKING DOWN THE MANDATE DOES NOT REQUIRE INVALIDATION OF THE ENTIRE POST-NEW DEAL STATE

Since the 1930s, the Supreme Court has upheld as constitutional numerous exercises of congressional power that go beyond the text of the Commerce Clause. A variety of major regulatory statutes rely on these precedents, including the National Labor Relations Act, agricultural regulations, and many others.<sup>20</sup> Some undoubtedly fear that relying on the text and original meaning to strike down an individual health insurance mandate would require invalidation of the entire panoply of post-New Deal expansions of federal power.

Overruling some of the New Deal-era precedents might not be such a terrible tragedy.<sup>21</sup> Regardless, striking down an individual mandate would not require courts to go that far. The mandate departs even farther from Congress’ textually enumerated powers than do the various post-New Deal economic programs previously upheld by the Court. Even the most expansive of these programs did not compel individuals to engage in economic transactions. Rather, they sought to regulate individuals’ preexisting participation in commerce, such as in the market for labor,<sup>22</sup> the market for agricultural products,<sup>23</sup> or the restaurant and motel markets.<sup>24</sup> Many of the great post-New Deal regulatory programs departed from the text by regulating economic activities that did not actually involve commerce across state lines. But the individual mandate goes a step further than this by regulating conduct that doesn’t involve any preexisting participation in commerce at all.

To say that an individual mandate can be invalidated without undercutting major longstanding government programs is not the same thing as saying that existing precedent can’t be plausibly interpreted to support its constitutionality. For example, the Supreme Court’s most expansive Commerce Clause precedent, *Gonzales v. Raich*, could be read in that way.<sup>25</sup> However, the reasoning of the Court’s precedents is distinct from the programs those precedents uphold. The latter can be preserved without necessarily endorsing all the most expansive language of the former and without giving Congress virtually unlimited power. Even *Raich*,<sup>26</sup> which endorsed Congress’ power to forbid the possession of homegrown medical marijuana that had never been sold in any market or crossed state lines, did not uphold a program that required people to participate in economic transactions that they had previously avoided. And, obviously, a decision overruling *Raich* or cutting back on its

reasoning would not imperil the major pillars of the post-New Deal regulatory state.

Perhaps the constitutional text can be overridden in order to uphold longstanding government programs whose abolition would be costly or politically infeasible. But there is no reason to ignore it merely to avoid disturbing the most indefensible elements of the Court's reasoning in previous decisions. It may be undesirable or at least politically impossible for the Court to fully enforce the textual limits on Congress' Article I powers. Yet it is also dangerous to use this reality as a justification for giving Congress a virtual blank check to wield unconstrained power.

Judicially-enforced limits on federal power protect many important benefits of a federal system, including competition between state governments and the ability of citizens to "vote with their feet" to escape policies that oppress them or harm their interests.<sup>27</sup> Contrary to claims that such limits undercut democracy, they can actually enhance democratic control over government by limiting the range of federal policies that overburdened voters have to monitor, and by enhancing citizens' abilities to vote with their feet as well as at the ballot box.<sup>28</sup>

An individual mandate requiring the purchase of health insurance exceeds Congress' powers under the Constitution. And courts can strike it down without imperiling any major long-established government programs.

## Endnotes

1 *Proposed Changes in the Final Health Care Bill*, N.Y. TIMES, Mar. 22, 2010, available at <http://www.nytimes.com/interactive/2010/03/19/us/politics/20100319-health-care-reconciliation.html>. American Indians, people with religious exemptions, and the very poor are exempt from the mandate. *Id.*

2 See, e.g., Legal Memorandum from Randy E. Barnett, Nathaniel Stewart & Todd Gaziano, Heritage Foundation, *Why the Personal Mandate to Ban Health Insurance is Unprecedented and Unconstitutional* at 6-8, Dec. 9, 2009, available at <http://www.heritage.org/Research/LegalIssues/Im0049es.cfm>; David B. Rivkin, Jr. & Lee Casey, *Mandatory Insurance Is Unconstitutional: Why an Individual Mandate Could be Struck Down by the Courts*, WALL ST. J., Sept. 18, 2009.

3 See, e.g., Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO, Oct. 23, 2009, available at <http://www.politico.com/news/stories/1009/28620.html>; Ruth Marcus, *An 'Illegal' Mandate? No*, WASH. POST, Nov. 27, 2009; Robert A. Schapiro, *Federalism is no Bar to Health Care Reform*, ATLANTA JOURNAL-CONSTITUTION, Nov. 2, 2009.

4 See, e.g., works cited in note 3 above.

5 U.S. CONST. art. I, § 8, cl. 3.

6 See, e.g., THE RANDOM HOUSE DICTIONARY 176 (1984) (defining "commerce" as "an interchange of goods").

7 See, e.g., *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (summarizing case law); see also *United States v. Morrison*, 529 U.S. 598, 609 (2000).

8 See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112-25 (2001).

9 Quoted in *id.* at 116.

10 See, e.g., Henry Butler & Larry Ribstein, *The Single License Solution*, REGULATION, Winter 2008-2009, at 36 (describing the current regulatory structure under which the federal government exempts health insurance companies from federal antitrust law and states forbid interstate insurance purchases).

11 U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

12 See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding regulation of discrimination against customers of a commercial restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding federal ban on discrimination against customers of a hotel serving interstate travelers). These cases are cited as justifying the constitutionality of the health insurance mandate in Chemerinsky, *supra* note 3.

13 Posting of Jack Balkin to Balkinization, *If You Can't Stop the Bill, Just Have Another* Bush v. Gore, Mar. 21, 2010, <http://balkin.blogspot.com/2010/03/if-you-cant-stop-bill-just-have-another.html> (Mar. 21, 2010).

14 Though, in my view, such a bill would still have been unconstitutional because it departs from the constitutional text for reasons discussed above.

15 U.S. CONST. art. I, § 8, cl. 1.

16 See, e.g., Jack M. Balkin, *The Constitutionality of an Individual Mandate for Health Insurance*, 158 U. PENN. L. REV. PENNUMBRA 102, 102-104 (2009).

17 For a more detailed discussion of this point, see Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 489-94 (2002).

18 Quoted in George Stephanopoulos, *Obama: Mandate is Not a Tax*, ABCNews, Sept. 20, 2009, available at <http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html>.

19 See, e.g., works cited in note 3.

20 See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act regulation of employment relations); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding legislation forbidding farmers to grow more wheat than is allowed under federal government quotas).

21 Cf. Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595 (2003) (describing how many of the policies upheld as a result of the New Deal revolution in Commerce Clause doctrine caused great harm and may have made the Great Depression worse); Harold Cole & Lee Ohanian, *New Deal Policies and the Persistence of the Great Depression*, 112 J. POL. ECON. 779 (2004) (showing that some of these policies increased unemployment and may have prolonged the Depression by as much as several years).

22 See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act regulation of employment conditions).

23 See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

24 See cases cited in note 12.

25 See Posting of Ilya Somin to Volokh Conspiracy, *Does a Federal Mandate Requiring the Purchase of Health Insurance Exceed Congress' Powers Under the Commerce Clause?*, [http://volokh.com/archives/archive\\_2009\\_09\\_20-2009\\_09\\_26.shtml#1253489281](http://volokh.com/archives/archive_2009_09_20-2009_09_26.shtml#1253489281) (Sept. 20, 2009) (discussing *Gonzales v. Raich*, 545 U.S. 1 (2005)). For explanations of ways that *Raich* can be distinguished from a case challenging the mandate, see Barnett et al., *supra* note 2, at 4-5, 7-9. I have criticized the reasoning of the *Raich* decision in detail in Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (2006).

26 545 U.S. 1 (2005).

27 See John McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004).

28 Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory*, 89 IOWA L. REV. 1287, 1329-51 (2004).





---

# ORIGINALISM, IN A NUTSHELL

By *Emily C. Cumberland\**

---

What is originalism? It is a bedrock of constitutional interpretation for federalists, but many have found it difficult to define comprehensively what it means. Originalism is, broadly speaking, a catchall term for methods of constitutional interpretation principled on fidelity to the Constitution.<sup>1</sup> It represents not one school of thought but a spectrum of theories about how the Constitution should be interpreted.<sup>2</sup> There is no solid consensus as to when originalism became a formally-recognized method of constitutional interpretation, although at least one account credits Paul Brest with coining the term in “The Misconceived Quest for Original Understanding” in 1980.<sup>3</sup> Another account claims then-Attorney General Edwin Meese III first publicized originalism in a speech before the American Bar Association in 1985.<sup>4</sup> Regardless of its exact debut, originalism has become sensational fodder for debate among constitutional law scholars over the past 30 years.<sup>5</sup>

## Phase I: Original Intent

Originalism’s methodology has evolved steadily since its creation, as scholars strive to find the best way to reveal the “original” Constitution. The first incarnation of these methodologies was original intent. Black’s Law Dictionary provides a cut-and-dried definition of original intent: “[t]he mental state of the drafters or enactors of the U.S. Constitution, a statute, or another document.”<sup>6</sup> But what does “mental state” mean? Discourse on how (and whether) to apply the original intent method focuses mostly on how broadly or narrowly “mental state” should be construed. In its broadest form, original intent originalism may be nothing more than “an obligation to avoid direct contradiction of the intentions and expectations of the Constitution’s framers.”<sup>7</sup> More narrowly, Randy Barnett asserts that an original intent interpretation must defer to the “goals, objectives, or purposes of those who wrote or ratified the text.”<sup>8</sup> Barnett also notes that the drafters’ goals, objectives, or purposes relevant to this approach may or may not be known to others, even at the time of drafting.<sup>9</sup> Another application of original intent, perhaps the most extreme, holds as binding the “historically demonstrable intentions of the framers.”<sup>10</sup> Jefferson Powell argues that this version of original intent goes a step further than the other versions of original intent; it stakes a claim to legitimacy because it claims there is an historical basis for giving effect to the framers’ original intent.<sup>11</sup>

Although original intent is considered one branch of originalism, it is not necessarily accepted by today’s originalists.<sup>12</sup> One of the attacks on original intent as a theory of interpretation is that it is inherently problematic: did the founding framers intend for their intentions to be binding on contemporary interpreters of the Constitution?<sup>13</sup> Jefferson Powell claims that the earliest interpreters applied techniques of statutory

construction, but if original intent were considered it would only be the intent of the sovereign parties to the Constitution, not the framers personally.<sup>14</sup> Another criticism of the original intent theory is that it requires projecting the drafters’ personal outlooks onto a future unknown and unimaginable to them.<sup>15</sup> Since these arguments against original intent were put forth, and perhaps in an effort to salvage a workable originalism, there has been a gradual shift among originalists towards interpretation on the basis of original meaning.<sup>16</sup>

## Phase II: Original Meaning

The shift from original intent to original meaning was basically a shift from a focus on the framers’ subjective intentions to a focus on the text’s objective meaning during the framers’ time.<sup>17</sup> Originalists generally agree that the focus of this method must be objective, but they tend to disagree on what constitutes “original meaning.” On one hand, Robert Bork argues “public understanding” should control: the interpreter should look to “what the public of that time would have understood the words to mean.”<sup>18</sup> However, Bork’s use of the word “public” leaves much to be desired. Does it mean the actual understanding of the populace as a whole or the understanding of just the literate class (the only class actually able to read and understand the text)?<sup>19</sup> Michael Rappaport asserts that original meaning originalism seeks to understand how knowledgeable individuals would have understood the text of the Constitution when it was drafted and ratified in the late 18th century.<sup>20</sup> Regardless of whether the understanding of the general public or the literate class controls, each approach requires some amount of speculation as the evidence is likely scant.<sup>21</sup> As a middle ground between the two, Bret Boyce claims the only practical approach to original meaning interpretation is to rely on the publicly manifested understanding of the framers and ratifiers.<sup>22</sup> Boyce elaborates, “Since a law is a public act, only its public meaning can have legal force,” and public meaning requires actual evidence of the views made known at the time of ratification.<sup>23</sup>

Jack Balkin asserts there are two steps in original meaning interpretation: the interpreter must (1) give effect to the meaning the language (and its underlying principles) had when the Constitution was drafted and ratified; and (2) apply the language the same as it would have been applied when the Constitution was drafted.<sup>24</sup> Balkin cites as an example Justice Scalia’s argument that capital punishment does not violate the Eighth Amendment:

[The principle underlying the Eighth Amendment] is not a moral principle of “cruelty” that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel. It means not . . . ‘whatever may be considered cruel from one generation to the next,’ but ‘what we consider cruel today [i.e., in 1791]’; otherwise it would be no protection against the moral perceptions of a future, more brutal generation. It is, in other words, rooted in the moral perceptions of the time.<sup>25</sup>

---

\* *The George Washington University Law School, J.D. Candidate 2010, President of the Federalist Society student chapter*



3. Originalism serves as a check on judicial activism, or alternatively, is less susceptible to judicial activism.

In an address to the American Bar Association in 1985, Attorney General Edwin Meese asserted that the Supreme Court in its 1984 term “continued to roam at large in a veritable constitutional forest.”<sup>50</sup> He argued that the variability of the Court’s decisions reflected its overall deference to what the Court deemed to be sound public policy instead of a deference to the Constitution, thus weakening the permanence of the Constitution.<sup>51</sup> As a solution, Meese urged the Court make a commitment to a jurisprudence of original intention, which “would produce defensible principles of government that would not be tainted by ideological predilection.”<sup>52</sup> In support of his position, Meese emphasized that the Court’s obligation is to determine the meaning of the language which framers of the Constitution consciously and carefully chose.<sup>53</sup>

While the originalism community has gradually shifted from a focus on original intent to original meaning since Meese’s speech, originalists maintain that the latter approach nonetheless quells judicial activism. The original meaning method is said to “tame the monster of judicial activism” because it requires a basis in historical evidence for the constitutional text’s original meaning, and thus ultimately yields a foundation for constitutional adjudication that is objective and reliable (not subjective and variable).<sup>54</sup> History is critical to the originalist inquiry (regardless of whether the focus is original intent or meaning), which Meese also emphasized: “[T]he Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis. . . . We know who did what, when, and many times why.”<sup>55</sup> In other words, the originalist’s argument is that history is to the originalist what public policy is to the nonoriginalist.

Originalist judicial interpretation is less susceptible to judicial activism, “the most significant weakness of the system of judicial review,” because its basis is not an evaluation of values but of historical criterion.<sup>56</sup> Finally, Scalia insists originalism is preferable to non-originalism because the latter camp has no defined or agreed-upon methodology, and “[y]ou can’t beat somebody with nobody.”

#### *On the Other Hand, a Dead Hand*

Justice Scalia has argued that non-originalists lack cohesion and have proffered no defined or agreed-upon methodology in opposition to originalism.<sup>57</sup> Yet while non-originalists may not have a team uniform or even a playbook, their oppositions to originalism are nonetheless vocal. Critics of originalism have included Yale Law professor and blogger Jack Balkin,<sup>58</sup> law professor Ronald Dworkin, and Harvard Law professor Laurence Tribe.<sup>59</sup>

1. Living Constitutionalist argument: Originalism requires that contemporary society be bound by the dead hand of the past.

If living constitutionalists had a mission statement (which they do not seem to have), it would mirror this statement by Justice Brennan:

Current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to

the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time.

Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.<sup>60</sup>

Justice Brennan touches on many concerns of the living constitutionalists in this brief excerpt, but their primary concern is with originalism’s insistence on retaining the “static meaning” the Constitution once had; from this principle, as living constitutionalists see it, arise problems with democracy and protection of basic rights.

For one, the “dead hand” argument posits the problem that the population bound by the Constitution today is not the population that originally agreed to it.<sup>61</sup> Living constitutionalists contend that “[d]emocratic-enactment authority arises from people’s right to bind and govern themselves.”<sup>62</sup> Requiring judges to adhere to the enactors’ original intent or the original meaning of the language during the enactors’ time violates this democratic-enactment principle because the enactors and the governed (i.e. today’s society) are mutually exclusive groups.<sup>63</sup> Also, living constitutionalists are concerned that some issues we regard as important now (e.g., federal labor, environmental, and civil rights laws) were not important or relevant when the Constitution was passed; thus, the Constitution if interpreted according to its original meaning will improperly limit Congress’s ability to legislate in these areas.<sup>64</sup>

2. The Constitution was designed to “endure for the ages.” Thus, interpretation is not necessarily restricted to textual or historical basis alone, and future generations’ adaptations of the text are permissible.

Laurence Tribe argues that interpreters of the Constitution are not bound to interpret the text by relying solely on the text, historical record, or a combination of the two; indeed, there is no constitutional provision requiring this method of interpretation or (with the exception of the Ninth Amendment) any other method for that matter.<sup>65</sup> Tribe’s argument parallels that of the living constitutionalists, who “insist that the legitimacy of the document cannot be fully defended if our first-order approach to it draws exclusively upon the historical.”<sup>66</sup> Leib makes the distinction that living constitutionalists are not willing to make the same pledge of faith (i.e., that history or text alone suffices) to the Constitution that originalists make.<sup>67</sup> Instead, the living constitutionalist considers a variety of factors when interpreting the language of the Constitution, including consequences from different interpretative outcomes, underlying principles of political morality, and doctrine, among others. Lastly, Tribe implies that in order to ensure a Constitution designed to “endure for the ages,” it may be necessary and more appropriate to have not a fixed set of rights that is resistant to change,



but a set of rights accompanied by underlying principles for adaptations to the needs of future generations.<sup>68</sup>

### Conclusion

Originalism has undergone many transformations since it became a topic of popular debate just over a quarter-century ago. What originalism is not has become clearer with time, but there is still no succinct, accurate definition of what originalism is. Instead, it is best understood as a spectrum of theories that is continually evolving. What began as original intent has now become original meaning, as originalists abandon their pursuit for subjective intentions in favor of objective meanings. Originalists of all types continue to bolster their theories with federalist sentiments, historical evidence, and words like “fidelity” and “writtleness.” Their tactic might be working; at least one living constitutionalist (Jack Balkin) has jumped ship recently to stake his claim on the originalists’ side, or at least nearby. Even still, originalism is not without its critics, who take issue with the originalist’s fixation on the stagnant text of the Constitution even while society continues progressively forward.

### Endnotes

- 1 See generally Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 186 (2008) [hereinafter Primus, *When Should Original Meanings Matter?*] (“Originalism is a family of ideas and practices that locate the authoritative content of legal provisions in meanings that prevailed, actually or constructively, at the time when the provisions were enacted.”); Justice Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851 (1989) (expounding on the defects and merits of originalism) [hereinafter Scalia, *The Lesser Evil*].
- 2 Primus, *When Should Original Meanings Matter?*, *supra* note 1.
- 3 Brett Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 1034 n.1 (1998); see also Scalia, *The Lesser Evil*, *supra* note 1 (commenting on Chief Justice Taft’s originalist thought in the 1926 Supreme Court opinion *Myers v. United States*); John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83, 83 (2003) (suggesting originalism took root in then-professor Robert Bork’s constitutional law class in 1977).
- 4 Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1, 1 (Steven G. Calabresi ed., 2007) [hereinafter Calabresi, *A Critical Introduction to the Originalism Debate*].
- 5 *Id.*
- 6 BLACK’S LAW DICTIONARY (8th ed. 2004).
- 7 Jefferson H. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885-886 (1985).
- 8 Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) [hereinafter Barnett, *Original Meaning of the Commerce Clause*].
- 9 *Id.*
- 10 Powell, *supra* note 7, at 886.
- 11 *Id.*
- 12 See, e.g., Justice Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the U.S. Constitution and Laos*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION] (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

- 13 See Powell, *supra* note 7.
- 14 *Id.* at 948.
- 15 Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 221 (1980).
- 16 Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) [hereinafter Barnett, *An Originalism for Nonoriginalists*].
- 17 *Id.* at 621.
- 18 Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 916 (1998) (quoting ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1989)).
- 19 Boyce, *supra* note 18, at 916-917.
- 20 Michael Rappaport, *Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1493 (2005) (emphasis added).
- 21 Boyce, *supra* note 18, at 917.
- 22 *Id.*
- 23 *Id.*
- 24 Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007) [hereinafter Balkin, *Abortion and Original Meaning*].
- 25 *Id.* (quoting Scalia, *Response, in A MATTER OF INTERPRETATION* 129, *supra* note 12, at 145) (emphasis in original).
- 26 Balkin, *Abortion and Original Meaning*, *supra* note 24.
- 27 Arguably, this subheading belongs with the critical perspectives (under “On the Other Hand, a Dead Hand”), but I think it is important background to the debate because (1) it is referenced frequently enough as a stand-alone phrase to merit explanation of what it means, and (2) it may not be a bone of contention but rather a defect of originalist interpretation acknowledged by originalist critics and proponents alike. See Justice Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL’Y 871, 872 (2008) [hereinafter Scalia, *Foreword*].
- 28 Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1378 (1990). Posner’s reference to “bad originalism” is merely peripheral in the context of this article; nevertheless, other scholars such as Balkin have kept the phrase alive.
- 29 Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 71 (2007).
- 30 *Id.*
- 31 Compare Charles J. Cooper, *Harry Jaffa’s Bad Originalism*, 1994 PUB. INT. L. REV. 189 (1994) (book review) (“A bad originalist is just another judicial activist.”), with Barry Friedman, 67 LAW & CONTEMP. PROBS. 149, 159 (“[I]f bad originalism were a sin, many Supreme Court Justices would be rewriting their opinions in purgatory at this very moment.”), and Scalia, *Foreword*, *supra* note 27 (“Bad originalism is originalism nonetheless, and holds forth the promise of future redemption.”).
- 32 See, e.g., Steven J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL’Y 149, 151. (2009) (arguing “[the media’s] intermediary role poses a particular problem for judges committed to a traditional judicial philosophy, termed either “interpretivism,” “textualism,” or “originalism”); Justice Scalia, Address at Catholic University of America (Oct. 10, 1986) (transcript available at <http://www.joink.com/homes/users/ninoville/cua10-18-96.asp>) (“I belong to a school, a small but hardy school, called ‘textualists’ or ‘originalists.’”).
- 33 Primus, *When Should Original Meanings Matter?*, *supra* note 1, at 187.
- 34 Richard A. Primus, *The Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL’Y 159, 162 (2009).
- 35 *Id.* at 163; see also 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 23.5(b) (4th ed. 2009) (“Interpretivist theory is an effort to cabin the judge, to place some limits on judicial review.”).
- 36 BLACK’S LAW DICTIONARY 1462 (8th ed. 2004) (defining strict constructionism as “[t]he doctrinal view of judicial construction holding that judges should interpret a document or statute . . . according to its literal terms, without looking to other sources to ascertain the meaning.”).
- 37 Scalia, *Common-Law Courts in a Civil-Law System, in A MATTER OF*



INTERPRETATION 3, *supra* note 12, at 23. *But see* Joseph Grcic, *The Supreme Court Decision: Consensus or Coercion?*, 54 FED. LAW. 52, 54 (2007) (“Those who favor what is sometimes called ‘strict constructionism’ seek a more constrained Supreme Court and believe that its power can be curbed by adopting ‘textualism’ as a method of interpreting the Constitution.”)

38 *E.g.*, Calabresi, *A Critical Introduction to the Originalism Debate*, *supra* note 4; Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 490 (2008); Charles J. Kesler, *Thinking About Originalism*, 31 HARV. J.L. & PUB. POL’Y 1121, 1121; Scalia, *Foreword*, *supra* note 27.

39 *See* Geoffrey Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1548 (2008).

40 *See* Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, SLATE, Sept. 21, 2005, <http://www.slate.com/id/2126680/>. *But see* Jeffrey Rosen, *Originalism and Pragmatism: False Friends*, 31 HARV. J.L. & PUB. POL’Y 937, 938 (2008).

41 All of whom, with the exception of Justice Thomas, have been cited in this article. *See* Clarence Thomas, *Why Federalism Matters*, Remarks at Drake University Law School’s Dwight D. Opperman Lecture (Sept. 24, 1999), in 48 DRAKE L. REV. 231 (2000), for a discussion of the need for federalism in constitutional interpretation in which Justice Thomas incorporates original understanding.

42 Scalia, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION 3, *supra* note 12, at 40.

43 Primus, *When Should Original Meanings Matter?*, *supra* note 1, at 178.

44 Barnett, *An Originalism for Nonoriginalists*, *supra* note 16, at 633. He also makes explicit that he does not view the Constitution as a contract in a literal sense. *Id.* at 629.

45 *Id.* at 633.

46 *Id.* at 632.

47 John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL’Y 917, 919-920 (2008).

48 *Id.*

49 *Id.*

50 Edwin Meese III, *Speech Before the American Bar Association*, Washington, D.C. (Jul. 9, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 57, 50 (Steven G. Calabresi ed., 2007).

51 *Id.* at 52-53.

52 *Id.* at 53.

53 *Id.*

54 Laurence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 1 (2007).

55 Edwin Meese III, *Speech Before the D.C. Chapter of the Federalist Society Lawyers Division*, Washington, D.C. (Nov. 15, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 71, 72 (Steven G. Calabresi ed., 2007); *see also* Scalia, *The Lesser Evil*, *supra* note 1, at 862.

56 *Id.* at 863-864.

57 *Id.* at 855. *But cf.* THOMAS B. COLBY & PETER J. SMITH, *LIVING ORIGINALISM* 4 (Geo. Wash. U. Law Sch. Legal Studies Research Paper No. 393, 2008), *available at* <http://ssrn.com/abstract=1090282> (arguing originalism lacks cohesion and consistency, despite being a so-called unified body of theories, and there is “profound internal disagreement” among originalists).

58 Ethan Leib claims that Jack Balkin was once a staunch advocate of “living constitutionalism” but has since abandoned the non-originalist camp (perhaps to espouse his own “expected original application” theory, discussed *supra* p. 52); a series of Balkin’s writings seem to affirm Leib’s charge. *See* Ethan Leib, *The Perpetual Anxiety of the Living Constitutionalism*, 24 CONST. COMMENT. 353, 353 (2007). *Compare* Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE, Aug. 29, 2005, <http://www.slate.com/id/2125226/>, *with* Balkin, *Abortion and Original Meaning*, *supra* note

24, *and* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007) [hereinafter Balkin, *Original Meaning and Constitutional Redemption*].

59 All of whom have been cited in this article.

60 William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1985).

61 Primus, *supra* note 1, at 168.

62 *Id.* at 192.

63 *Id.* NB—The “dead hand” argument does not support the conclusion that the Constitution is altogether invalid, only that original meaning is an unacceptable method of constitutional interpretation.

64 Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 67, at 433.

65 Richard Tribe, *Comment*, in A MATTER OF INTERPRETATION 65, *supra* note 12, at 77.

66 Leib, *supra* note 58, at 359-360.

67 *Id.*

68 Tribe, *Comment*, in A MATTER OF INTERPRETATION 65, *supra* note 12, at 89.



---

# FINANCIAL SERVICES & E-COMMERCE

## ANNA NICOLE SMITH GOES SHOPPING: THE NEW FORUM SHOPPING PROBLEM IN BANKRUPTCY<sup>1</sup>

By G. Marcus Cole\* & Todd J. Zywicki\*\*

---

### EDITOR'S NOTE

On March 19, 2010, just as this article was going to press, the U.S. Court of Appeals for the Ninth Circuit held, in *Marshall v. Stern* (formerly *Marshall v. Marshall*), that the bankruptcy court's decision below giving Anna Nicole Smith half of Marshall's estate was not a core proceeding and thus not a final judgment. Therefore, according to the Ninth Circuit, the bankruptcy court's decision took no precedence over the conflicting judgment of the Texas probate court, which had decided that Smith was entitled to nothing. The Ninth Circuit's decision can be found at <http://www.ca9.uscourts.gov/datastore/opinions/2010/03/19/02-56002.pdf>.

---

In the United States, relations between debtors and their creditors are governed by two distinct legal regimes. For the overwhelming majority of credit relationships, state law of contract, property, tort, and consumer protection establish the framework within which the debtor-creditor relationship is established, functions, and, in the end, is dissolved. In a smaller but significant number of these relationships, a different forum orchestrates the end of these relationships, namely, federal bankruptcy court. These two distinct forums for debtor-creditor relations exist side-by-side, with some relationships moving over time from one forum to the other. As with any system where dual regimes for dispute resolution exist, parties seeking resolution of debtor-creditor disputes can and will, under the right conditions, engage in "forum shopping." The "nightmare" forum-shopping scenario is the situation in which one dispute between two parties receives dramatically different treatment depending upon which forum was used to adjudicate the dispute.

The solution to the forum-shopping problem has been to craft a bankruptcy regime that treats creditors and debtors substantively the same inside the bankruptcy forum as they would be treated outside of it and to merely change the procedures by which those substantive rights are vindicated. In other words, bankruptcy has long served as a place with special procedures, but not, for the most part, with special substantive law. This principle of equilibrium between bankruptcy and non-bankruptcy treatment of claims and defenses has come to be known as the *Butner* principle, because of the Supreme Court's articulation of it in that case.<sup>2</sup> The *Butner* principle has been rearticulated by courts on numerous occasions, most importantly by the Supreme Court in *Granfinanciera v. Nordberg*.<sup>3</sup>

This separation of substantive and procedural law, which long served as the guiding principle of American bankruptcy, is threatened by a new type of forum shopping. In order to achieve outcomes unavailable outside of bankruptcy, some litigants

have identified a nuance of bankruptcy jurisdiction that, if interpreted in a particular way, has the ability to overturn the substantive law of their cases.

This Article proceeds in two parts. Part I describes the "core" and "non-core" distinction in bankruptcy jurisdiction, and the significance of that distinction for final orders in bankruptcy. This section also describes the new forum shopping problem, and how bankruptcy courts and litigants might interpret section 157, to achieve outcomes dramatically different from what might occur outside of bankruptcy. The best example of this new forum-shopping problem is provided by *Marshall v. Marshall*, the famous "Anna Nicole Smith" case, in which a bankruptcy court in California set a Texas probate court judgment on its head.<sup>4</sup>

Part II explores the policy justifications for a limited bankruptcy jurisdiction, rooted both in the *Butner* principle as well as Congress's response to the Supreme Court's ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, in which the Court held the jurisdictional scheme provided by the Bankruptcy Code of 1978 to be unconstitutional.<sup>5</sup>

Part III concludes.

### I. Forum Shopping Through Bankruptcy Jurisdiction

#### A. The New Forum Shopping Problem

The new forum-shopping problem is largely a creature of statute, or, more accurately, the vagaries of the statute. A confusing deployment of terms within Title 28 of the U.S. Code has permitted bankruptcy courts to assume jurisdiction and power that flaunts the longstanding respect for state law in a federalist system.

In the hands of an activist bankruptcy judge this development threatens to undo the careful balance between federal and state law crafted over the past 110 years of American bankruptcy law and to spawn a race to the courthouse that could upset long-established principles of tort, property, and contract law that underlie our legal system. There is no evidence that Congress intended the stability of the American legal system and the law of testamentary succession to turn on the whim of Article I bankruptcy judges and a naked hope that judges would use this proffered power responsibly. Instead, although bankruptcy judges' authority is broad, it is not unlimited. There are clear constitutional and statutory limits

---

\* *The Wm. Benjamin Scott & Luna M. Scott Professor of Law, Stanford Law School, and Visiting Professor of Law & Economics, Universiteit van Amsterdam.*

\*\* *George Mason University Foundation Professor of Law, George Mason University; Searle Fellow, George Mason University School of Law (Fall 2008).*

to rein in bankruptcy judges who exceed their authority, and it is essential that those restraints be enforced. Otherwise every probate court case could be subject to a race to the courthouse as disgruntled claimants seek a rehearing of their state law rights before a bankruptcy judge. Moreover, strategic forum shopping might not be limited only to debtors, but might also include opportunities for creditors to trigger involuntary bankruptcy proceedings if they believe that the bankruptcy court will provide a more favorable forum.

The dangers of the new forum-shopping problem are dramatically demonstrated in the recent tabloid-fodder case of *Marshall v. Marshall*.<sup>6</sup>

#### B. Forum shopping in *Marshall v. Marshall*

If pulp-fiction novelists or Hollywood screenwriters were engaged to craft an example of pernicious forum shopping from scratch, they would be hard-pressed to envision a more troubling story than *Marshall v. Marshall*. The case is famous, not because of its legal complexities or nuances, but rather for its celebrity litigant. It revolved around the financial affairs of the widow of the late J. Howard Marshall II, namely, Vickie Lynn Marshall, popularly known as Anna Nicole Smith.<sup>7</sup>

The case, which is more accurately characterized as “cases,” began shortly before the death of J. Howard Marshall II. Marshall had been a successful law professor, lawyer, public servant, and oil company executive over a long and distinguished career.<sup>8</sup> Marshall met Smith shortly after the second of his two 30-year marriages ended with the death of his second wife.<sup>9</sup> Smith, an exotic dancer, actress, and 1993 *Playboy Magazine* Playmate of the Year, met Marshall in 1991 in the Houston club where she performed.<sup>10</sup> The two married in June 1994, and the sixty-three year difference in their ages gave rise to public speculation that Smith had married Marshall for his money.<sup>11</sup> The marriage was short-lived. Just thirteen months after marrying Smith, Marshall died, leaving an estate valued by some estimates at over a billion dollars.<sup>12</sup>

The litigation over Marshall’s estate actually began before his passing and has lasted almost ten times longer than the star-crossed marriage that spawned it. Four months before his death, Smith filed an action in Texas probate court seeking to invalidate Marshall’s estate plan.<sup>13</sup> Marshall, a former professor at Yale Law School, had crafted in 1982 an estate plan consisting of a “pour-over” will and a living trust which provided for the disposition of Marshall’s property.<sup>14</sup> Marshall gave Smith millions of dollars worth of gifts while he was living, but he never designated her as a beneficiary of the trust.<sup>15</sup> Smith brought the Texas probate action in an attempt to invalidate the trust.<sup>16</sup>

Three days after Marshall’s death, Smith contested the validity of the will and the entire estate plan.<sup>17</sup> She further claimed that Marshall had orally promised to give her much more of his estate, and had instructed his attorneys to construct a “catch-all” trust for her benefit, but that this plan was thwarted by Marshall’s son, E. Pierce Marshall, leading Smith to subsequently file a charge of tortious interference with an *inter vivos* gift.<sup>18</sup>

The Texas probate case was pending when Smith’s activities in another forum interrupted the proceedings. Maria Antonia

Cerrato, a former housekeeper and nanny to Smith’s child from a prior marriage, filed suit against Smith for sexual harassment and received a default judgment for \$850,000. In January 1996, in response to the judgment, Smith filed for bankruptcy in the U.S. Bankruptcy Court for the Central District of California.<sup>19</sup> Smith then filed suit in the bankruptcy case against E. Pierce Marshall, again alleging, as she had in her Texas probate court action, that he had tortiously interfered with the fulfillment of his father’s promise to her.<sup>20</sup>

The initial judgment for alleged sexual harassment was entered as a default judgment; Smith and the purported victim later settled the suit for an amount that was small enough to relieve her of any further need of bankruptcy to satisfy her creditors.<sup>21</sup> In fact, the combination of the initial default judgment and the subsequent settlement has raised concerns that the initial suit was manufactured collusively just to create bankruptcy court jurisdiction. And even if this was not actually a collusive bankruptcy filing, the facts illustrate the ease by which bankruptcy potentially could be manufactured through collusion.

In early March 1999, the bankruptcy court confirmed Smith’s Chapter 11 restructuring plan, effectively ending the bankruptcy case.<sup>22</sup> Nevertheless, even though the Chapter 11 case was concluded and the Texas case was about to commence, the bankruptcy court proceeded to adjudicate Smith’s tortious interference suit against E. Pierce Marshall. In October 1999, the bankruptcy court determined that Pierce Marshall had engaged in discovery abuse and as a sanction barred him from introducing evidence at trial to contradict Smith’s assertions. After conducting a five day summary trial and waiting almost a year to issue its decision in September 2000, the bankruptcy court held in favor of Smith, concluding that E. Pierce Marshall had fraudulently altered his father’s trust, and that as a result Smith “would have received half of the community property but for [his] actions in making . . . the Trust irrevocable.”<sup>23</sup> The bankruptcy court reasoned that under its interpretation of Texas law, Marshall’s failure to include Smith in his will entitled her to a “widow’s election,” comprised of “half of the community property that passes through the estate.”<sup>24</sup> Meanwhile, jury selection was about to begin in the Texas probate court case.

One month after its initial judgment, the bankruptcy court issued a revised opinion, again resting upon the discovery sanction.<sup>25</sup> Contrary to the court’s initial determination, it now found that Marshall had intended to transfer a substantial portion of his wealth to Smith, but that, as a discovery sanction, E. Pierce Marshall had tortiously interfered with that plan by firing the lawyer hired to draft the “catch-all” trust for Smith.<sup>26</sup> With this new ruling, the bankruptcy court awarded Smith \$449,754,134 on her Texas law-based tortious interference claim, relying, in part, on the court’s own estimates as to increases in the price of oil.<sup>27</sup>

E. Pierce Marshall appealed these determinations to the U.S. District Court for the Central District of California.<sup>28</sup> The district court vacated the bankruptcy court’s judgment, agreeing that the Texas law tortious interference lawsuit did not fall within the bankruptcy court’s “core” bankruptcy jurisdiction under 28 U.S.C. §157.<sup>29</sup> The district court rejected E. Pierce Marshall’s argument that it lacked jurisdiction under



the “probate exception” to federal jurisdiction, and proceeded to adjudicate the Texas law claims *de novo*.<sup>30</sup>

Meanwhile, in Texas, the probate court proceeded to adjudicate the dispute regarding Marshall’s will, including Smith’s tortious interference claim against E. Pierce Marshall.<sup>31</sup> After five months of testimony from over 40 witnesses, including witnesses that E. Pierce Marshall was precluded by sanctions from introducing in the bankruptcy court hearings, a Texas jury returned a verdict upholding the validity of Marshall’s estate plan, trust, and will.<sup>32</sup> The jury rejected all allegations of impropriety, including Smith’s tortious interference claim against E. Pierce Marshall.<sup>33</sup> In December 2001, the Texas probate court entered its final judgment, admitting Marshall’s will to probate, finding the trust valid, and dismissing Smith’s counterclaims against E. Pierce Marshall.<sup>34</sup>

Shortly after the Texas probate court entered its judgment, E. Pierce Marshall filed a motion in the U.S. District Court for the Central District of California to dismiss the Texas-law-based probate claims prior to the start of the trial in Santa Ana.<sup>35</sup> The district court in California denied the motion, holding that even though the Texas state court proceedings had concluded with a judgment resting upon Texas law, that judgment was not entitled to any preclusive effect on the same claims in federal court.<sup>36</sup>

Three months after the Texas probate court entered its judgment, the U.S. district court entered its own decision on Smith’s Texas-law-based tortious interference claim.<sup>37</sup> Although the district court acknowledged that Texas courts had never recognized a claim for tortious interference with an “expectancy of an *inter vivos* gift,” the district court in Santa Ana nevertheless determined that it would be the first court to so find under Texas law.<sup>38</sup> The district court found that Marshall had intended to create a “catch-all” trust for Smith, and that E. Pierce Marshall had tortiously interfered with that plan.<sup>39</sup> With these findings, directly contradicting the findings of the Texas probate court jury on the same issues, the district court awarded Smith \$88,585,534.66 in compensatory and punitive damages.

E. Pierce Marshall appealed the district court judgment, arguing that probate cases were excepted from federal jurisdiction, and that the Full Faith and Credit Act required the district court to give preclusive effect to the Texas probate court judgment.<sup>40</sup> The U.S. Court of Appeals for the Ninth Circuit reversed the district court judgment.<sup>41</sup> Smith then appealed the case to the Supreme Court.<sup>42</sup>

The Court reversed the Ninth Circuit’s dismissal of Smith’s Texas law claim, holding that the “probate exception” did not permit a state court to grant itself exclusive jurisdiction over a state-law-based claim.<sup>43</sup> The Court remanded the case on the question as to whether the bankruptcy court had core jurisdiction over the state law claim, and, in turn, whether it had the power to issue final orders in the case.<sup>44</sup>

In short, *Marshall v. Marshall* is the prototype of a new forum-shopping problem in bankruptcy. As a state court proceeding was underway, one of the parties to that proceeding filed a bankruptcy petition 1,500 miles away. After the bankruptcy case had ended, the bankruptcy court then exercised jurisdiction over the state-law-based claims, and reached a judgment diametrically opposed to that entered by the state

court applying its own law. The ruling was unnecessary both as a matter of administration of the bankruptcy estate or as an expedient to avoid undue delay. The case is particularly strange in that the result in the bankruptcy court case was determined by the imposition of sanctions for the failure to cooperate in an action that the bankruptcy court should not have heard in the first place. As a result of hearing the case under these terms, the bankruptcy court reached a result that was almost certainly incorrect on both the law and the facts, as demonstrated by the contrary result in the fully-litigated state case.

*Marshall v. Marshall* can accurately be characterized as one dispute between two parties, in two different courts, purportedly applying the same state law but having dramatically different outcomes.<sup>45</sup>

This result is possible, perhaps even likely, if the bankruptcy court jurisdiction over the claim is rendered equal to that of the state court, or an Article III federal court. The conclusive and dispositive effect of final orders governing discovery and sanctions produce a potential, as in *Marshall*, for dramatically different outcomes with respect to the same dispute. This “final order” question gives rise to the new forum shopping problem in bankruptcy, and a new question: “When can a bankruptcy court enter final orders?”

## II. The Logical Limits of Bankruptcy Jurisdiction

Strong policy considerations, reflected in the plain language of the jurisdictional statutes governing bankruptcy courts, support the proposition that certain matters are properly heard by an Article III judge (or the state equivalent) rather than by a bankruptcy judge. The Framers showed great care in designing the Article III federal judiciary and particularly the structural protections for individual rights and the effective administration of justice embedded therein, including life tenure and undiminishable remuneration. Article I bankruptcy judges, by contrast, lack both of these protections. This distinction is not trivial—the Framers plainly understood that the protections of judicial independence and competence were essential to the proper and unbiased administration of justice.

Article III establishes a particular, albeit an admittedly imperfect, incentive structure for judges exercising the judicial power. In Federalist 78, Alexander Hamilton referred to the judiciary as the “least dangerous” branch of government because it held the least capacity to infringe upon individual constitutional rights.<sup>46</sup> He reasoned that its power to do harm was limited to the authority of its judgments.<sup>47</sup> This characterization of the judiciary turned, in part, upon Hamilton’s vision of an independent judiciary. By independence, Hamilton insisted that it was necessary that judges serve during good behavior, and as explained in Federalist 79, without risk to their fiscal support.<sup>48</sup> According to Hamilton, “the power over a man’s subsistence amounts to a power over his will.”<sup>49</sup>

Article III prevents certain considerations from influencing the judgment of judges. Judges and courts created pursuant to Congress’s authority under Article I, by contrast, lack these protections. And even when parties consent to jurisdiction, some courts have recently limited the decision-making authority of Article I courts under the Constitution.<sup>50</sup>



There are several notable differences between Article I and Article III judges.

First, bankruptcy cases are often more abbreviated than non-bankruptcy proceedings. Bankruptcy judges are often more sensitive to the typically limited resources at issue in bankruptcy, which may give rise to more streamlined, summary processes. As noted, this is an accommodation to the needs of speedy and final resolution in bankruptcy, but it is not ideal when no such haste and informality is necessary. There is no reason to substitute the summary proceedings of bankruptcy courts when a more thorough and accurate process is available with minimal delay.

Second, bankruptcy judges are appointed by the United States court of appeals for the circuit in which they sit, and not by the President upon the advice and consent of the Senate. Bankruptcy judges serve for a term of 14 years, and though they may be reappointed, the term is limited nevertheless.<sup>51</sup> Moreover, the process for reappointment of bankruptcy judges is highly opaque and depends on currying favor with the local bankruptcy bar. In general, of course, local bankruptcy lawyers are going to prefer judges who assert their jurisdiction authority broadly, thereby bringing major high-profile—and large-fee generating—cases (such as *Marshall*) to their district.<sup>52</sup> And unlike Article III judges who serve for life subject to their “good Behaviour” and cannot have their salary reduced during their time in office, bankruptcy judges may be removed for “incompetence, misconduct, neglect of duty, or physical or mental disability.”<sup>53</sup>

All of these characteristics could conceivably cause the incentive structure of bankruptcy judges to differ in unfavorable ways from that of Article III judges. Term judges could be seeking reappointment, promotion to an Article III judgeship, fame for purposes of post-judicial employment, or other goals unrelated to an unbiased judgment of the cases before them.<sup>54</sup> Scholars have argued that bankruptcy judges have an incentive to compete to hear high-profile cases even when those cases and the justice system would benefit from having those cases heard elsewhere.<sup>55</sup>

And while bankruptcy judges possess the expertise essential to the efficient operation of the bankruptcy system, their narrow focus and specialized jurisdiction may blind them to the larger social and legal context in which they operate, causing them to overweigh bankruptcy concerns and policies relative to other social, economic, and judicial values. Supervision by Article III judges of general jurisdiction provides a broader perspective on such issues, thereby counterbalancing a tendency toward a parochial “bankruptcy-centric” perspective that can arise and lead bankruptcy judges to undervalue other important systemic and substantive values of the legal system. The accommodation of comity for state courts, for instance, is reflected in a variety of limits on the power of federal courts to resolve disputes grounded in state law, such as limitations on diversity jurisdiction and the highly-circumscribed grounds for pendent jurisdiction over state law claims. Various abstention doctrines further illustrate this principle of deference to state courts in matters of state law.

Bankruptcy jurisdiction, by contrast, is very broad as a matter of statutory grant. And, as the Supreme Court held

in the *Marshall* appeal in narrowly construing the probate exception to the bankruptcy laws, as a matter of plenary power bankruptcy courts must have broad power to resolve matters affecting the administration of the estate. But that a broad grant of jurisdiction may be necessary does not mean that bankruptcy judges *should* interfere in every dispute that could conceivably affect the administration of an estate. Rather it highlights the fundamental question raised by the bankruptcy judge’s actions in *Marshall*—the crucial need for self-restraint by bankruptcy judges to respect other values in the American legal system, such as comity for other actors and the prevention of improper forum-shopping. Where self-restraint is lacking and bankruptcy judges overreach to address issues that fundamentally relate to the private rights of individuals rather than the timely administration of the bankruptcy estate and unduly infringe on state court interpretations of their own laws, the constitutional and statutory scheme renders these judgments advisory only, not final orders. Indeed, the Constitution itself compels this.

More fundamentally, it is crucial to enforce the boundary between the authority of Article I and Article III judges to prevent Congress from circumventing the structural protections created by the Constitution by assigning authority to Article I judges to resolve issues properly reserved to Article III judges. Similarly, appellate courts must enforce this boundary to prevent circumvention by Congress or judges such as essentially interpreting private rights by recharacterizing them as public rights or inherent judicial powers.<sup>56</sup>

The outcome of *Marshall v. Marshall* provides an instructive example of the ways in which the incentive structure associated with Article I might dramatically affect the outcome of a dispute rooted in state law. For instance, the bankruptcy judge in the case held what has been characterized as a press conference in open court, fielding questions from the media.<sup>57</sup> Of course, the media attention was largely a product of the celebrity status of the debtor, Anna Nicole Smith. It may not be unusual for a bankruptcy judge to field questions from the press in open court—although the authors have never heard of it— but it would be naïve to suggest that such behavior was unrelated to the celebrity of the debtor. Many cases, both in district as well as bankruptcy court, receive substantial media attention, but the judge’s behavior in catering to and apparently seeking this attention is nonetheless unusual.

Second, the court in *Marshall* issued discovery sanctions upon the less celebrated party in the case, sanctions that were ultimately overturned on appeal, but were nevertheless dispositive in establishing the factual predicate upon which legal determinations in favor of the celebrity debtor were reached. While sanctions are occasionally overturned, their severity and conclusory nature, when coupled with other questionable judicial conduct, undermine the authority underlying the exercise of judicial power in the case.

A third example of behavior uncharacteristic of Article III judges is less obvious, but telling. In *Marshall*, the Texas probate jury had handed down its findings after five months of deliberations, based upon determinations of Texas law made by a Texas court.<sup>58</sup> Nevertheless, the bankruptcy court in *Marshall* refused to abstain or give deference to the state court

adjudication already concluded. Instead, the bankruptcy court thought it an appropriate use of judicial and debtor resources to adjudicate the dispute anew, with limited evidence, all while making path-breaking, unprecedented determinations of Texas law. While the court arguably was under no obligation to abstain from the matter, it *unarguably* was under no obligation to decide the matter either, and the arguments for refusing to abstain well after the close of the underlying bankruptcy case are unpersuasive, at best. At worst, they appear to stem from the court's dissatisfaction with the outcome of the state court proceedings.

Under *Marshall* every probate dispute could be swept into warring judicial processes to be manipulated by savvy bankruptcy filers. There is no reason to believe that, in establishing the jurisdiction of the federal bankruptcy courts, Congress intended for the resolution of multi-billion dollar probate disputes to turn on the relative speed by which they are resolved, rather than the thoroughness, accuracy, and expertise of the court hearing it. In fact, upon learning of the determination of the California bankruptcy court to rush forward with its trial, Judge Mike Wood, who presided over the probate trial in Texas state court, told the attorneys, "If this were a bankruptcy court in Texas that judge would send you back to probate court and say, 'Let me know when you are finished.'"<sup>59</sup> Such deference is typical in such situations, which explains why the bankruptcy judge's behavior in this case can be seen as so unusual.

Rather than relying on Texas courts to administer Texas law in a forum with Texas witnesses and judges, a federal bankruptcy judge over a thousand miles away issued an order after a summary hearing and a series of questionable interpretations of Texas probate law. *Marshall* potentially raises the specter of such a race to the courthouse in every probate case—and the principle potentially extends beyond probate to all issues of traditional state law including tort, contracts, and property. Bankruptcy law and state probate law have peacefully coexisted for over a century, and it is difficult to believe that Congress intended such a radical departure from this harmony, especially when doing so would create such perverse policy results for little obvious advantage.<sup>60</sup>

Professor Troy McKenzie recently has pointed to many of these same factors and concluded that bankruptcy judges increasingly act with a degree of authority and discretion more fitting of Article III judges.<sup>61</sup> He notes, for instance, the vast powers carried out by bankruptcy judges and their relative immunity to review by superior Article III courts.<sup>62</sup> He also argues that because bankruptcy judges are chosen by a merit-selection process rather than a political process, bankruptcy judges may be even more insulated from political pressures.<sup>63</sup> McKenzie argues that the Supreme Court should retreat from its efforts to police the boundaries of the powers reserved to the Article III courts (and implicitly, the core versus non-core distinction).

We agree with McKenzie's observation that bankruptcy courts today exercise a broad scope of authority in practice. But we disagree with his sanguinity toward this development. We instead support a greater degree of self-restraint by bankruptcy judges about the exercise of their powers and tighter oversight

by Article III judges. For instance, McKenzie argues that bankruptcy judges are subject to an appointments process that may be less political in nature than that for Article III judges. This is not obvious—research indicates, for instance, that so-called "merit selection" of state judges does not remove political pressures on appointments but simply redistributes it to other venues (such as bar politics) that may be political as well, just in different ways.<sup>64</sup>

Even if true, it does not address the concern about the political issues involved in *reappointment* of bankruptcy judges or the potential for bankruptcy judges to leave the bench at the end of their term and enter private practice. McKenzie acknowledges that these pressures might lead to the capture of bankruptcy judges by the bankruptcy bar.<sup>65</sup> Scholars who have studied other specialized courts, such as the Federal Circuit, have found a tendency for those courts to succumb to capture by repeat-players that appear before them.<sup>66</sup> Once an Article III is appointed—even if the initial process is highly-politicized—the judge is immune from future political pressure. Bankruptcy judges, by contrast, know that they will be held accountable one way or the other at the end of their term and this fear casts a shadow over their behavior.

### III. Conclusion: A Modest Approach to Bankruptcy Jurisdiction

The federal courts today are now confronted with a new form of forum shopping in bankruptcy. Litigants concerned with the likelihood of success in state or federal non-bankruptcy courts can race to the courthouse, file a bankruptcy petition, and take their chances in a more streamlined, less thorough, and often resource-constrained bankruptcy process, administered by Article I bankruptcy judges. The statutory grant of bankruptcy court jurisdiction can be construed broadly, and, as *Marshall's* facts suggest, can be easily manipulated. Once jurisdiction is established, the primary restraint on strategic forum-shopping is the self-restraint of the bankruptcy judge. Where the bankruptcy judge fails to exercise proper restraint, however, it is the duty of Article III judges to intervene to enforce those limitations. As the Framers implicitly understood, there are sound reasons for vesting the federal judicial power in the hands of Article III judges. It is precisely for these reasons that Article III judges serve as "backstops" to the rulings of Article I judges on matters involving private rights, treating such rulings as non-core matters to be treated as something less than the final judgment of a case.

### Endnotes

- 1 This paper is adapted from a law review article of the same title, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1417621](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417621).
- 2 *Butner v. United States*, 440 U.S. 48 (1979).
- 3 492 U.S. 300 (1989).
- 4 *In re Marshall*, 253 B.R. 550 (Bankr. C.D. Cal. 2000).
- 5 458 U.S. 50 (1982).
- 6 392 F.3d 1118 (9th Cir. 2005), *rev'd and remanded*, 547 U.S. 293.
- 7 *Marshall v. Marshall*, 547 U.S. 293 (2006).
- 8 Brief of Respondent, *Marshall v. Marshall*, S.Ct. case no. 04-1544.

9 Marshall v. Marshall, 275 B.R. 5, 21-22 (C.D. Cal. 2002).

10 *Id.*

11 Marshall v. Marshall, 547 U.S. at 300.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 Marshall v. MacIntyre (*In re Estate of Marshall*), prob. juris. noted, no. 276,815-402.

17 Marshall v. Marshall, 547 U.S. at 300.

18 *Id.* at 300-01.

19 *In re Marshall*, 275 B.R. 5, 8 (Bankr. C.D. Cal. 2002).

20 *Id.*; see App. 23-25.

21 Ronald A. Cass, *Marshall v. Marshall and the Probate Exception to Federal Court Jurisdiction*, [http://www.fed-soc.org/doclib/20070322\\_MarshallvMarshall.pdf](http://www.fed-soc.org/doclib/20070322_MarshallvMarshall.pdf).

22 *In re Marshall*, 253 B.R. 550, 558-59 (Bankr. C.D. Cal. 2000).

23 *Id.* at 561.

24 *Id.*

25 *In re Marshall*, 257 B.R. 35 (C.D. Cal. 2000).

26 *Id.* at 40.

27 *Id.*

28 *In re Marshall*, 275 B.R. 5 (C.D. Cal. 2002).

29 *Id.* at 10.

30 *Id.* at 50.

31 *In re Marshall*, 392 F.3d 1118, 1124-25 (9th Cir. 2004).

32 Marshall v. Marshall, 547 U.S. 293, 294 (2006).

33 *In re Marshall*, 392 F.3d at 1129.

34 *Id.*

35 Marshall v. Marshall, 547 U.S. at 294.

36 *Id.*

37 *Id.*

38 *Id.* at 295.

39 *Id.* at 304.

40 *In re Marshall*, 392 F.3d 1118, 1121 (9th Cir. 2004).

41 *Id.* at 1137.

42 Marshall v. Marshall, 545 U.S. 1165 (2005).

43 Marshall v. Marshall, 547 U.S. 293, 313-14 (2006).

44 *Id.* at 315.

45 *Cf. Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

46 THE FEDERALIST NO. 78 (Alexander Hamilton).

47 *Id.*

48 THE FEDERALIST NO. 79 (Alexander Hamilton).

49 *Id.*

50 See *United States v. Johnson*, 258 F.3d 361 (5th Cir. 2001) (limiting the authority of Article I magistrate judges to review district court determinations in criminal proceedings under 28 U.S.C. §2255 as unconstitutional).

51 One study estimates that approximately 8% of bankruptcy judges were formally denied reappointment for a second term, but that the percentage may be as high as 26% when considering those who appear to have had reappointment denied informally or were induced to retire. See Judith Resnik, "Uncle Sam Modernizes His Justice": *Inventing the Federal District Courts of the*

*Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L. J. 607, 675 (citing Stan Bernstein, *The Reappointment of Bankruptcy Judges: A Preliminary Analysis of the Present Process* (unpublished manuscript)).

52 See Todd J. Zywicki, *Is Forum-Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L. J. 1141, 1180-85 (2006).

53 28 U.S.C. §152(e).

54 Resnik, *supra* note 51, at 672-73. Resnik notes that it has become increasingly common for Article I bankruptcy and magistrate judges subsequently to be promoted to district and appellate judgeships.

55 See LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION OF BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 20 (2005).

56 See, e.g., Resnik, *supra* note 51, at 668-69.

57 Brief of Respondent at 6, *Marshall v. Marshall*, S.Ct. No. 04-1544 (noting that at one point, a reporter from *Newsweek* magazine took the podium and posed questions regarding the case); *id.* at 6 n.7.

58 *Id.* at 294.

59 Jill Smolowe, *Estate of the Union: Bereaved by Unbowed, Model Anna Nicole Smith Wages Battle to Claim a Portion of the Millions Left by Her Ninetysomething Oil-Tycoon Husband*, 52 PEOPLE No. 19 (Nov. 15, 1999), available at <http://www.people.com/people/archive/article/0,,20129774,00.html>.

60 *Cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 542 (1994) (noting that courts should be reluctant to infer congressional intent to disrupt the "ancient harmony" between state debtor-creditor law and federal bankruptcy law).

61 Troy McKenzie, *Judicial Independence, Autonomy, and The Bankruptcy Courts*, working paper.

62 *Id.* at 29.

63 *Id.* at 45.

64 See Todd J. Zywicki, *Public Choice and Tort Reform* (working paper, George Mason University School of Law) (2000) (discussing state judicial "merit selection" programs).

65 McKenzie, *supra* note 61, at 50.

66 Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 17-18 (2008); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1110 (2003); John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 792-94 (2003) (discussing how the Federal Circuit's "jurisprudence increasingly reflects a trend towards adjudicative rule formalism," which is explained in part as a response to the "lawyers [who] draft the exclusionary rules that are patent claims").



PROPOSED FEDERAL LEGISLATION SEEKS TO OVERTURN SUPREME COURT LIMITS ON AIDING AND ABETTING LIABILITY IN CERTAIN SECURITIES CASES

By Jeffrey J. Jones, J. Todd Kennard & Marjorie P. Duffy\*

Under recently-introduced legislation, a company's bankers, auditors, business partners, and outside lawyers could be held liable in civil actions under Section 20 of the Securities Exchange Act of 1934 ("1934 Act") if they provide "substantial assistance" in violation of the statute. According to Senator Arlen Specter's statement accompanying Senate Bill 1551, the Liability for Aiding and Abetting Securities Violations Act of 2009, "[t]he massive frauds involving Enron, Refco, Tyco, Worldcom, and countless other lesser-known companies during the past decade have taught us that a stock issuer's auditors, bankers, business affiliates, and lawyers—sometimes called 'secondary actors'—all too often actively participate in and enable the issuer's fraud."

I. The 1933 and 1934 Acts

The Securities Act of 1933 ("1933 Act") regulates initial distributions of securities, while the 1934 Act for the most part regulates post-distribution trading. Certain bad actors can be subject to civil liability under either express statutory rights or private rights of action that courts have implied under § 10(b) and § 14(a) of the 1934 Act. In addition to the private litigation available under the Acts, the Securities and Exchange Commission ("SEC") can bring actions and injunctive proceedings.

Section 10(b) of the 1934 Act makes it unlawful for any person:

directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange — . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, in turn, provides that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

II. Supreme Court First Says No Aiding and Abetting Liability Under § 10(b) in Central Bank

In Central Bank of Denver, N.A. v. First Interstate Bank of Denver, the Supreme Court considered whether a private plaintiff may maintain an aiding and abetting suit under § 10(b) against those who do not engage in a manipulative or deceptive practice. In a 5-4 decision, the Court said no.

The Colorado Springs-Stetson Hills Public Building Authority ("Authority") had issued millions of dollars in bonds to finance public improvements at a planned development. Central Bank served as indenture trustee for the bond issues. Landowner assessment liens, in turn, secured the bonds. The bond covenants required that the land subject to the liens be worth at least 160% of the bonds' outstanding principal and interest and required the developer to give Central Bank an annual report containing evidence that the 160% test was met.

After the Authority defaulted on the bonds, bond purchasers sued the Authority and others directly. They also contended that Central Bank was "secondarily liable" under § 10(b) for aiding and abetting the alleged fraud. Central Bank allegedly agreed to delay an independent review of the land appraisal after one appraisal showed the land values nearly unchanged and Central Bank's in-house appraiser indicated the values listed appeared optimistic, among other things. The court of appeals in Central Bank, as well as other federal courts, had previously allowed private aiding and abetting actions under § 10(b).

The Supreme Court's reasoning for rejecting private aiding and abetting liability included:

- The Court "[a]dhere[d] to the text" of § 10(b). The Court noted that "the language of Section 10(b) does not in terms mention aiding and abetting." "Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)."
The Court rejected the argument that § 10(b)'s textual use of the phrase "directly or indirectly" covers aiding and abetting, noting that aiding and abetting liability extends beyond persons who engage "even indirectly" in a proscribed activity.

\* Attorneys at Jones Day. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the law firm with which they are associated.



- The Court noted that the “directly or indirectly” language is used elsewhere in the 1934 Act in a way that does not impose aiding and abetting liability.<sup>20</sup>
- The Court noted that in other statutes Congress has explicitly imposed aiding and abetting liability when it chose to do so.<sup>21</sup>
- The Court analyzed the express causes of action in the 1933 Act and the 1934 Act and concluded that none of the express causes of action in the 1934 Act further imposes liability on one who aids or abets a violation.<sup>22</sup> “From the fact that Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts, we can infer that Congress likely would not have attached aiding and abetting liability to § 10(b) had it provided a private § 10(b) cause of action. There is no reason to think that Congress would have attached aiding and abetting liability only to § 10(b) and not to any of the express private rights of action in the Act.”<sup>23</sup>
- The Court found that its reasoning was confirmed by the fact that imposing aiding and abetting liability under Rule 10b-5 would result in liability when at least one element critical for recovery under 10b-5 is missing: reliance. A plaintiff must show reliance on the defendant’s statement or omission to recover under Rule 10b-5.<sup>24</sup>
- The Court also rejected a congressional “intent” argument. While there is a general aiding and abetting statute applicable to all federal criminal offenses, Congress has not enacted a general civil aiding and abetting statute.<sup>25</sup>
- The Court rejected the SEC’s policy argument that aiding and abetting liability should be allowed because it deters secondary actors from contributing to fraudulent activities and ensures that “plaintiffs are made whole,” stating that “[p]olicy considerations cannot override our interpretation of the text and structure of the Act.”<sup>26</sup> The Court also noted that liability for aiders and abettors exacts costs that may undermine the goals of efficiency and fair dealing in securities because of the danger of vexatious litigation, which may make it difficult for newer and smaller companies to get advice from professionals.<sup>27</sup>

Justice Stevens, writing for a four-member dissent in *Central Bank*, noted that in numerous prior judicial and administrative proceedings, the courts and the SEC had previously concluded that § 10(b) and Rule 10b-5 allow for aiding and abetting liability.<sup>28</sup> The dissent emphasized that the statute was passed in an era when courts commonly read statutes broadly to accord with their remedial purposes.<sup>29</sup> The dissent also noted Congress’ failure to amend the statute after prior court and administrative decisions that allowed for aiding and abetting liability.<sup>30</sup>

### III. The Supreme Court Reaches a Similar Result of No Liability for Secondary Liability in *Stoneridge*

In *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, the Supreme Court last year again declined to extend secondary

actor liability under § 10(b). Specifically, the Court found that a company’s vendors and customers could not be liable as secondary actors under § 10(b).<sup>31</sup>

The plaintiffs in *Stoneridge* sought to impose liability on entities that allegedly agreed to arrangements that allowed Charter Communications, Inc. (“Charter”) to mislead its auditor and issue a misleading financial statement affecting Charter’s stock price.<sup>32</sup> The Court held that the implied right of action under § 10(b) of the 1934 Act did not reach entities that were suppliers, and later customers, of Charter because the investors did not rely upon these entities’ statements or representations.<sup>33</sup>

According to the complaint, Charter allegedly decided to alter its existing arrangements with Scientific-Atlanta and Motorola to mislead Charter’s auditor, Arthur Andersen.<sup>34</sup> The complaint asserted that Charter arranged to overpay \$20 for each converter set top box that Charter furnished to its customers until the end of the year, with the understanding that Scientific-Atlanta, Inc. and Motorola, Inc. would return the overpayment by purchasing advertising from Charter.<sup>35</sup> Thus, the transactions allegedly had no economic substance but allowed Charter to record the advertising purchases as revenue and capitalize its purchase of the set top boxes.<sup>36</sup> The deals allegedly misled Charter’s auditor into approving a financial statement showing Charter met projected revenue and operating cash flow numbers.<sup>37</sup> According to the complaint, to hide the link between the increased payments for the boxes and the advertising purchases, the companies drafted documents to make the transactions appear unrelated and in the ordinary course and also backdated the supplier agreements.<sup>38</sup>

Although Scientific-Atlanta and Motorola had no role in preparing or disseminating Charter’s financial statements, the complaint alleged that they knew or recklessly disregarded Charter’s intention to use the transactions to inflate Charter’s revenues and knew that investors and research analysts would rely on the resulting financial statements that Charter issued.<sup>39</sup> The complaint claimed that by participating in the transactions Scientific-Atlanta and Motorola violated § 10(b) and Rule 10b-5.<sup>40</sup>

Again, the Supreme Court rejected the notion that secondary actors could be subject to civil liability under those provisions. The Court noted that in *Central Bank* it had determined that § 10(b) liability did not extend to aiders and abettors and that § 10(b)’s text limits its scope, and the text fails to mention aiding and abetting liability.<sup>41</sup> The Court explained that the *Central Bank* decision led to calls for new legislation to expressly provide for aiding and abetting liability within the 1934 Act, but Congress chose not to pass such legislation.<sup>42</sup>

In rejecting the aiding and abetting claim in this case, the Court stated that “[r]eliance by the plaintiff upon the defendant’s deceptive acts is an essential element of the § 10(b) private cause of action. It ensures that, for liability to arise, the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury exists as a predicate for liability.”<sup>43</sup> The Court found that a rebuttal presumption of reliance did not apply because Scientific-Atlanta and Motorola had no duty to disclose and their deceptive acts were not communicated to the public.<sup>44</sup>



with a public company. Potential defendants would encompass a company’s outside professionals—such as accountants, investment banks, securities analysts, credit rating agencies, and lawyers—undoing the *Stoneridge* Court’s rejection of such an expansive scope of liability. As the Court previously found, “[w]ere [plaintiff’s] concept of reliance to be adopted, the implied *cause of action would reach the whole marketplace in which the issuing company does business.*”<sup>57</sup> Such concerns warrant careful analysis with regard to the pending legislative efforts.

## Endnotes

- 1 155 Cong. Rec. S8564 (daily ed. July 30, 2009) (statement of Sen. Specter).
- 2 *See id.*; *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).
- 3 *See Central Bank*, 511 U.S. at 171.
- 4 *See id.*
- 5 15 U.S.C. § 78j (emphasis added).
- 6 7 C.F.R. § 240.10b-5 (2009) (emphasis added).
- 7 *See Central Bank*, 511 U.S. at 167.
- 8 *Id.*
- 9 *Id.*
- 10 *Id.*
- 11 *See id.*
- 12 *Id.* at 168.
- 13 *Id.*
- 14 *Id.* at 168-69.
- 15 *See id.* at 169.
- 16 *See id.* at 174.
- 17 *Id.* at 175 (quotation omitted).
- 18 *Id.* at 191.
- 19 *See id.* at 176.
- 20 *See id.*
- 21 *See id.* at 176-77.
- 22 *See id.* at 179.
- 23 *Id.* at 179-80 (internal citation and quotation omitted).
- 24 *See id.* at 180 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)).
- 25 *See id.* at 180-82.
- 26 *See id.* at 188.
- 27 *See id.* at 188-89.
- 28 *Id.* at 192 (Stevens, J. dissenting).
- 29 *See id.* at 195-96.
- 30 *See id.* at 196-98.
- 31 *See Stoneridge*, 552 U.S. at 766.
- 32 *Id.*
- 33 *Id.*
- 34 *Id.*
- 35 *Id.*
- 36 *Id.*

- 37 *See id.*
- 38 *Id.* at 767.
- 39 *Id.*
- 40 *Id.*
- 41 *See id.* at 768.
- 42 *See id.* at 768-69.
- 43 *Id.* at 769 (quotation omitted).
- 44 *See id.*
- 45 *See id.* at 770.
- 46 *See id.*
- 47 *Id.*
- 48 *See id.* at 771.
- 49 *See id.*
- 50 *See id.* at 771, 773.
- 51 *See id.* at 773-74.
- 52 *See id.* at 774 (Stevens, J. dissenting).
- 53 *See id.* at 775.
- 54 *See id.* at 775-77.
- 55 *See id.* at 778-79.
- 56 *See* 155 Cong. Rec. S8565 (daily ed. Jul. 30, 2009) (statement of Sen. Specter).
- 57 *Stoneridge*, 552 U.S. at 770 (emphasis added).



---

# FREE SPEECH & ELECTION LAW

## WHY VOTE IN SECRET? BALANCING AUTONOMY AND ACCOUNTABILITY IN ABSENTEE, CARD CHECK, AND CORPORATE VOTING CONTEXTS

By Allison R. Hayward\*

---

The way a group, jurisdiction, or nation votes, and makes decisions binding on their members and citizens, is fundamental and deceptively prosaic. Why do some groups (e.g., faculties, Congress, caucuses, HOAs) take public votes in most contexts, accompanied by debate, sometimes heated? Why do others (e.g., electorates, labor unions) take private votes (often by ballot cast in a secure setting where “heated debate” is not allowed) in most contexts?<sup>1</sup>

Moreover, what should we make of the exceptions to these general forms? This article contends that the hybrid mode of voting—non-public yet non-secret voting such as in contemporary absentee balloting, in union organizing petitions (so called “card check” campaigns) as well as among corporate shareholders—carries with it the weaknesses of each alternative without the strengths. Accordingly, where possible the situations that use this hybrid should be reformed to adopt the open or secret modes.

### I. Why Different Contexts Require Different Modes of Voting

Voting systems must manage two separate characteristics. The first is the character of the decision being made. Certain decisions are better-made in deliberative assemblies rather than by balloting. Debate can bring the question into focus and can allow a body to make a prompt decision. An aspect of deliberation is also the flexibility to modify the issue before the vote. Motions can be amended; ballots cannot. It is easier for a meeting to accommodate a series of votes on amendments that would require separate elections by ballot and avoid the problem of “cycling preferences” where the electorate ends up with a suboptimal choice.<sup>2</sup>

The second characteristic is voter independence, power, or vulnerability. In the context where the vote is cast, is it important at that moment for the voter to be insulated from pressure, so as to express his preference privately, sincerely, anonymously, and secretly? Secret voting is important in situations where we want voters to register their preference secure in the knowledge that no one will know how they voted. Historically, secret balloting has been instituted in response to fraud, but it can stand on its own in situations where elections need to register the sentiment of a relatively large group about a contested issue of general interest.

Condorcet’s widely discussed insights suggested that individual voters are more likely to be correct about the choice that is best for them and for the polity overall. Sincere expression of majority will is likely to result in the best alternative.<sup>3</sup>

---

\* Assistant Professor of Law, George Mason University School of Law, Board member, Center for Competitive Politics, and Board member of the Office of Congressional Ethics.

The “best” is a desirable outcome, not only because it may better serve the welfare of the group, but because dissenters, understanding this, will more willingly acquiesce to the majority’s choice (at least in the short run). We especially care about dissenters’ feelings of legitimacy when the “group” under discussion is a political subdivision.<sup>4</sup> “Love it or Leave it” (or “exit” in Albert Hirschmann’s influential description) is rarely a realistic choice in a polity. Moreover, withdrawal is undesirable if those dissenters’ honest perspectives as voters will be necessary for future good decisions on other questions.<sup>5</sup> Also, when dissenters feel cheated, their attempt to rectify the direction of government can take antisocial forms.

Thus, a well-run election in a large body where exit is unrealistic, like a political jurisdiction, should restrict as much as possible any opportunities for threats, bribes, or monitoring at the moment of voting. Other voting contexts however, present competing concerns and should be administered differently. Thus, when the voter is also a representative, votes should be cast openly and each voter’s vote identified with him. Only then can colleagues and the constituency observe how the representative is performing in office. Even here, it is customary to allow a secret ballot in certain sensitive situations.<sup>6</sup>

### II. Balloting Through History

Before the 1880s, most American jurisdictions voted by ballot, but American ballots were not “secret” ballots. Voters brought their own ballots to a central polling place. Parties would print out the slate of candidates for all offices, and voters would choose a ticket, then deposit it at the polls.<sup>7</sup> Generally, voters would make their way through a crowd to their voting window with their ticket, hand it inside to an election official, who would then deposit it in a ballot box out of reach of the public.<sup>8</sup>

While the American private ballot system was more closed than that afforded in open-voice voting, voters could (and did) exercise more discretion over their vote than it might at first appear. Simply because a voter took and cast a Republican ballot did not limit the voter to every candidate on the Republican slate. Voters could alter their party ballots, by writing in a preferred choice or pasting in the name of another candidate provided by that campaign.<sup>9</sup> Or voters could tear off the names of disfavored candidates and vote the rest.<sup>10</sup> But the private ballot system also allowed malefactors to distribute misleading or fraudulent ballots. Local parties could print up their own slates to oppose the regular party nominees (or demand money to distribute the “correct” ballot). Opposing parties could circulate “bogus” rival ballots.<sup>11</sup>

Between 1888 and 1900, the secret, state-printed “Australian ballot” swept the United States.<sup>12</sup> Standardization was not without costs. “What had been a relatively fluid and informal electoral process, dominated by the local party



organizations, now became a more formal proceeding, still dominated by the major parties but with vastly more authority vested in the party elite.”<sup>13</sup>

The secret ballot posed new challenges. Is the ballot designed so that voters can easily choose their preferences? For instance, the “Massachusetts ballot,” now the modern standard, organized candidates by office; the “Indiana ballot” listed columns of candidates by party.<sup>14</sup> The Massachusetts ballot was more conducive to independent voting and split tickets; the Indiana ballot encouraged straight-ticket voting but took less time to vote, reduced “roll off,” and (by incorporating symbols for the parties) was easier for uneducated or illiterate voters to use.<sup>15</sup> Among some, the motives for adopting the state-printed Australian ballot was to disenfranchise illiterate voters.<sup>16</sup> Pre-election voter education, such as distributing sample ballots in advance, reduced voter confusion but added to the expense of the election.<sup>17</sup>

Even when the instructions are clear, voters make mistakes. How will nonconforming ballots be counted, if at all? Can election administrators number ballots, so that in a recount or contest a voter can identify his ballot and can clarify his intent? State courts confronted with such systems split on whether such numbering was inconsistent with a guarantee of a secret ballot.<sup>18</sup>

Once the state prepared the ballots, state law determined who could appear on them, with nontrivial consequences for voters’ choices. Evidence suggests that ballot access restrictions in a handful of Southern states saved the presidency for Harry Truman in 1948, and New York’s denial of Eugene McCarthy’s ballot access suit in 1976 helped elect Jimmy Carter.<sup>19</sup>

The Australian ballot has become another public budget item, subject to those constraints and incentives. As populations increased, election administrators have been faced with growing expenses in guaranteeing the secret ballot, in locating and staffing polling places, printing ballots and other materials, and tabulating returns. Yet citizen outcry for greater election administration budgets is seldom heard.

### III. Important Exceptions

Today, we vote by non-secret ballot in situations where public accountability and deliberation are also nonexistent. These situations might be labeled “demi-publicity.” An ever-increasing number of ballots are cast by mail, away from the compelled confidentiality of the polling place. Whereas twenty-five years ago only about five percent of the total votes cast were cast away from the traditional election-day polling place, in 2000 that percentage had risen to fourteen percent, and in 2004 to approximately twenty-two percent.<sup>20</sup> In 2008, it appears that an unprecedented number—about thirty percent—of voters cast their ballots before Election Day, either at early polling locations or by voting absentee away from a polling place.<sup>21</sup>

The “demi-publicity” problem is not confined to public elections. In “card check” labor organizing campaigns, voters are asked to cast a vote in favor of union representation in frequently coercive situations. Moreover, voting by corporate shareholders is not anonymous and also can be susceptible of influence and coercion. Why is confidentiality not protected in these contexts? Should it be?

### A. Absentee Voting

Vermont first extended an “absentee” vote to civilians in 1896.<sup>22</sup> Its law, however, required that the absent voter cast a vote on election day at a polling place in the state. By 1928 all but three states had provided at some point for absent voting. The vast majority of these laws allowed the voter to vote before election day, either by appearing in the registrar’s office or before an officer qualified to administer an oath. Commentators observed that so long as these laws ensured that ballots “would be voted under some public auspices and transmitted to the proper precincts protected from dishonesty and without violating the voters’ confidence” that absent voting was little threat to the integrity of elections.<sup>23</sup> Such protections make voting less convenient, and few took advantage of absentee voting. In 1922, out of an electorate numbering 2,300,000 in New York City, 329 absentee votes were cast.<sup>24</sup>

More recently, legislators have broadened the availability of absentee voting in many states by adopting “no excuses” absentee balloting. That is, a voter can apply for and vote an absentee ballot even if able to reach the polls on election day.<sup>25</sup> Not surprisingly, absentee voting increased in these states—California’s absentee turnout went from about five percent at the time its “no excuses” law was enacted, to over thirty percent in 2004.<sup>26</sup> California also adopted permanent absentee status in 2002, under which the state will send the voter an absentee ballot each election without the voter requesting a ballot each time. In 2005 twenty-one percent of all registered California voters had permanent absentee status.<sup>27</sup>

Innovations like “no excuses” absentee voting and permanent absentee status, by increasing voting outside the protection of the polls, could logically increase the availability of absentee ballots for fraud. But even in jurisdictions where these innovations have not been adopted, a culture of absentee fraud can flourish. With the cooperation of a willing notary, for example, even the affidavit provisions of these stricter laws provide no guarantee against fraud by entrenched interests.<sup>28</sup> In a 1982 Oklahoma prosecution of absentee voter fraud, the judge justified accepting a no-contest plea because “it’s been kind of difficult to put someone in the pokey for this since it has been going on for so long.”<sup>29</sup> To the extent absentee voting is seen as needing reform, most of the attention is on the error rates of absentee voting, and activists counsel that easier standards will result in fewer spoiled or rejected absentee votes.<sup>30</sup>

Finally, even in the best circumstances voters make mistakes. Because absentee voters tend to be better-educated and older than election day voters, one might expect that their ballots would exhibit fewer problems.<sup>31</sup> However, the evidence shows that the problem of the miscast or “residual” absentee ballot is real and substantial. Residual vote rates for absentee voters tend to be higher than for early voting or election day voting at the polls.<sup>32</sup> In some jurisdictions the differences are striking. In California, for instance, the residual rate in the 2004 election was 1.0% for polling place voting, and 1.3% for absentee voting (out of 4,108,088 absentee ballots counted); in Virginia 0.7% for polling place voting versus 1.1% for absentee voting (of 221,890 absentee ballots counted), and in North Carolina 2.2% versus 4.6% (of 122,984 absentee ballots counted).<sup>33</sup>

Although absentee voters as a group would appear better prepared to vote (given demographics), absentee ballots exhibit more mistakes. Something about voting away from the polls affects a voter's ability to cast a ballot. That "something" may be as simple as having a checking device at the polling place to reject overvotes and ballots with illegible marks. This is a persistent deficiency in absentee voting not readily capable of remedy.

### *B. Voting and Card Check Campaigns*

A union can become the recognized agent for collective bargaining in one of three ways. It may be selected by a majority of the unit's employees in an NLRB-conducted election.<sup>34</sup> Or the employer may agree to recognize the union once a majority of its workers have signed authorization cards.<sup>35</sup> Finally, the NLRB may order a union be recognized if a majority of workers have signed authorization cards and the employer has engaged in practices that make a fair election unlikely.<sup>36</sup> Accordingly, in situations where there is a "question of representation"—typically because a union claims to be the designated representative of a set of employees and the employer disputes that claim—the National Labor Relations Act requires the Board to direct an election by secret ballot.<sup>37</sup>

Labor organizations complain that this system is unduly burdensome, in that employers presented with authorization cards from a majority of the relevant unit's employees should, they contend, recognize that union as the collective bargaining representative for all employees in that unit. As the law stands now, however, even if the union collects authorization cards from a supermajority of employees, the employer may still insist upon an election.<sup>38</sup> During the period before the election, unions complain that employers inundate their employees with anti-union information, intimidate employees, and otherwise coerce the employees' judgment, reducing if not eliminating the chances the election will favor the union.<sup>39</sup>

Voting at a Certification-Election Day resembles voting at public polls in many respects. Employees present themselves to monitors, who, once satisfied with the voter's bona fides, provide a ballot and direct the voter to a booth.<sup>40</sup> After the voter marks the ballot, a worker under the scrutiny of an NLRB agent deposits the ballot into a ballot box. Authorization "card check" campaigns, by contrast, resemble absentee balloting in some respects. Individuals supporting the union solicit signatures from employees one-on-one, often at home and away from observation by others.<sup>41</sup>

The encounters can be unpleasant. "In the context of a union organizing drive, peer pressure from fellow workers and from the union to sign union membership cards may make it difficult for an employee to express genuine feelings about the union."<sup>42</sup> Similarly, supervisors may call organizers aside and counsel them against engaging in this protected activity, unlawfully threaten them with dire consequences, or promise advantages if the employee stops organizing.<sup>43</sup>

At present, the closest analogy in politics to a card check effort is a petition drive. In both, sufficient signatures merely trigger an election by secret ballot on a question. But under proposed revisions titled the "Employee Free Choice Act" (EFCA), a card check effort that obtained a bare (absolute)

majority of the unit's worker signatures would bring all relevant workers, whether or not they like it, under the collective bargaining representation of the union with no separate election.<sup>44</sup> Currently, the employer, although not capable logistically to argue against the union's efforts during the card check drive, has the opportunity to reach workers with its perspective during the campaign before the election. Under EFCA, this opportunity disappears. A card check authorization effort would become analogous to a one-sided petition drive with the power, alone, to amend existing law. To be sure, this change in the law would prevent supervisors and employers' agents from threatening, coercing, or bribing employees not to support the union, but critics assert that the appropriate remedy for such unfair labor practices is not to cut the employer's perspective out of the campaign altogether.<sup>45</sup>

Under EFCA, we encounter a more extreme example of non-secret but non-private voting than in the absentee balloting context. While absentee balloting occurs within the requisite time limits and deadlines of a particular campaign, a union authorization card can be deemed "current" for a year or more after being signed and cannot be revoked by the worker.<sup>46</sup> Workers are approached by one party to the contest and either vote for union representation or face the unpleasant consequences of refusing. Unlike absentee balloting, where a self-confident voter might be able to avoid a campaign worker's prying eyes, there is no hypothetical case where the voter can exercise his choice confidentially.<sup>47</sup> The organizer either walks away with a signed card or does not.

Furthermore, because card check efforts need not be publicized, nor the identities of supporters released, there is no way for a worker whose name has been fraudulently added to the union's list to detect the fraud, whereas the voter whose absentee ballot is intercepted by a third party may notice it missing or find out on election day that a vote has already been cast in his name. Unlike voting a secret ballot under the supervision of some neutral overseer, the worker is vulnerable to coercion and/or fraud. Unlike a public meeting to vote for representation, he cannot hear competing arguments, ask questions, or observe the attitude of his colleagues. Finally, the card check process is only available under EFCA when a workplace is being organized. It is not available when employees want to change their representative or rescind recognition.<sup>48</sup> If card check is a suitable way to express workplace democracy in the organizing context, it should be equally appropriate for changes in representation.

If card check organizing is rejected, then which is better, secret ballot or open meetings? History teaches us that union organizing and representation elections are potentially unpleasant. The purpose behind the NLRA, after all, was to increase industrial peace in an often hostile context. The rise of the neutrality agreement/card check model via private contract between unions and employers provides a useful, already-existing alternative for those situations where each side can work with the other.<sup>49</sup> Those campaigns that remain subject to NLRA are the tense and contested ones. Therefore, it is unlikely that a "public meeting" open voting alternative would work in those workplace campaigns that now proceed under the NLRA.

Thus, there is good reason to preserve employee access to the secret ballot in the labor organizing context. Secret ballot elections are admittedly no guarantee of smooth sailing—experience has shown that they too can be used as a tool of fear and manipulation, as the unhappy histories of certain trade unions will attest.<sup>50</sup> Those matters reach beyond the task of this Article, which has been to explain the importance of the secret ballot in certain settings, especially those where voters have reason to fear retribution. Fewer contexts present a clearer example of this than the contested union organizing election.

### *C. Shareholder Voting*

Under Delaware's corporate code, shareholders vote to elect directors, typically by plurality vote. Shareholders also vote on bylaw amendments, resolutions, mergers, and amendments to the Certificate of Incorporation.<sup>51</sup> These votes are cast on "ballots," away from any protective polling location, and the identity of the voter is on the ballot. The corporation can see who has voted and how they voted. Is this voting process legitimate, given the concerns raised throughout this article about non-public, non-confidential balloting?

Corporate voting, especially in large, publicly-traded companies, has characteristics not shared by the other forms of voting discussed above. Unlike voters, who register and vote based mostly on domicile, or workers, who are part of a collective bargaining unit determined by their job, the shareholder franchise is based on possession, perhaps fleeting, often indirect, of an intangible asset. Simply because someone possesses shares as of a certain date may say little about their stake in the operation of the company or their knowledge of its operations.<sup>52</sup>

Moreover, investors may loan their securities to others, and with them, the votes. Those borrowers would be able to vote without having anything meaningful at stake.<sup>53</sup> "Empty voting" by investors who have hedged their positions is controversial, and it is hard to think of an analogous situation in politics where large voting blocks would cast their votes "insincerely"—perhaps in an effort to make things worse off.<sup>54</sup>

Unlike a voter or worker, the identity of the beneficial shareholder may not be known if, as is frequently the case, the owner of record is not the individual investor but a broker or other nominee. If investors have elected to be treated as an objecting beneficial owner (OBO), the corporation will never know their individual identities but can only convey voting materials to intermediaries.<sup>55</sup> This makes for an inefficient "campaign" but also means that the corporation at this stage is unable to lobby the shareholder. That insulation is fleeting—once the vote is cast, management could see who voted against management and contact those shareholders or the transmitting intermediaries.

Moreover, beneficial shareholders may not control their votes. If the investor never receives the materials, the custodian may vote the "uninstructed" shares as it sees fit.<sup>56</sup> Even after an investor casts a vote or instructs the custodian of the shares how to vote, he may reverse that vote—until the end of voting, a shareholder may cast multiple votes, and only the proxy cast last in time determines the votes of the shares.<sup>57</sup> Shareholders can enter into "voting trusts" that bind them contractually to

vote a certain way, and can "buy" votes.<sup>58</sup> In short, many shared traits in other voting contexts—an identifiable and relatively stable electorate with a real stake, to whom a campaign can be directed, who cast votes directly, on ballots where there is some means for imposing ballot integrity, are not present in corporate voting.

In the context of this study, corporate voting would seem to share some traits with absentee and card check voting. A shareholder casts a vote outside a setting shielded from influence or coercion. In fact, similar to the card check setting, a shareholder can be approached again and again during a voting period to "re-vote." Corporate voting would thus be classified as a form of non-secret but non-public voting that our analysis suggests is illegitimate.

Yet differences in shareholder voting mean that the shareholder voting context is not susceptible to the same analysis. In a large, publicly-traded corporation, small shareholders, unlike voters or workers, would likely find that "exit" from the corporation, to a competitor or financial substitute, is easier (even preferable) than researching and voicing an opinion through voting.<sup>59</sup> So whatever influence or pressure they may suffer when casting their vote can be avoided easily, if they so choose.

Furthermore, not all corporations are large, publicly-traded companies. How does open voting fare in closely-held corporations, when shares may be relatively illiquid and exit is thus difficult? Here, the other characteristics of mass voting are also not present. Voting in closely-held corporations is more like voting on a committee, faculty, or HOA, face-to-face, where votes are usually cast openly after motions and debate. This context lacks the logistical impediments to open voting with debate that exist in mass elections.

To assert that there is no political gamesmanship or coercion in these contexts would be naive, but given the number and diversity of such bodies, it is hard to imagine how mandated secret voting would be implemented. Moreover, open voting with debate, discussion, and the potential for reconsideration, as observed at the outset, is the most flexible and accommodating form for taking votes. On balance, corporate voting may not present a situation where the secret ballot is needed for ascertaining the true will of participants.

Larger institutional shareholders of publicly-traded corporations fall at the opposite end of the spectrum from the small shareholder. These investors are more analogous to representatives (of their beneficiaries, perhaps, or of other shareholders) and, like members of Congress or Parliament, in our model should appropriately cast a public vote. Where it makes little sense for the individual shareholder to have to register a public opinion on the board of directors or a merger, a large shareholder such as a union pension fund, TIAA-CREF, or Calpers has the resources to bring questions before the shareholders and advocate for change.<sup>60</sup> Activist hedge funds make it their business to agitate for corporate change.<sup>61</sup> These shareholders should engage openly, sharing research, views, and arguments, and responding to the corporation's defenses and counterproposals. It is good for the corporation, other investors, and the economy if that engagement, and the votes cast, are public. Larger investors are also more likely to be the



shareholders that engage in insincere “empty voting.” If a vote on a corporate matter is to have legitimacy with all shareholders, these large shareholders should be monitored.<sup>62</sup>

Other commentators, notably corporate law scholar Lucian Bebchuk, have called for the secret ballot in all voting on directors. He contends that the lack of confidentiality distorts the voting of institutional investors in favor of incumbents. These investors, banks, funds, and other players in the financial world will have business interests better served by remaining on good terms with corporate insiders than by voting for challengers who are better for overall shareholder value.<sup>63</sup> Yet this problem doesn’t disappear with a “secret ballot” cast in circumstances akin to an absentee ballot. Just as with absentee voting, if the shareholder wants to show corporate incumbents how its shares voted, it can. The problem is that no one else can see, and no one else can monitor that shareholder-incumbent deal.

Substantial differences between “corporate democracy” on the one hand, and workplace or public democracy on the other hand, mean that the model developed at the outset applies differently. The exchange between these representative institutional shareholders and the corporation is more analogous to a legislative debate, or oversight of administrators, than an election requiring the protection of the secret ballot.

### Conclusion

Forms of voting that offer “demi-publicity” are in most contexts defective and difficult to justify. There are reasonable alternatives. For absentee voting in elections, jurisdictions should provide early voting in controlled locations where the protection against coercion and fraud are possible. In the labor organizing context, the analysis argues against the choice of a bare majority through card check to determine whether the workplace is organized. Instead, the card check process could provide the first step to an organizing election (as a petition places an issue on the ballot). Legitimate grievances about the fairness of union organizing elections, and whether employers are engaging in unfair labor practices, offer no justification for discarding the protection from fraud and coercion secured through a secret ballot. Voting by shareholders can also be non-debated and non-secret, but the diverse characteristics of large and small shareholders counsel for transparency, not secrecy, when large institutional investors are engaged in contested corporate voting.

### Endnotes

- 1 This article is a condensed version of a larger study, Allison Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, available at [http://works.bepress.com/allison\\_hayward/7](http://works.bepress.com/allison_hayward/7).
- 2 See Saul Levmore, *Parliamentary Law, Majority Decisionmaking and the Voting Paradox*, 75 VA. L. REV. 970, 988 (1989).
- 3 See H.P. Young, *Condorcet’s Theory of Voting*, 82 AM. POL. SCI. REV. 1231 (1988).
- 4 ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY 15-20 (1970).
- 5 *Id.* at 98-105.
- 6 ROBERT’S RULES OF ORDER NEWLY REVISED 38, lines 22-27.

- 7 RICHARD F. BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* 14-15 (2004).
- 8 *Id.* at 11-14.
- 9 John Reynolds and Richard McCormick, *Outlawing “Treachery”: Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910*, 72 J. AM. HIST. 835, 845 (1986).
- 10 See ROBERT C. BROOKS, *POLITICAL PARTIES AND ELECTORAL PROBLEMS* 425 (1933) (describing large numbers of “bob-tailed” Democrat ballots omitting Horace Greeley’s name in the 1872 Presidential contest).
- 11 Reynolds and McCormick, *supra* note 9, at 846-47.
- 12 JOSEPH P. HARRIS, *ELECTION ADMINISTRATION IN THE UNITED STATES* 154-55 (1934); JOHN C. FORTIER, *ABSENTEE AND EARLY VOTING* 9 (2006).
- 13 Reynolds and McCormick, *supra* note 9, at 858.
- 14 HARRIS, *supra* note 12, at 155.
- 15 *Id.* at 155-61.
- 16 ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 142-43 (2000).
- 17 HARRIS, *supra* note 12, at 189-90.
- 18 Ritchie v. Richards, 47 P. 670, 673 (Utah 1896) (holding that ballot numbering was not unconstitutional under a state secret-ballot requirement); *Ex Parte Owens*, 42 So. 676 (1906).
- 19 Judith L. Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387, 388-89 (1978).
- 20 FORTIER, *supra* note 12, at 19.
- 21 Michael McDonald, *The Return of the Voter: Voter Turnout in the 2008 Presidential Election*, 6 FORUM, Article 4, at 4 (2008). Some jurisdictions have seen absentee voting rates soar; in 2008 in Colorado, almost 79% of the total vote was cast early, with 80% of that early vote cast by mail-in absentee ballot. Michael McDonald, *(Nearly) Final 2008 Early Voting Statistics*, updated Jan. 11, 2009, <http://election.gmu.edu>. In Florida, early voting made up almost 52% of the total vote, and mailed-in absentees comprised 40% of that early vote. *Id.*
- 22 HELEN M. ROCCA, *A BRIEF DIGEST OF THE LAWS RELATING TO ABSENTEE VOTING AND REGISTRATION* 5 (1928); BROOKS, *supra* note 10, at 452-53.
- 23 Victor J. West, *1921 Laws Respecting Elections*, 16 AM. POL. SCI. REV. 460, 464 (1922).
- 24 EDWARD M. SAIT, *AMERICAN PARTIES AND ELECTIONS* 554 (1927).
- 25 FORTIER, *supra* note 12, at 13.
- 26 *Id.* at 14.
- 27 *Id.*
- 28 *Voter Fraud Charge Names New Yorkers*, N.Y. TIMES, Oct. 28, 1929, at 19.
- 29 *Oklahoma Speaker Tried in Vote Fraud Case*, N.Y. TIMES, Aug. 14, 1982, at 23.
- 30 Bob von Sternberg, *Minn Race Spotlights National Problem; Difficulties With Absentee Voting “Are the New Hanging Chad,” Expert Says*, WASH. POST, Dec. 21, 2008, at A3.
- 31 DAVID C. KIMBALL, *ADVANCED VOTING AND RESIDUAL VOTES* 8 (2008), available at [http://www.allacademic.com/meta/p279962\\_index.html](http://www.allacademic.com/meta/p279962_index.html).
- 32 *Id.* at 15.
- 33 *Id.* at 35.
- 34 Elections can also be conducted, by consent of the employer and the union, by another third party, such as an arbitrator. GERALD MAYER, CONGRESSIONAL RESEARCH SERVICE, *LABOR UNION CERTIFICATION PROCEDURES: USE OF SECRET BALLOTS AND CARD CHECKS* 9 (April 16, 2009).
- 35 Again, the union and the employer can negotiate their own card check agreement, which may require a supermajority of employees to sign cards. Mayer, *supra* note 34, at 12; Adrienne E. Eaton & Jill Kriesky, *NLRB Elections versus Card Check Campaigns: Results of a Worker Survey*, 62 INDUS. & LAB. REL. REV. 157, 158 (2009).



36 Mayer, *supra* note 34, at 8.

37 29 U.S.C. §159 (c).

38 *Id.*

39 See KATE BRONFENBRENNER, ECONOMIC POLICY INSTITUTE, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING, Briefing Paper #235, at 4-5 (May 20, 2009); NLRB v. St. Francis Healthcare, 212 F.3d 945 (6th Cir. 2000) (discussing standard for determining if employer has “threatened” employees); Eaton & Kriesky, *supra* note 34, at 158 (summarizing studies).

40 See Newport News Shipbuilding & Dry Dock Co., 243 N.L.R.B. 99, 101-02 (1979) (describing voting procedures).

41 See *Strengthening America’s Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education & Labor*, 110th Cong. 5 -7 (2007).

42 Susan Johnson, *Card Check or Mandatory Representation Vote? How the Type of Union Recognition Procedure Affects Union Certification Success*, 112 ECON. J. 344, 350 (2002) (noting that mandatory voting systems reduce recognition rates by about 9 percent).

43 See, e.g., *Impressive Textiles*, 317 N.L.R.B. 8 (1995) (discussing threats of termination for advocating vote for union recognition).

44 H.R. 1409, 111th Cong. (1st Sess. 2009).

45 Eaton & Kriesky’s survey indicates that workers experience less coercion in card check organizing campaigns than secret ballot elections. See *supra* note 35. Under existing law that would be expected, since presently card check campaigns are conducted under a private neutrality agreement, typically supervised by an arbitrator. See Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589, 1589-90 (2008); see also *Prof’l Janitorial Serv. of Houston*, 353 N.L.R.B. No. 65 (Dec. 17, 2008) (card check under neutrality agreement conducted by American Arbitration Association); *Dana Corp.*, 351 N.L.R.B. No. 28, 2007 WL 2891099 (Sept. 29, 2007) (same).

46 Richard Epstein, *The Case Against the Employee Free Choice Act* 43 (Working Paper No. 452, 2009).

47 See *Excelsior Underwear*, 156 N.L.R.B. 1236 (1966) (holding that an employee cannot claim a privacy right to keep his union sentiments secret from the union).

48 See, e.g., JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS* 92 (2006) (challenger candidate murdered); ROBERT FITCH, *SOLIDARITY FOR SALE* 169-71 (2006); *Democracy in AFSCME DC37 in NYC*, Union Democracy Review #168 (May-June 2007) (noting that an inconvenient polling location allowed local president to remain in office). One could argue that true employee free choice would necessarily include extending card check recognition to changes in affiliation or rescission of representation.

49 Cooper, *supra* note 45, at 1593-94.

50 See *Mob Influence at Its Worst: The Case of Local 560*, 7 TRENDS ORGANIZED CRIME 40, 44-50 (Winter 2001) (summarizing abuse of union elections by Anthony Provenzano).

51 DEL. GEN. CORP. L. §§109, 216, 242, 251, 271; see also JONATHAN R. MACEY, *PROMISES KEPT, PROMISES BROKEN* 201 (2008).

52 See Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 453 (2008).

53 *Id.* at 485-86.

54 MACEY, *supra* note 51, at 215 (discussing Compaq shareholders alleging empty voting in merger with HP).

55 Marcel Kahan & Edward B. Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1237-45 (2008)

56 *Id.* at 1233.

57 See Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159, 161-62 (2008).

58 Hayden & Bodie, *supra* note 52, at 484; DEL. GEN. CORP. L. 218(a), (c).

59 See Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 138 (2009).

60 J.W. Verret, *Pandora’s Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Reexamined*, 62 BUS. LAW. 1007, 1030-31 (2007).

61 *Id.* at 1031-32.

62 MACEY, *supra* note 51, at 215-16; Thompson & Edelman, *supra* note 59, at 156.

63 Lucian Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 704-05 (2007). Confidential voting was a prominent issue for activist shareholders (especially the United Shareholders Association) in the early 1990s but waned after 1994. See Roberta Romano, *Does Confidential Proxy Voting Matter?* 32 J. LEGAL STUD. 465, 476-77 (2003).



---

## THE REGULATION OF GRASSROOTS LOBBYING

By William R. Maurer\*

---

President Obama's domestic policies have generated opposition among many in the general public and mobilized previously uninvolved citizens. This opposition has manifested itself in public rallies, "tea party" protests, and spirited feedback at town hall meetings. Supporters of the president's policies have accused those participating of being part of a larger, organized conspiracy or, at the very least, pawns of the healthcare industry, insurance companies, the Republican and Libertarian parties, and K Street lobbyists.<sup>1</sup> Even White House Press Secretary Robert Gibbs alleged that the protests were the result of "groups . . . that have bragged about organizing and manufacturing that anger" who have been "busing people in and planting people at these rallies."<sup>2</sup>

In a bit of irony, these protests against an expanding and unrestrained federal government have resulted in calls for the federal government to regulate and restrict that political activity. The fact that these protests were not regulated by the government disturbed many, particularly those seeking ever-greater restrictions on the participation in and financing of political campaigns. Those seeking increased regulation and restriction of political speech pointed out that organizing efforts to have citizens contact their elected officials is an area where citizens may participate in the political process without having to register and report to the government (at least at the federal level). One prominent leader of the pro-regulation movement noted, "We're hearing about it with the health care debate. We're going to see it with the climate warming debate. We're going to see it with the financial services reform debate. The problem is, we don't know what's going on because there's no mandatory disclosure."<sup>3</sup> As a result, many are calling for federal regulation of what is sometimes called "grassroots lobbying," or more derisively, "Astroturf lobbying."<sup>4</sup>

The effort to regulate and restrict citizen-to-citizen political communication is not new, but the tea party activities have revived calls for an expansion of the federal regulatory apparatus into political activity at the very heart of the First Amendment. In 2007, the U.S. Senate considered adding grassroots lobbying registration to existing federal lobbyist disclosure requirements.<sup>5</sup> The provision was heavily promoted by organizations traditionally backing campaign finance restrictions, who urged its passage as a means to "increase transparency and provide a more accurate record of paid lobbying actions in Congress."<sup>6</sup> Conservative groups and the American Civil Liberties Union successfully persuaded Congress that such a measure would be unconstitutional, and the Senate dropped the provision from the final bill. With the rise in citizen opposition to the President's agenda, it is likely that some version of the 2007 regulation will be introduced in the near future. This effort, critics say, represents a direct challenge to the ability of ordinary citizens to participate in the governmental process and will leave the political process in the

hands of only those organizations with the resources to comply with the complicated and sweeping regulatory requirements some seek to impose.

### What Do Grassroots Lobbying Laws Look Like?

Although the federal government does not regulate grassroots lobbying, numerous states do, with varying levels of intrusiveness. For instance, Washington, a state with one of the most expansive laws, regulates the "grassroots lobbying" activities of any person who has spent more than \$1,000 in the aggregate in any three months or \$500 in any one month "in presenting a program addressed to the public, a substantial portion of which is intended, designed, or calculated primarily to influence legislation."<sup>7</sup> "Legislation" is defined in the law to cover "bills, resolutions, motions, amendments, nominations, and other matters pending or proposed in either house of the state legislature," and the term "includes any other matter that may be the subject of action by either house or any committee of the legislature and all bills and resolutions that . . . are pending approval by the governor."<sup>8</sup> Within 30 days of becoming a sponsor of a so-called grassroots lobbying campaign—what many Americans would consider a fundamental aspect of citizenship in a representative form of government—the sponsor of the effort must register with the government.<sup>9</sup> The registration statement must include the sponsor's name, address, business, and occupation, or, if the sponsor is an organization, the names, addresses, and titles of the "controlling persons" of the organization.<sup>10</sup> The registration statement also must include the names, addresses, and businesses or occupations of all persons organizing or managing the "grassroots lobbying" effort, along with the names and addresses of each person contributing \$25 or more to the effort and the aggregate amount of their contributions.<sup>11</sup>

In addition, a person or group classified as a grassroots lobbying sponsor has to reveal the purpose of their efforts, including the specific policy about which they are concerned, and the totals of all expenditures made by the campaign, divided into advertising (segregated by media and sometimes by outlet), contributions, entertainment, office expenses (including rent), salaries and wages, consultants, and printing and mailing services.<sup>12</sup> Once the government has collected this mass of information, the citizen activist is still not done; the government also requires the person who has engaged in such activities to file monthly reports of activities and update the information contained in the registration statement.<sup>13</sup>

States such as West Virginia,<sup>14</sup> Oregon,<sup>15</sup> and California<sup>16</sup> have laws similar to Washington's and directly regulate "grassroots lobbying" or the solicitation of others to contact state officials. Other states, such as Florida<sup>17</sup> and New York,<sup>18</sup> regulate attempts to "influence legislation," a more amorphous term that provides even less guidance than explicit grassroots lobbying laws but nonetheless appears to encompass grassroots activism within the scope of the regulations. In all, over thirty states regulate, in one form or another, citizen-to-citizen contact to urge political change.

---

\* William R. Maurer is an attorney with the Institute for Justice.





Internet made accessing databases of political activity easily available to anyone with access to a computer. In 1954, the cost of accessing information on political activity was relatively high. Now, the Internet has allowed the government to create government-run databases of political activity that can be accessed with just a few keystrokes. Twenty-first century technology has made *Harriss* a vestigial organ of a pre-digital age when accessing the information in the government's possession was difficult, time-consuming, and expensive, and any current grassroots lobbying law must be considered in light of the ease with which public information can be used to harass, coerce, and threaten. In that regard, the United States Supreme Court will soon consider the constitutionality of releasing the names of individuals who signed a petition to place a referendum on the ballot to repeal Washington's "everything but marriage" domestic partnership law in light of evidence that release would result in coercion or a backlash.<sup>31</sup>

### Conclusion

Congress has concluded that it cannot constitutionally reach and regulate citizen-to-citizen communications urging political change, and there is no reason for Congress to heed pro-regulation calls to revisit this question. Federal courts now have the opportunity to recognize that the law, technology, and the ability of political opponents and government officials to access information about the political activity of ordinary citizens has changed dramatically since 1954, and to hold that, under current interpretations and any plain meaning of the First Amendment, the regulation of citizen-to-citizen political advocacy is unconstitutional.

### Endnotes

- 1 See, e.g., Glenn Thrush, *Doggett Calls Protestors a 'Mob,'* POLITICO, Aug. 3, 2009, [http://www.politico.com/blogs/glennthrush/0809/Doggett\\_calls\\_protestors\\_a\\_mob.html](http://www.politico.com/blogs/glennthrush/0809/Doggett_calls_protestors_a_mob.html) (Representative Lloyd Doggett, a former Texas Supreme Court justice, stated: "This mob, sent by local Republican and Libertarian parties, did not just come to be heard, but to deny others the right to be heard. And this appears to be part of a coordinated, nationwide effort."); Lee Fang, *Durbin Responds To Lobbyist-Run Efforts To Harass Town Halls: We 'Won't Fall For A Sucker-Punch Like This,'* THINK PROGRESS, Aug. 3, 2009, <http://thinkprogress.org/2009/08/03/durbin-townhalls-gone-wild/> (Democratic Senator Richard Durbin stated: "These health insurance companies and people like them are trying to load these town halls for visual impact on television.").
- 2 David Jackson, *Obama White House Decries 'Astro-Turf' Lobbying Against Health Care,* USA TODAY, Aug. 4, 2009, <http://content.usatoday.com/communities/theoval/post/2009/08/68496154/1>.
- 3 Eliza Newlin Carney, *A Grassroots Cautionary Tale: Bonner & Assoc.,* NAT'L JOURNAL'S UNDER INFLUENCE, Oct. 19, 2009, <http://undertheinfluence.nationaljournal.com/2009/10/a-grassroots-cautionary-tale-b.php> (quoting Craig Holman, legislative representative for Public Citizen).
- 4 Jim Snyder, *Town Halls Underscore Grassroots Secrecy, Critics Say,* THE HILL, August 10, 2009, available at <http://thehill.com/business--lobby/town-halls-underscore-secrecy-of-grassroots-critics-say-2009-08-10.html> (quoting Public Citizen's Craig Holman, regarding the town hall meetings: "We don't know who is behind it or who pays for it. We don't know how much of it is happening.").
- 5 S. 1, 110th Cong. § 220 (2007).
- 6 Campaign Legal Center, *Legal Center Sends Senators Memo on Astroturf Lobbying,* <http://www.campaignlegalcenter.org/press-2342.html> (posted

- Jan. 10, 2007). Other organizations supporting the measure were Common Cause, Democracy 21, League of Women Voters, Public Citizen, and OMB Watch.
- 7 WASH. REV. CODE § 42.17.200(1). The triggers for reporting were initially \$500 in any three month period or \$200 in one month period. However, the legislature has since required the PDC to modify these amounts based on inflation. WASH. REV. CODE § 42.17.370(11).
- 8 WASH. REV. CODE § 42.17.020(30) (emphasis added).
- 9 WASH. REV. CODE § 42.17.200(2).
- 10 WASH. REV. CODE § 42.17.200(2)(a).
- 11 WASH. REV. CODE § 42.17.200(2)(b) & (c).
- 12 WASH. REV. CODE § 42.17.200(d) & (e).
- 13 WASH. REV. CODE § 42.17.200(3).
- 14 W. VA. CODE § 6B-3-5(1).
- 15 ORS § 171.725(8).
- 16 MD. STATE GOV'T CODE § 15-701(a)(5).
- 17 FLA. STAT. § 11.045(2).
- 18 NY CLS LEGIS § 1-c(c).
- 19 U.S. v. Cruikshank, 92 U.S. 542, 553 (1875); see also *United Mine Workers v. Ill. St. Bar Ass'n*, 389 U.S. 217, 222 (1967) ("We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of liberties safeguarded by the Bill of Rights.").
- 20 *United Mine Workers*, 389 U.S. at 222.
- 21 U.S. v. *Harriss*, 347 U.S. 612, 615 (1954).
- 22 *Id.* at 626.
- 23 *Id.* at 620.
- 24 *Id.* (emphasis added). The Court referenced at this point the Senate's Report on the Lobbying Act, which stated that it intended to cover "[t]hose who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts." *Harriss*, 347 U.S. at 621 n.10. It is remarkable how similar this language is to members of the current Congress's discussions of the Tea Party protesters.
- 25 See, e.g., *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 6 (D.C. Cir. 2009) (upholding a lobbying law because "nothing has transpired in the last half century to suggest that the national interest in public disclosure of lobbying information is any less vital than it was when the Supreme Court first considered the issue").
- 26 See *Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1080 (11th Cir. 2008) (relying on *Harriss* and holding that Florida's grassroots lobbying law was constitutional because of the legislature's compelling interest in "self-protection" from the people it purports to represent); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996) (relying on *Harriss* and noting that "the government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements"); *Minn. State Ethical Practice Bd. v. Nat'l Rifle Ass'n*, 761 F.2d 509, 513 (8th Cir. 1985) (relying on *Harriss* and upholding Minnesota's grassroots lobbying law, which required disclosure of association communications, because "[w]hen persons engage in an extensive letter-writing campaign for the purpose of influencing specific legislation, the State's interest is the same whether or not those persons are members of an association"); *Comm'n on Ind. Colls. & Univs. v. N.Y. Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 498 (N.D.N.Y. 1982) (applying *Harriss*'s "self-censorship" rationale); *Kimball v. Hooper*, 665 A.2d 44, 48 (Vt. 1995) (applying *Harriss* and concluding that "[p]roperly evaluating the governmental process . . . implicates indirect as well as direct communication and activities needed to get the message across"); *Advisory Opinion on the Constitutionality of 1975 PA 227*, 242 N.W.2d 3, 23 (Mich. 1976) (applying *Harriss* and noting that "[b]oth the electorate and public officials have a right to be informed of those interests represented by lobbyists").



27 See, e.g., *Smith v. California*, 361 U.S. 147, 154 (1959) (striking down a state law making booksellers strictly liable for the sale of obscene material in their store; the Court stated that booksellers’ “self-censorship” would affect the whole public and impede the distribution of all books). See also *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (holding that a truth defense for libel actions against public officials did not save the constitutionality of such actions because a rule requiring a critic to guarantee the factual accuracy of all his statements would lead to “self-censorship”).

28 *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

29 See DICK CARPENTER, INSTITUTE FOR JUSTICE, *DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM* (2007), available at [http://www.ij.org/index.php?option=com\\_content&task=view&id=1624&Itemid=165](http://www.ij.org/index.php?option=com_content&task=view&id=1624&Itemid=165); JEFFREY MILYO, INSTITUTE FOR JUSTICE, *CAMPAIGN FINANCE RED TAPE: STRANGLING FREE SPEECH & POLITICAL DEBATE* (2007), available at [www.ij.org/index.php?option=com\\_content&task=view&id=1527&Itemid=194](http://www.ij.org/index.php?option=com_content&task=view&id=1527&Itemid=194). Dick Carpenter is also the Director of Strategic Research at the Institute for Justice, the firm at which the author works.

30 See *Protect Marriage Wash. v. Reed*, No. 09-5456BHS (W.D. Wash. July 29, 2009) (granting temporary restraining order against disclosure of individuals’ identities who support ban on gay marriage); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (documenting the retaliation faced by supporters of California’s recent Proposition 8: one donor had a window broken; another had a flier distributed around his hometown calling him a bigot; and others received envelopes containing suspicious white powder); John R. Lott, Jr. & Bradley Smith, *Donor Disclosure Has Its Downsides: Supporters of California’s Prop. 8 Have Faced a Backlash*, *WALL ST. J.*, Dec. 26, 2008; Amy Bounds, *Gay Rights Advocates Picket Boulder Cineplex*, *ROCKY MOUNTAIN NEWS*, Nov. 30, 2008 (business picketed and boycotted based on CEO’s personal donation); Associated Press, *John Kerry Grills Belgium Ambassador Nominee over Swift Boat Donation*, Feb. 28, 2007 (“A Senate hearing that began with glowing tributes to a St. Louis businessman and his qualifications to become ambassador to Belgium turned bitterly divisive Tuesday after he was criticized for supporting a controversial conservative group.”).

31 *John Doe #1 v. Reed*, 2010 U.S. LEXIS 536 (U.S., Jan. 15, 2010); see also *Citizens United v. FEC*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 876, 175 L. Ed. 2d 753, 801 (2010) (upholding disclosure provisions applying to independent expenditures made by corporations because the plaintiffs “offered no evidence that its members may face . . . threats or reprisals”).



---

# INTELLECTUAL PROPERTY

## SIXTY YEARS LATER: HOLDEN CAULFIELD, FAIR USE, AND PRIOR RESTRAINT UNDER THE COPYRIGHT ACT

By David Applegate\*

---

When J.D. Salinger published *The Catcher in the Rye* in 1951, he likely had little idea that his novel would become a mainstay of high school and college literature classes, that the name and character “Holden Caulfield” would pass into the popular lexicon,<sup>1</sup> or that over half a century later both Salinger and Caulfield would become the focus of what could be the next important U.S. copyright law case. But with the filing in New York of *Salinger v. Colting*,<sup>2</sup> now on appeal to the U.S. Court of Appeals for the Second Circuit,<sup>3</sup> that could well come to pass.

### *The Catcher in the Rye*

On its face, Salinger’s now-famous story is mundane: in a first-person account in vernacular language, a disaffected sixteen-year old wanders Manhattan after being kicked out of prep school just before the holidays, moving from one random encounter to another and frequently returning to Central Park before meeting his sister Phoebe, the one person in whom he trusts.<sup>4</sup> The adventures of Caulfield, who first appeared some five or six years earlier in a magazine short story, feature such forgettable scenes and trivial moments as Caulfield stumbling in the dark on his way through the bathroom and wondering aloud to himself where the ducks must go when the Central Park ponds freeze in the winter.<sup>5</sup>

At first blush, then, Salinger’s book would seem no more destined for greatness than William Kotzwinkle’s equally entertaining *The Fan Man*, first serialized in *Esquire*, in which a shifty and typically stoned character named “Horse Badorties” has trouble leaving his apartment because of all the distractions running through his disoriented mind, and which has a recent Amazon.com sales rank of exactly 48,884.<sup>6</sup> Yet *The Catcher in the Rye* has achieved literary stardom, not only showing up ubiquitously on assigned reading lists but also making *Time*’s and the Modern Library’s lists of greatest novels and becoming a consistent fan favorite and best-seller.<sup>7</sup>

### Copyright Term Protection

At the time of *Catcher*’s 1951 publication, United States copyrights were governed by the 1909 Copyright Act, under which authors of published works could obtain twenty-eight years of initial copyright protection plus a twenty-eight year renewal term, for a total of fifty-six years.<sup>8</sup> Under then-existing copyright law, therefore, Salinger’s copyright on *The Catcher in*

*the Rye* would have expired in 2007, even with renewal,<sup>9</sup> and anyone would have been free to reprint Salinger’s book or to write Caulfield’s continuing adventures thereafter.

But just twenty-five years after *Catcher*’s publication, Congress enacted the Copyright Act of 1976—the first major overhaul of copyright law in sixty-seven years—and extended the length of the renewal period for copyrights in their first term as of January 1, 1978 (such as *The Catcher in the Rye*’s) to forty-seven years, for a total of seventy-five years’ protection.<sup>10</sup> Not quite another quarter-century later, the Sonny Bono (yes, that Sonny Bono) Copyright Extension Act of 1998 extended copyright protection an additional twenty years; in the case of *The Catcher in the Rye*, to ninety-five years from the year of its publication.<sup>11</sup>

So under existing law, no one can legally copy Salinger’s book or publish a derivative work featuring the continuing adventures of Holden Caulfield until the year 2047.<sup>12</sup> Or can one?

### “J. D. California”

On May 7, 2009, under the pseudonym John David (“J. D.”) California, a Swedish author named Fredrik Colting published in the United Kingdom a book entitled *60 Years Later: Coming Through the Rye*.<sup>13</sup> Initially touted as a sequel to *Catcher* in which Caulfield is a seventy-six-year old man on the run from a nursing home,<sup>14</sup> the book has since been characterized as both a legally-protected parody<sup>15</sup> and a criticism of both Caulfield and Salinger,<sup>16</sup> as well as perhaps just a literary fraud.<sup>17</sup> Whether parody, criticism, sequel, or fraud, the book features Salinger as a character and posits in part that Salinger is trying to kill Caulfield. In reality, by suing to prevent its U.S. publication and sale, Salinger wanted to kill the book instead.<sup>18</sup>

### J. D. Salinger

As Salinger himself readily admitted before his recent death,<sup>19</sup> he was notoriously reclusive, possessive, proud, and feisty. “For over fifty years,” his complaint asserts, he “has been fiercely protective of both his intellectual property and his privacy.”<sup>20</sup> In addition to not having published or authorized any publication of “any new narrative” involving Holden Caulfield (or indeed any work derivative of *Catcher*) since its 1951 publication, the complaint continues, Salinger did not publish any additional work whatsoever after 1965; and other than a 1949 film of one of his short stories, he has never permitted adaptations of any of his works.<sup>21</sup> Even when approached specifically about *Catcher* by such film luminaries as Harvey Weinstein and Steven Spielberg, the complaint asserts, Salinger always declined, saying in effect that “[t]here’s no more to Holden Caulfield. Read the book again. It’s all there.”<sup>22</sup>

---

\* David Applegate is an attorney at Williams Montgomery & John. An honors graduate of Yale University and a past chairman of the Hinton Moot Court Program at the University of Chicago Law School, Mr. Applegate speaks and writes frequently on matters of litigation and intellectual property, is an adjunct faculty member of the Practising Law Institute, and has been a guest lecturer at the University of Chicago Law School.



---

## The Constitutional Dimensions of Copyright

In theory, at least, the U.S. Constitution creates a government of enumerated powers. Following a preamble that sets forth the Constitution's general purposes, Article I prescribes the powers of the legislature, Article II sets forth the powers of the president, and Article III sets forth the powers of the judiciary.<sup>41</sup> Known popularly as "The Bill of Rights," the first ten amendments arguably protect five fundamental freedoms, all encompassed by the First Amendment: freedom of religion, freedom of speech, freedom of the press, freedom peaceably to assemble, and freedom to petition the government for redress of grievances.<sup>42</sup>

So what happens when an enumerated power runs smack dab, as Salinger's Caulfield might say, into one of the First Amendment's fundamental freedoms? That is, in part, what *Salinger v. Colting* asks.

U.S. copyright protection is manifestly an enumerated power. Although its principles date to England's Statute of Ann, circa 1710,<sup>43</sup> U.S. copyright law derives its constitutional authority from Article I, Section 8, clause 8, sandwiched in between the power to establish post offices and post roads and to constitute tribunals "inferior to" the Supreme Court:

The Congress shall have Power . . . To promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . .

As courts and commentators have long recognized, this enumerated power intuitively conflicts with the First Amendment, for "[w]hile the First Amendment disallows laws that abridge the freedom of speech, the Copyright Clause calls specifically for such a law."<sup>44</sup> Part of what keeps the two provisions in harmony, however, is the expressed purpose of the copyright clause: to promote the progress of "science," or knowledge. By giving time-limited monopolies to authors, the Copyright Act and the enabling clause of the Constitution provide authors with the incentive not only to create, but also to publish—literally, that is, to make available to the public—new and creative works, all of which in theory add to the body of available thought and knowledge.<sup>45</sup>

But the progress of science, or knowledge, would necessarily be hobbled if readers or viewers of copyrighted works could not, in some way and at some time, make use of what they have read or seen. Thus, after a statutorily "limited" time, copyright protection expires and the previously exclusive rights that copyright law secures to the author<sup>46</sup> become available to all; the previously copyrighted work becomes, that is, part of the copyright "commons." Accordingly, anyone today can publish the works of William Shakespeare or can write a sequel or prequel to "Othello," although one cannot yet do that with the works of J. K. Rowling or the adventures of Harry Potter. One set of exclusive rights has expired, another has not. In the meantime, while a copyright is in force, copyright law protects and promotes free expression—a societal interest and a fundamental freedom—by rewarding and promoting writing and the creative arts.

As currently constituted, exclusive U. S. copyright law rights encompass, among others, the rights to reproduce the

copyrighted works and to create "derivative works" based upon the copyrighted work; that is, a work based on a pre-existing work, such as an abridgment, condensation, or "any other form in which a work may be recast, transformed, or adapted."<sup>47</sup> And although Congress has repeatedly extended the term of U. S. copyrights—such that the copyright term is arguably no longer appropriately "limited"—the Supreme Court has rejected the argument that Congress has exceeded its power in doing so.<sup>48</sup> Thus, Salinger's claim to continuing protection for his book and his character, including the right to make "derivative" works such as the continuing adventures of Holden Caulfield, would appear to be both statutorily-protected and constitutionally-sound, at least until the year 2047.

## Current Controversy

At issue on the current appeal, however, is not just the viability of a "fair use" defense to Colting's parody/sequel, but also the propriety of a preliminary injunction against selling the book in the United States—that is, in First Amendment parlance, a "prior restraint." Lined up as *amici* on the side of the accused infringer are Public Citizen, Inc., Amici Publishers, and Library Amici, who together make three sets of arguments implicating the First Amendment.

First, amicus Public Citizen argues that the district court improperly confused Salinger's valid copyright in *Catcher* with the absence of a viable copyright in the character of Holden Caulfield and that the court thus violated copyright law's idea-expression dichotomy and thus also undermined the First Amendment. Second, Amici Publishers argue, if Colting's work is even arguably transformative within the meaning of the copyright law, then the First Amendment prohibits the court from granting a prior restraint, particularly at the preliminary injunction stage and especially where money damages would ultimately suffice. Third, the Library Amici argue that, by applying both an incorrect preliminary injunction standard and an unduly restrictive "fair use" standard," the District Court unduly impinged on the First Amendment.

Let us consider each argument further.

### Argument One: The Courts Should Not Restrain Arguably Transformative Works

#### *First Amendment Restrictions on Preliminary Injunctions*

Amici Publishers, who say they "do not come to this position lightly," acknowledge that a court may justifiably enjoin a "word-for-word" taking, but citing both the "Pentagon Papers" and the *Nebraska Press Association* cases, argue that the First Amendment is sufficiently strong that a prior restraint is "our most disfavored remedy."<sup>49</sup> In the Pentagon Papers case, the U.S. Supreme Court declined to prohibit *The New York Times* from publishing purloined and classified U.S. government documents despite the government's claim that their publication would jeopardize national security during the Vietnam War;<sup>50</sup> five years later, in *Nebraska Press Association v. Stuart*, the high Court declined to suppress publication of information that could have prejudiced a defendant's right to a fair trial.<sup>51</sup> If neither national security nor the Sixth Amendment right to a fair trial justifies an injunction, Amici Publishers argue, then neither should the mere "pride of a reclusive author in not having his



desires fulfilled barring commentary about his iconic book and character, without any actual financial harm . . . .”<sup>52</sup>

It is true, as Amici Publishers argue, that the Supreme Court has consistently held that any “system of prior restraints” comes before the Court with a heavy presumption against it,<sup>53</sup> even in the context of libel or access to the judicial system.<sup>54</sup> In contrast to the common law of libel, however, where “there has been a long tradition in American law” against enjoining libelous speech, U.S. copyright law explicitly authorizes the grant of injunctions,<sup>55</sup> and injunctions by their nature either restrain or mandate conduct. Injunctive relief, moreover, is not necessarily a “system of prior restraints,” but instead a category of discretionary equitable relief that courts may grant only *after* weighing the traditional equitable requirements of likely success on the merits, an inadequate remedy at law, a balancing of harms, and consideration of the public interest.<sup>56</sup> Thus, the force of Amici Publishers’ argument comes mainly from simply characterizing the district court’s award of an injunction as a “prior restraint” rather than from analyzing the appropriateness of the specific relief granted in this specific case.

Independent of the adequacy of monetary relief and the adequacy of the record before the district court, which Amici Publishers later address, the real equitable questions concerning the appropriateness of a preliminary injunction therefore become a balancing of harms and consideration of the public interest.

#### *Balancing the Harms*

If, as Amici Publishers suggest, the only harm to Salinger in not granting a preliminary injunction is to his wounded pride, then the court in *Salinger* must balance that against the harm, if any, to Colting in granting the requested relief, and that too appears slight. Put aside both Colting’s too-cute-by-half decision to publish his book under the name pseudonym “J.D. California”<sup>57</sup> and the fact that his publishing house has in the past specialized in low-budget trivia books, astrology books, and the like.<sup>58</sup> Amici Publishers still fail to show how Colting could not be made whole by recouping from Salinger in damages any profits on sales he may lose during the pendency of the preliminary injunction, or any additional costs he may incur, if he were ultimately to prevail in the case. Hence, where granting a preliminary injunction is concerned, a true balancing of harms does not appear to favor Colting any more than it does Salinger.

#### *The Public Interest*

That then leaves whether it would better serve the public interest to grant or to deny a preliminary injunction in this particular case. Amici Publishers agree that, “in cases approaching pure copying, injunctions may be appropriate,” but argue that, where accompanied by commentary, criticism, or some transformative use, a preliminary injunction—which Amici Publishers again characterize as a “prior restraint”—is categorically unjustified.<sup>59</sup> Yet here again, Amici Publishers fail to make a compelling case that a categorical prohibition against preliminarily enjoining even arguably transformative works would serve the public interest and instead simply fall back on inapposite cases and the alleged adequacy of money damages.<sup>60</sup>

Rather, Amici Publishers argue by analogy that “critics and scholars ‘regularly quote from copyrighted matter to make points essential to their instructive undertakings’” and that whether their takings in any given case will pass the fair use test is “difficult to predict.”<sup>61</sup> This is, in effect, one of many types of “slippery slope” arguments—“if you don’t do X in Y case, then you can’t do X in Y+1 case”<sup>62</sup>—and it suffers from the flaw of many a slippery slope argument. The line may be difficult to draw, as Amici Publishers assert, but surely even Amici Publishers can distinguish critics and scholars quoting from copyrighted material, on the one hand, from a pseudonymous author appropriating another author’s character and name<sup>63</sup> for commercial sale, on the other.

And if, as copyright law and Article 1, Section 8, of the Constitution presume, it serves the public interest to grant authors the “exclusive” rights to their respective writings for limited times because doing so promotes the progress of science/knowledge, then the fact that Congress has included derivative works—which are necessarily transformative—among those exclusive rights suggests that the public interest favors granting preliminary injunctive relief, even where transformative use is involved. What, after all, can “exclusive” possibly mean, if not the right to exclude?

Amici Publishers further strain their argument by asserting that courts should not grant preliminary injunctions against challenged uses that are even “colorably transformative,” even where a fair use may ultimately be rejected<sup>64</sup>; that is, the mere possibility that a challenged use may be found fair should suffice to prohibit preliminary injunctive relief. But to accept this premise would be to throw out entirely the first prong of the traditional preliminary injunction test, namely likelihood of ultimately success on the merits, and to substitute instead absolute certainty of success on the merits.

In short, if a case exists for categorically exempting potentially transformative uses from even the possibility of preliminary injunctive relief, then Amici Publishers have not made that case.

#### *Prior Restraints and Preliminary Injunctions*

Amici Publishers next argue that “prior restraints” are particularly inappropriate at the preliminary injunction stage, because each is a drastic remedy and no prior restraint should ever be made without a full evidentiary record. This argument, too, sounds superficially appealing but ultimately disappoints. Its superficial appeal lies in the argument that, because a preliminary injunction is an extraordinary remedy, it should not be granted until “all procedural safeguards, such as exhaustive fact-finding, cross-examination, and perhaps even a full jury trial are held.”<sup>65</sup> But that, of course, stands on its head the proposition on which Amici Publishers rely—namely, that preliminary injunctions should not be granted as a routine matter<sup>66</sup>—and says that the courts should never grant preliminary injunctions at all; after all, only after trial on the merits have fact-finding (namely discovery) and full cross-examination been completed. But even at a preliminary injunction hearing, of course, one may call and cross-examine witnesses and may request discovery in advance of the hearing. It is only on a motion for a temporary restraining order, which expires after ten days, that one rarely has an opportunity for

discovery, and, even there, one may submit evidence and call available witnesses.<sup>67</sup>

It may be true, as Amici Publishers suggest, that the record before the district court in this case was sparse,<sup>68</sup> but that does not mean it was inadequate for its task. For if, as Amici Publishers also suggest, the determining factor that warrants protecting Colting's challenged infringing work is its transformative nature,<sup>69</sup> then all the district court needed before it were the challenged and the original works themselves, from which the court could then make the appropriate comparisons. No testimony of either Mr. Salinger or Mr. Colting was necessary.

Amici Publishers' argument, moreover, is reverse tautological, which becomes clear when one reflects that Amici Publishers consistently use "prior restraint" and "preliminary injunction" interchangeably. This line of argument therefore becomes that "a preliminary injunction is particularly inappropriate at the preliminary injunction stage," which simply makes no sense: preliminary injunctions are by definition granted *only* at the preliminary injunction stage. In sum, this argument is simply not persuasive.

#### *Sufficiency of Money Damages*

Amici Publishers' final line of argument, that an award of money damages would adequately protect Salinger even if Colting's work is ultimately found infringing, is often the most persuasive argument against awarding injunctive relief in any case and yet the most perplexing. Copyright infringement plaintiffs typically seek the award of both damages (either statutory or actual) and injunctive relief and U.S. copyright law permits the award of both,<sup>70</sup> yet the two are mutually exclusive with respect to the same temporal infringement. That is, a successful infringement plaintiff could conceptually receive damages for the period of pretrial infringement and injunctive relief against post-verdict infringement, but if damages suffice for the pre-judgment period then why, except on equitable grounds, should they not also suffice for any post-judgment infringement? After all, if they are measurable for the one period, then they should be measurable for the other. The only satisfactory answer to this apparent conundrum can be that, once plaintiff has won on the merits a judgment of infringement, then the balance of equities has shifted because plaintiff has indeed shown "a likelihood of success" on the merits, but that does not in any way affect the conceptual adequacy of damages as a remedy.

#### **Argument Two: The Injunction Violates the Idea-Expression Dichotomy**

Public Citizen makes the next major argument against the District Court's ruling, namely that it violates the distinction between an uncopyrightable original idea and the copyrightable expression of that idea and therefore violates the First Amendment as well.

#### *Copyrightability of Characters*

Public Citizen argues first that the district court incorrectly found a valid copyright in the Caulfield character itself because copyright protection, in the words of the statute, extends to only "'original works of authorship' that are 'fixed' in a 'tangible medium of expression,'" which should preclude

"purely literary characters" in contrast to "graphically depicted characters."<sup>71</sup> Public Citizen acknowledges the great confusion of courts in this area<sup>72</sup> but concludes that characterization is "a mental impression formed from a character's appearance, thoughts, words, or actions, and is thus inherently subjective" and therefore uncopyrightable.<sup>73</sup> The district court's incorrect finding of copyrightability of the Caulfield character, Public Citizen continues, "contaminated" its infringement analysis, which is purportedly incompatible with copyright law's dichotomy between idea and expression; more simply put, the district court "asked the wrong question and it got the wrong answer."<sup>74</sup>

Because the only Salinger copyright in issue is that to *Catcher*, not to Caulfield, Public Citizen argues, then *60 Years Later* does not infringe any valid copyright of Salinger's: other than a few common English words and phrases, Public Citizen asserts, no global similarities in structure and sequence nor "localized similarity" in language between the two works exists. Although a few scenes share common settings, both the scenes and the larger work are transformed.<sup>75</sup> Relying instead on the "frequent and extensive use of Caulfield's character traits,"<sup>76</sup> Public Citizen says, the district court got it wrong by impermissibly extending copyright protection not just to fixed expression but also to the very *idea* of Holden Caulfield, a protection that the Copyright Act expressly forbids.<sup>77</sup>

#### *First Amendment Impact*

In doing so, moreover, the district court's analysis undermines core First Amendment protections, Public Citizen insists, because the idea-expression dichotomy is itself an important built-in accommodation of the First Amendment.<sup>78</sup> Unlike "fair use"—the alleged vagueness and unpredictability of which helps "chill" free speech and is burdensome because it must be pleaded as an affirmative defense—the idea-expression distinction allegedly "prevents copyright from extending to the suppression of literary imagination in the first place."<sup>79</sup> As a result, copyright law thus "encourages others to build freely upon the ideas and information conveyed by the work" while at the same time assuring authors the right to their original expression.<sup>80</sup> This ability to build on the ideas in others' work, Public Citizen asserts, is essential to First Amendment protection because "even the most creative or artistic activity depends on the ability to borrow from what has gone before."<sup>81</sup> More simply put, Public Citizen argues, "Poetry can only be made out of other poems; novels out of other novels."<sup>82</sup>

Had Public Citizen stopped with the idea-expression argument, then its case may have been more persuasive, but by moving on explicitly to a First Amendment argument, Public Citizen reveals the fatal flaw in its argument. Even if arguably overbroad (by recognizing copyright protection in Salinger's character as well as his book) the district court's injunction in fact does not prevent anyone from building on Salinger's work. Anyone is instead free, for the duration of *Catcher's* copyright, to explore the same themes, motifs, and characterizations, even from the perspective of a disaffected adolescent (or, in Colting's case, a disaffected septuagenarian) *so long as one does not appropriate the character of Caulfield himself.* (Thereafter, once the copyright expires, one of course may even appropriate Caulfield or copy the book in its entirety.)





4 See Complaint at ¶¶16-28, *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No. 09 Civ. 5095).

5 Salinger's complaint states inconsistently that Caulfield "first appeared in a short story, 'Slight Rebellion off Madison,' that was published in *The New Yorker* in 1946," but that he "also appeared in the short story 'I'm Crazy,' published in Collier's magazine (December 22, 1945)." *Id.* at ¶29. Other Caulfield family members reportedly appeared even earlier, including in "Last Day of the Last Furlough," *The Saturday Evening Post* (July 15, 1944), and "This Sandwich Has No Mayonnaise," *Esquire* (October 1945) and two unpublished stories, "The Last and Best of the Peter Pans" and "The Ocean Full of Bowling Balls." *Id.*

6 ("I am all alone in my pad, man, my piled-up-to-the-ceiling-with-junk pad. Piled with sheet music, piled with garbage bags bursting with rubbish, piled with unnameable flecks of putrified wretchedness in grease. My pad, my own little Lower East Side Horse Badorties pad.") WILLIAM KOTZWINKLE, *THE FAN MAN* (Reprint ed. 1994); see, e.g., [http://www.amazon.com/gp/product/0679752455/ref=cm\\_rdp\\_product/191-5144339-9542567#noop;http://web.fccj.edu/~hdenson/ENC%20Syllabi/horse.htm](http://www.amazon.com/gp/product/0679752455/ref=cm_rdp_product/191-5144339-9542567#noop;http://web.fccj.edu/~hdenson/ENC%20Syllabi/horse.htm).

7 According to Salinger's lawsuit discussed in this article, *Time* named *Catcher* one of the 100 greatest novels of 1923-2005; in 1998 the Modern Library named it the 64th-greatest English-language novel of all time; and New York's Strand Bookstore's readers voted it their fourth favorite book of any kind. In addition, according to the complaint, *Catcher* has to date sold over 35 million copies in dozens of languages and as recently as May 2009 the book was outselling *Harry Potter and the Sorcerer's Stone*, *The DaVinci Code*, *To Kill a Mockingbird*, and *Of Mice and Men* on amazon.com. Salinger Complaint, *supra* note 4, at ¶¶31-33.

8 17 U.S.C. § 24 (1909), as amended Sept. 19, 1962; Aug. 28, 1965; Nov. 16, 1967; and July 23, 1968.

9 Salinger or his agents initially registered *Catcher* with the U.S. Copyright Office on June 11, 1951, Reg. No. A00000056070/1951-06-11, and renewed it on January 22, 1979, Reg. No. RE00000018341/1979-01-22, before assigning the copyright on October 24, 2008, to the J.D. Salinger Literary Trust, assignment no. V3570D891. Salinger Complaint, *supra* note 4, ¶¶42-44, Exs. A and B. Copyrights expire at the end of the calendar year in which they are registered, see 17 U.S.C. § 304; hence, no gaps exist in Salinger's registration.

10 The precise length of copyright protection under the 1976 Act depended on whether a work was anonymous, pseudonymous, or a work made for hire; whether it was published or unpublished; when it was created; and whether it was in its first or its renewal term on January 1, 1978, the Act's effective date. See 17 U.S.C. §§ 302-304 (1976). Under the Act, copyrights in works created on or after January 1, 1978, endured for the life of the last surviving author plus fifty years; copyrights in anonymous and pseudonymous works and works made for hire endured for the shorter of seventy-five years from the year of first publication or 100 years from the year of creation; copyrights in their first term on the Act's effective date endured for twenty-eight years plus a renewal term of forty-seven years, for a total of seventy-five years' protection; and copyrights in their renewal term or for which renewal application was made in the year preceding the Act's effective date endured for a total of seventy-five years.

11 Again, the precise extension in any given case depends on the many factors enumerated above; the shortened version is that the Bono Act extends the terms of existing copyrights another twenty years. 17 U.S.C. §§ 302-304.

12 By statute, U.S. copyrights run through the end of the calendar year in which they expire, 17 U.S.C. § 304, so that *Catcher*'s U.S. copyright now runs through December 31, 2046.

13 Posting of Dennis Johnson to MOBYLIVES, Melville House Publishing, "Fraud Behind Salinger Fraud Admits He's a Fraud," <http://mhpbooks.com/mobylikes/?p=7220> (June 12, 2009).

14 See Wikipedia Entry for "John David California," note 1, [http://en.wikipedia.org/wiki/John\\_David\\_California#cite\\_note-1#cite\\_note-1](http://en.wikipedia.org/wiki/John_David_California#cite_note-1#cite_note-1) (citing salinger.org: 60 Years Later: Coming Through the Rye, [http://salinger.org/index.php?title=60\\_Years\\_Later:\\_Coming\\_Through\\_the\\_Rye](http://salinger.org/index.php?title=60_Years_Later:_Coming_Through_the_Rye)).

15 See Wikipedia Entry for "John David California," note 6, [http://en.wikipedia.org/wiki/John\\_David\\_California#cite\\_note-6#cite\\_note-6](http://en.wikipedia.org/wiki/John_David_California#cite_note-6#cite_note-6) (citing Baltimore Sun: Author Sued by J.D. Salinger for 'Catcher in the

Rye' Sequel Submits Defense, <http://www.baltimoresun.com/entertainment/booksmags/bal-salinger-0616,0,7415101.story>).

16 See Wikipedia Entry for "John David California," note 7, [http://en.wikipedia.org/wiki/John\\_David\\_California#cite\\_note-7#cite\\_note-7](http://en.wikipedia.org/wiki/John_David_California#cite_note-7#cite_note-7) (citing Svenska Dagbladet: Salingerbok stoppas tillfälligt, [http://www.svd.se/kulturnoje/nyheter/salingerbok-stoppas-tillfalligt\\_3088635.svd](http://www.svd.se/kulturnoje/nyheter/salingerbok-stoppas-tillfalligt_3088635.svd)).

17 See Salinger's Last Stand: Is Fredrik Colting's Book *60 Years Later* Fair Use or Just a "Goddam Phony"?, <http://www.encyclopedia.com/doc/1G1-202488117.html> (last visited Dec. 2, 2009).

18 Salinger Complaint, *supra* note 4.

19 Salinger died at age 91 on January 28, 2010, at his home in Cornish, New Hampshire. Charles McGrath, *J.D. Salinger, Literary Recluse, Dies at 91*, N.Y. TIMES, Jan. 29, 2010, at A1, available at <http://www.nytimes.com/2010/01/29/books/29salinger.html?scp=28sq=salinger&st=cse>.

20 Salinger Complaint, *supra* note 4, ¶36.

21 *Id.* at ¶¶ 36-38.

22 *Id.* at ¶39.

23 *Id.* at ¶¶ 16-28.

24 *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No.09 Civ 5095).

25 For an excellent discussion of the differences between "probative similarity" and "substantial similarity," see ROBERT C. OSTERBERG & ERIC C. OSTERBERG, PRACTICING LAW INSTITUTE INTELLECTUAL PROPERTY LAW LIBRARY, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW (2005).

26 *Salinger*, 641 F. Supp. 2d at 263-64.

27 17 U.S.C. § 107.

28 Just as the status of the defendants in *New York Times v. Sullivan*, 376 U.S. 967 (1964), may have led the Supreme Court to formulate the "actual malice" standard applicable to libel and slander cases against "public figures," so the unique perspective of the author may have helped sway the court in *SunTrust Bank* to reverse a preliminary injunction against sales of the book *The Wind Done Gone*. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001).

29 *Salinger*, 641 F. Supp. 2d at 258-60. In particular, the Court noted that Colting himself had made clear in a number of public statements that he considered *60 Years Later* to be a sequel, not a parody or critique, such as: "[T]his is no spoof. . . . We are not concerned about any legal issues." *Id.* at 260 (citing Westberg Aff., Ex. H, Philip Sherwell, *J.D. Salinger Considers Legal Action to Stop The Catcher in the Rye Sequel*, TELEGRAPH.CO.UK, May 30, 2009).

30 *Id.* at 260-61.

31 *Id.* at 267-68.

32 *Id.* at 268.

33 The four traditional hurdles to preliminary injunctive relief are (1) likelihood of ultimate success on the merits, (2) inadequacy of money damages, (3) a balancing of harms between plaintiff and defendant, and (4) impact on the public interest. *E.g.*, *Aguila Records, Inc. v. Nueva Generacion Music Group, Inc.*, 2009 WL 3719422 (N.D. Ill. Nov. 4, 2009). Inadequacy of money damages is sometimes characterized as "irreparable harm." *E.g.*, *Ty, Inc. v. Publ'ns Int'l, Ltd.*, 81 F. Supp. 2d 899 (N.D. Ill. 2000).

34 547 U.S. 388 (2006).

35 *Salinger*, 641 F. Supp. 2d at 268-69 (citing *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996)); *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008); *E. Gluck Corp. v. Rothenhaus*, 585 F. Supp. 2d 505, 519 (S.D.N.Y. 2008). Regarding *eBay*, the court reasoned that "that case dealt only with the presumption of irreparable harm in the patent law context, and thus is not controlling in the absence of Second Circuit precedent applying it in the copyright context." *Id.* n.6. *But see* *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008) ("[T]he presumption of irreparable harm in copyright infringement actions, unlike the rule addressed in *eBay*, does not require courts to impose an injunction following a determination of infringement.").



- 36 *Salinger*, 641 F. Supp. 2d at 269.
- 37 Notice of Appeal, *Salinger v. Colting*, 641 F. Supp. 2d 250 (2009) (No. 09 Civ 5095).
- 38 Brief for The New York Times Company et al. as Amici Curiae Supporting Defendants-Appellants, *Salinger v. Colting*, 641 F. Supp. 2d 250 (2009) (No. 09-2878) (“Publishers Brief”).
- 39 Brief for American Library Association et al. as Amici Curiae Supporting Defendants-Appellants, *Salinger v. Colting*, 641 F. Supp. 2d 250 (2009) (No. 09-2878) (“Library Brief”).
- 40 Brief for Public Citizen, Inc., as Amici Curiae Supporting Defendants-Appellants, *Salinger v. Colting*, 641 F. Supp. 2d 250 (2009) (No. 09-2878) (“Public Brief”).
- 41 One is tempted to say more broadly that Article I deals with the powers of the executive branch, but as filings in recent litigation involving application of “open government” legislation to the Vice Presidency point out, the Office of the Vice President receives its first mention in Article I as President of the Senate, art. I, § 3, cl. 4, and only later appears incidentally in Article II. U.S. CONST. art. II, § 1, cls. 3 and 6; *id.* § 4.
- 42 Under this analysis, the Second and Third Amendments protect these five fundamental freedoms from intrusion by the military power of the government; the Fourth through Eighth Amendments protect these fundamental freedoms against the police power of the government; and the Ninth and Tenth Amendments clarify that the national government is limited to its enumerated powers and that the states and the people, respectively, retain all other rights and powers. See Burt Neuborne, *The House Was Quiet and the World Was Calm: The Reader Became the Book*, 57 Vand. L. Rev. 2007, 2082 (2004). One might also argue that the freedom of religion clause proclaims two specific religious freedoms: freedom from the establishment of a government religion, and the free exercise of religion. U.S. CONST. amend. I.
- 43 Also known as The Statute of “Anne” (for Queen Anne, during whose reign it was enacted), “An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned,” or the Copyright Act 1709 (8 Anne c.19 [also cited as 8 Ann c. 21]), this statute was enacted in 1709 and entered into force on 10 April 1710. Due to changes in the reckoning of the New Year from March to January, the correct year of enactment according to the modern calendar would reportedly be 1710. See John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, in PUBLISHING HISTORY 19(8), 39 n.3 (1980); Wikipedia Entry for Lyman Ray Patterson, [http://en.wikipedia.org/wiki/Lyman\\_Ray\\_Patterson](http://en.wikipedia.org/wiki/Lyman_Ray_Patterson); Wikipedia Entry for Copyright in Historical Perspective, [http://en.wikipedia.org/wiki/Copyright\\_in\\_Historical\\_Perspective](http://en.wikipedia.org/wiki/Copyright_in_Historical_Perspective); Wikipedia Entry for Vanderbilt University Press, [http://en.wikipedia.org/wiki/Vanderbilt\\_University\\_Press](http://en.wikipedia.org/wiki/Vanderbilt_University_Press); see also Wikipedia Entry for Calendar (New Style) Act 1750, [http://en.wikipedia.org/wiki/Calendar\\_\(New\\_Style\)\\_Act\\_1750](http://en.wikipedia.org/wiki/Calendar_(New_Style)_Act_1750). In any event, it is generally regarded as the first full-fledged copyright law.
- 44 *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001); see also I MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT §1.10 [B] [1] (2001) (acknowledging “conflicting interests that must be accommodated in drawing a definitional balance” between copyright law and the First Amendment).
- 45 To qualify for U.S. copyright protection in the first instance, a work must be “original.” *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991).
- 46 Under 17 U.S.C. § 106, U.S. copyright law secures to authors the exclusive rights (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
- 47 17 U.S.C. § 106(1), (2).
- 48 See David Applegate, *Eldred v. Ashcroft: The Supreme Court’s Mickey Mouse Copyright Decision*, 3 ENGAGE 87, 88 (Oct. 2003).
- 49 Press Brief at 2.
- 50 *New York Times Co. v. United States*, 403 U.S. 713 (1971).
- 51 *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).
- 52 Press Brief at 1.
- 53 Press Brief at 5 (citing *New York Times Co. v. United States*, 403 U.S. at 714 (1971), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 78 (1963), and *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980)).
- 54 *Id.* at 5-6 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).
- 55 17 U.S.C. § 502.
- 56 *E.g.*, *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Christopher Phelps & Assocs. v. Galloway*, 429 F.3d 532 (4th Cir. 2007); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 518 F. Supp. 2d 1197 (C.D. Cal. 2007).
- 57 See *Johnson, supra* note 13.
- 58 Swedish Wikipedia Entry for “Nicotext,” <http://sv.wikipedia.org/wiki/Nicotext> (last visited June 19, 2009) (in Swedish) (discussing Nicotext, Colting’s publishing house).
- 59 Press Brief at 18.
- 60 *Id.* at 19-20 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *New York Times Co v Tasini*, 533 U.S. 483 (2001) (finding that the Author’s copyright had in fact been infringed)).
- 61 *Id.* at 20 (quoting Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1131 (1990)).
- 62 See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003); Eugene Volokh & David Newman, *In Defense of the Slippery Slope*, LEGAL AFF. 21-23 (Mar/April 2003).
- 63 In addition to Colting’s choice of “J. D. California” as a pseudonym, Salinger appears under his own name as a character in Colting’s book. See Press Brief at 20, n.10 (citing *Salinger*, 2009 U.S. Dist. LEXIS 56012, at \* 26).
- 64 Press Brief at 20.
- 65 *Id.* at 21.
- 66 *Id.* (citing *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990)).
- 67 Fed. R. Civ. P. 65 (b)(2).
- 68 Amici Publishers assert that “[h]ere a book was banned on the basis of a two-hour hearing with no witnesses. There was no discovery, and the plaintiff Mr. Salinger did not enter an affidavit even opining on how he claimed to have been injured, and certainly was not subject to cross-examination.” Press Brief at 22-23. Yet the district court had before it extensive briefs, affidavits of both parties, numerous exhibits, and the full texts of both books. *Salinger*, 641 F. Supp. 2d at 258-59.
- 69 *Id.* at 20.
- 70 17 U.S.C. §§ 502-504.
- 71 Public Brief at 3 (citing 17 U.S.C. § 102). Thus, in Public Citizen’s view, “Frazz’s” character Caulfield would be protected, but Salinger’s Holden Caulfield would not. See *supra* note 1. The same reasoning explains how such famous fictional characters as Superman and Mickey Mouse can qualify for copyright, as well as trademark, protection.
- 72 *Id.* at 5-9 (citing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (discussing copyrightability of characters in Shakespeare’s “Twelfth Night”); *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (rejecting copyrightability of Dashiell Hammett’s “Sam Spade” character); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 621 (2d Cir. 1982) (leaving open the “difficult” and venerable” question of copyrightability of Edgar Rice Burroughs’s “Tarzan” character); *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (same)).
- 73 *Id.* at 9
- 74 *Id.* at 10.

- 75 *Id.* at 11.
- 76 *Id.* at 12 (quoting *Salinger*, 641 F.Supp.2d at 263-64).
- 77 *Id.* (quoting 17 U.S.C. § 102(0b) (“In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . .”)).
- 78 *Id.* at 14 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)); *see also* Applegate, *supra* note 47.
- 79 *Id.* at 15 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)).
- 80 *Id.* (citing *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991)).
- 81 *Id.* at 16.
- 82 *Id.* (citing NORTHROP FRYE, *ANATOMY OF CRITICISM* 97 (1957)).
- 83 *See, e.g., Salinger*, 641 F. Supp. 2d at 258.
- 84 Library Brief at 1-2.
- 85 *Id.* at 3.
- 86 467 F.3d 244, 251-52 (2d Cir. 2006).
- 87 510 U.S. 569, 578 n.10 (1994).
- 88 Library Brief at 14 (quoting *Blanch v. Koons*, 267 F.3d 244, 251-52 (2d Cir. 2006)).
- 89 *Id.* at 16-17.
- 90 *Id.* at 19.
- 91 *Id.* at 20.
- 92 *Id.* at 22.
- 93 *Id.* at 23-24.
- 94 *Id.* at 26-28.
- 95 17 U.S.C. § 106A(a)(2), (3).
- 96 *See* Applegate, *supra* note 48, at 93.
- 97 *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *see also* Applegate, *supra* note 48.



“PROMOTING THE PROGRESS” OR PAYING FOR DELAY? BALANCING PATENT AND ANTITRUST LAW IN THE AGE OF HEALTH CARE REFORM

By Robert G. Pluta\*

In patent litigation valued between \$1 million and \$25 million, a patent owner should expect to spend more than \$2 million litigating the patent through trial and appeal. Costs can climb above \$4 million where more than \$25 million is at stake.<sup>1</sup> While the rewards for successfully enforcing a patent may be large and beneficial, the risks are large as well: loss of the patent through invalidation means a loss in, among other things, current or potential licensing revenue enjoyed by the patent holder. Sunk costs for research, development, and bringing to market a product or process that may be the subject of the claims of the patent also raise the stakes of litigation. The risks and rewards involving pharmaceutical patent litigation are no exception, and may be higher in many respects.

Costs to bring a drug to market are substantial.<sup>2</sup> A new drug is essentially an information good—once its formula is understood, it is generally easy and inexpensive for others to manufacture it without incurring similar research and development costs.<sup>3</sup> Empirical evidence suggests that higher drug profits are positively correlated with greater research and development efforts.<sup>4</sup> Pharmaceuticals have been associated with the case for strong patents because of the substantial research and development costs.<sup>5</sup>

Things are more complicated than they seem. Congress has established an elaborate regulatory scheme to test the validity and scope of the pharmaceutical patent such that, if the patent holder’s patent is found invalid or not infringed, a generic competitor may enter the market prior to the scheduled expiration of the patent.<sup>6</sup> For reasons explained below, this scheme spawns patent infringement lawsuits between a pharmaceutical patent holder and a generic drug manufacturer aspiring to enter the market. Oftentimes such lawsuits, as with most patent litigations, end in settlement.

Sometimes, settlement results in payments made to the accused infringer.<sup>7</sup> Individuals and organizations that are suspicious of such payments often derogate them as “reverse payments” or “pay-for-delay” because they believe the natural direction in which payments should flow in settling a patent litigation is from the alleged infringer to the patentee-plaintiff, rather than the other way around. Critics primarily cite concerns for competition and consumer cost as reasons such payments should explicitly be ruled antitrust violations.<sup>8</sup> However, most courts that have considered the issue find “reverse payment” settlements in line with the antitrust laws.<sup>9</sup> Yet, even with a fairly consistent pronouncement from the circuit courts on the issue, controversy remains.

The current White House Administration has indicated that eliminating such payments is one of the ways to achieve

savings to help pay for health care reform.<sup>10</sup> The FTC chairman has indicated that eliminating these deals is one of the FTC’s highest priorities,<sup>11</sup> and the DOJ is following suit.<sup>12</sup> Congress is currently wrangling over legislation that would do away with “reverse payments.”<sup>13</sup>

Are these payments good or bad for competition? Are these settlements consistent with the patent system’s goal of “promoting progress”?<sup>14</sup> The answer, as with most in law, is: “It depends.” This paper highlights some concerns of the proposed legislation and suggests that per se treatment of so-called “reverse payments” under the antitrust laws would upset the delicate balance between patent and antitrust law, and likely be harmful to competition and to consumers in the long run.

I. Brief History of The Hatch-Waxman Framework

The genesis of “reverse payments” is the Hatch-Waxman Act (the “Act”). The Act incentivizes innovator companies to develop and market new drugs and treatments and incentivizes generic firms to introduce low cost versions of branded drugs.<sup>15</sup> The Act sets forth procedures for securing early determination of whether a generic drug infringes patent rights.

Once a New Drug Application (“NDA”) has been approved, the Act allows a generic firm to market a competing version of the drug without repeating the process endured by the NDA applicant, provided the generic firm adheres to tenets of the Act. The filing of an Abbreviated New Drug Application (“ANDA”) by a generic rival is less complicated and time-consuming than seeking an NDA. The ANDA applicant need not independently demonstrate safety and efficacy of the drug, but rather must show that the proposed generic is bioequivalent to an approved branded drug.<sup>16</sup>

As part of the ANDA process, the ANDA applicant must, for each unexpired patent included in the branded drug’s listing with the government, either identify the patent and its expiration date (a “Paragraph III certification”) or certify that each patent listed is either invalid or not infringed by the proposed generic (a “Paragraph IV certification”).<sup>17</sup> A Paragraph IV certification is an act of infringement under the patent statute, thereby implicating the branded drug’s right to enforce its patent immediately and enabling the generic applicant to challenge the patent without making potentially infringing sales that exposes it to damages.<sup>18</sup> Upon Paragraph IV certification, the generic must provide notice to the holders of the applicable patent.<sup>19</sup> If the patent holder does not file an infringement lawsuit within forty-five days of receiving notification of Paragraph IV certification, the FDA may approve the ANDA.<sup>20</sup> If the patent holder files suit within the prescribed time, FDA approval for the ANDA is automatically stayed for thirty months with certain exceptions or until the court hearing the infringement case determines that the patent is invalid, not infringed, or unenforceable, whichever is earlier.<sup>21</sup>

The Act incentivizes generic firms to challenge patents by granting the first ANDA holder to file a Paragraph IV

\* Robert Pluta is a patent attorney with Brinks Hofer Gilson & Lione in Chicago. The views expressed herein are his own. Mr. Pluta may be contacted at rpluta@usebrinks.com.

certification a 180-day generic exclusivity period, during which time the FDA will not approve any other ANDAs containing Paragraph IV certifications that list the same branded drug and patent.<sup>22</sup> The 180-day exclusivity does not begin to run until one of the first filers markets the drug or until any generic applicant obtains a final, non-appealable judgment against the patent, whichever is earlier.<sup>23</sup> A first filer retains its 180-day exclusivity if it is sued by a patentee and the parties subsequently settle and agree that the generic can begin marketing on a date certain. This exclusivity period stokes the controversy of so-called reverse payment settlements because when the patentee settles with the first filer, it prolongs the time during which newcomers cannot enter the market other than the party that enjoys the Act's exclusivity period.

## II. Hatch-Waxman Litigation

Significant litigation has occurred addressing the issues surrounding reverse payments in pharmaceutical litigation. Nearly every circuit court that has addressed the issue has ruled that reverse payments do not necessarily run afoul of the antitrust laws.<sup>24</sup> Certain cases often cited by the FTC and opponents of "reverse payments" are distinguishable because those cases involved interim agreements in which a branded drug company paid a generic challenger to stay off the market while the patent litigation continued.<sup>25</sup> Such agreements neither settle litigation nor foster innovation, and therefore courts have recognized that they are not subject to the same analysis as reverse payment situations.<sup>26</sup>

The majority of courts that have considered the issue have adopted a "scope of the patent" test, which states that settlements are lawful, even if they contain reverse payments, so long as competition is not restricted beyond the scope of the patent's claims or beyond its term. These courts recognize that "a delicate balance must be drawn between [antitrust law and patent law]."<sup>27</sup> As Michael Friedland has noted in these pages,

If the interests of antitrust law were ignored, patent law could be used as a pretext for collusion. A company could use an invalid patent for, among other things, cover for a price-fixing scheme . . . Ignoring the interests of patent law would lead to an equally undesirable result. Under patent law, and the Constitution, patent owners are granted the exclusive right to exploit their inventions. A patent owner wanting to exercise that right would not have the option of obtaining a settlement that includes an agreement by its competitor to withdraw from the market. Because such a settlement would be too vulnerable to antitrust challenge, the patent owner would be forced to litigate his patent suit to final judgment or give up on his exclusive right.<sup>28</sup>

This reasoning was bluntly expressed by the Second Circuit in *Tamoxifen*, stating:

Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing antitrust law, as long as competition is restrained only within the scope of the patent.<sup>29</sup>

The key part of this holding is the latter portion: so long as any agreement restraining competition does not extend beyond the life of the patent, the interests of patent law and antitrust law are balanced. The *Schering-Plough* court recognized that a rule encouraging patent litigation could obstruct innovation: "[T]he caustic environment of patent litigation may actually decrease product innovation by amplifying the period of uncertainty around [an inventor's] ability to research, develop, and market the patented product or allegedly infringing product."<sup>30</sup>

Prior to the Hatch-Waxman Act, a generic manufacturer would need to enter the market and begin producing its product in order to challenge an incumbent's patent.<sup>31</sup> Under the Act, a challenge is easier. The *Schering-Plough* court noted this change altered the balance of bargaining power in favor of patent challengers, and it was more likely that settlements would involve payments to the generic challenger.<sup>32</sup> The court found that in this setting treating all settlements with reverse payments as antitrust violations would discourage settlements.<sup>33</sup> And, without the availability of the Act to permit challenges to patents prior to a challenger entering the market, challenges to patents would not be as prevalent.

Notwithstanding the consensus among the circuit courts that have considered the issue, the current FTC chairman has forthrightly acknowledged the FTC's aim to create a circuit split in the hopes of persuading the Supreme Court to accept review.<sup>34</sup> The present White House Administration has—through the Department of Justice—filed briefs that clearly have the same aim.

## III. Current Issues and Policy Considerations Involving Reverse Payments

Critics of reverse payments charge that the settlement arrangements violate antitrust laws and are anti-competitive because they can delay a generic drug's entry into the market. This delay can be manifested in the Act's 180-day exclusivity period because the first-filer retains its exclusivity if it is sued and the parties subsequently settle and agree that the first-filer can begin marketing on a date in the future. The Department of Justice, the FTC, the current White House Administration, and certain members of Congress are poised to eliminate the option for patent litigants. Jon Leibowitz, the current Chairman of the FTC, sees eliminating reverse payments as a way to pay for health care reform and a "highest priority" for the FTC.<sup>35</sup> Members of Congress also have proposed legislation aimed at eliminating such payments.<sup>36</sup>

In its brief in the *Cipro* case, the Department of Justice argues that reverse payment settlements must be scrutinized under the antitrust laws and that the Second Circuit's *Tamoxifen* standard inappropriately permits patent holders to contract their way out of what the DOJ characterizes as a statutorily-imposed risk that patent litigation could lead to invalidation of the patent while the parties claim antitrust immunity for that private contract.<sup>37</sup> The DOJ further states that the *Tamoxifen* standard treats a private settlement agreement excluding competition as the equivalent of a litigated judgment affirming the validity of the patent. This, the DOJ argues, is a bad thing. However, all patent litigation settlements—whether they contain a "reverse payment" or



not—are private settlement agreements excluding competition in one way or another. Similarly, all patent litigations contain the risk of loss of patent through invalidation. Taking this reasoning to its logical conclusion, the DOJ would advocate a policy that forbids patent litigation settlements absent the FTC’s blessing on the transaction. This policy is embodied in the legislation pending before Congress.

The proposed Senate bill bans reverse payments by forbidding the following:

any person, in connection with the sale of a drug product, to directly or indirectly be a party to any agreement resolving a patent infringement claim in which (1) the [generic firm] receives anything of value; and (2) the [generic firm] agrees not to research, develop, manufacture, market or sell the [generic] product for any period of time.<sup>38</sup>

The House bill is similar. Both Acts give the FTC power to exempt and authorize any reverse payment agreements which act “in furtherance of market competition and for the benefit of consumers.”<sup>39</sup> Notwithstanding this provision, the bills propose a per se rule against reverse payments.

The goal of preserving access to affordable generic drugs is laudable, but a rigid per se application to reverse payment patent settlements should be resisted. Courts apply a per se rule only where an agreement always or almost always reduces output to a product market and increases prices to consumers. Further, the language of the bills unnecessarily hamstring litigants. For example, a proscription against a generic company receiving anything of value is so vague as to be meaningless. Settling any litigation, even for no money whatsoever, can be viewed as value received by the exiting litigant. In the case of a putative patent infringer, exiting the litigation by agreeing not to research, develop, manufacture, market, or sell the infringing product for a period of time (generally while the patent is not expired) is a necessary precursor to effective enforcement of intellectual property rights. Thus, putting aside for the moment the concept of per se treatment of reverse payments, the current language of the bills appears to forbid the settlement of patent litigation generally where two pharmaceutical companies are the litigants.

Opponents of the bills, including several antitrust scholars, warn against a per se rule in the context of generic drugs due to the lack of empirical evidence supporting the per se approach.<sup>40</sup> It is only after considerable experience with certain business relationships that courts should consider classifying those business relationships as per se violations.<sup>41</sup> The Eleventh Circuit in *Schering-Plough* approached the issue prudently when it declined to find reverse payments per se illegal and declined to apply a rule of reason analysis to those payments.<sup>42</sup>

To be sure, anticompetitive effect is necessarily present in these situations because patents are, by their nature, exclusionary. However, the focus instead should be on whether the challenged conduct of a particular settlement extends beyond the reach of the patent. Specifically, as the Eleventh Circuit concluded, an analysis of antitrust liability should include “(1) the scope of the exclusionary potential of

the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects.”<sup>43</sup>

The ex post review proposed by the bills only injects uncertainty for parties contemplating patent settlement. Indeed, in contrast to the recent statements of the FTC’s chairman, the FTC in the past has acknowledged the “serious uncertainties that would confront parties who seek to settle patent litigation if the Commission undertook to examine the underlying merits itself later on, and gave them conclusive weight.”<sup>44</sup>

Those focusing on reverse payments as antitrust violations face a challenge, in that the social effects or costs of anticompetitive patent settlements are only tenuously correlated with the direction in which payment flows in the settlement. Professor Dan Crane argues that the social cost of patent settlements involving cessation of competition between the branded and generic firm equals the social cost of the continuing monopoly multiplied by the probability that, but for the settlement, the generic would have won the patent infringement action and entered the market in competition with the branded firm.<sup>45</sup>

There is, however, no relationship between the social cost of cessation of competition between the branded and generic and the fact that the settlement payment flows from the branded to the generic, unless of course the fact that payment flows from the patentee-plaintiff to the infringer-defendant necessarily evidences that the plaintiff’s claim is weak, which in turn means that the branded’s probability of success in the infringement action is low and the social cost of the settlement is therefore high. Thus, as Professor Crane posits, antitrust rules that focus on reverse payment settlements as a category not only run the risk of creating false positives, but they also run the risk of creating false negatives to the extent that they focus the inquiry on the direction in which consideration flows.

The parties to a patent dispute generally will have incentives to settle in order to avoid costly and risky litigation, and these incentives are more aligned than not with social benefits.<sup>46</sup> Further, employing reverse payments may be necessary for socially beneficial and pro-competitive settlements to be reached due to, for example, asymmetric information, excess optimism, and differential cash needs between the parties to a patent dispute.<sup>47</sup> Finally, and most likely, reliable judgments about the likelihoods of litigation outcomes of a patent dispute are not feasible if those judgments would be part of any antitrust inquiry because such inquiry may disturb the normal behavior of the litigants, who would otherwise be balancing risks and rewards of settlement absent the uncertainty of the possibility of settlement vitiation due to antitrust inquiry.

From a policy standpoint, more experience by antitrust agencies and courts, along with more economic research, is needed to determine whether—as a general matter—settlement is likely to benefit or harm competition. An informed determination of whether terms of a given settlement will likely benefit or harm competition will be more probative when the fact-finder is aware of the timing of the settlement (e.g., before or after the date of entry of a successfully-

challenging generic), the facts underlying the character of a settlement, and the basis for and size of compensation in the form of “reverse payments.” This probative knowledge will never be ascertained if a per se rule is adopted.

#### IV. Conclusion

The central goal of the patent system is to provide an economic tool for promoting public access to new technologies.<sup>48</sup> The foregoing illustrates that, at least at this point in our understanding of how reverse payment situations work, a rigid per se rule against reverse payments would be overly restrictive of settlements and may actually stifle innovation by disallowing a generic an income stream through settlement as a reward for posturing itself to bring a generic drug to market. It remains to be seen what, if anything, Congress will do and what any final bill regarding reverse payments will look like. Interested people of both political parties have reasons for supporting or for attacking reverse payments. However, taking a calm view and applying what we know about reverse payments in practice, along with a recognition of the delicate balance between patent law and antitrust law, it is likely most prudent to allow parties to patent suits to continue to settle the matters in the ways the parties best see fit.

#### Endnotes

- 1 American Intellectual Property Law Association, *Report of the Economic Survey*
- 2 Studies estimate it may cost a drug company \$802 million to bring a drug to market. Joseph A. DiMasi, Ronald W. Hansen & Henry G. Grabowski, *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. HEALTH ECON. 151 (2003). Under the Food, Drug, and Cosmetic Act, a drug company must demonstrate that a drug is safe and effective before the FDA will approve it for marketing. 21 U.S.C. § 355(d) (2009). That demonstration is made through a New Drug Application (NDA), which is a lengthy, expensive, time-consuming process that costs millions of dollars to the drug company, much of which is spent conducting necessary clinical trials. *Id.* § 355(b). Therefore, drug makers rely heavily on patent protection because a patent is generally considered necessary to recoup the costs of an initial investment in the drug. See Richard C. Levin et al., *Appropriating the Returns from Industrial Research and Development*, 1987 BROOKINGS PAPERS ON ECON. ACTIVITY (SPECIAL ISSUE) 783, 795-96, 819 (illustrating that pharmaceutical manufacturers value patents highly as appropriation means); see also Eli Lilly & Co. v. Teva Pharms. USA, Inc., 609 F. Supp. 2d 786, 811 n.23 (S.D. Ind. 2009) (providing examples of steep erosion of brand sales upon generic entry (loss of approximately 80% of sales within three weeks)).
- 3 See C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement As A Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553 (2006). Drug companies, compared to innovators in other industries, cannot as easily rely upon a head start, complementary assets, and scale of production as means to preserve profits.
- 4 Carmello Giacotto et al., *Drug Prices and Research and Development Investment Behavior in the Pharmaceutical Industry*, 48 J.L. & ECON. 195, 195 (2005).
- 5 See Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1615-17 (2003).
- 6 See 21 U.S.C. § 355 et seq.
- 7 A good general consideration of the issue has been presented in these pages before. See Michael K. Friedland, *Antitrust Implications of Patent Settlements: Balancing Patent Policy, Antitrust Law, and the Practical Limits of Litigation*, 9 ENGAGE 89 (June 2008); see also Geoffrey A. Manne & Joshua D. Wright, *The Federalist Society for Law and Public Policy Studies, Reverse Payment*

Settlements and Upcoming Congressional Action (Aug. 20, 2009), [http://www.fed-soc.org/doclib/20090820\\_ReversePayments.pdf](http://www.fed-soc.org/doclib/20090820_ReversePayments.pdf).

- 8 See generally Bigelow & Willig, “Reverse Payments” in *Settlements of Patent Litigation: Schering-Plough, K-Dur, and the FTC*, in THE ANTITRUST REVOLUTION 248 (Kwoka, Jr. & White eds., 2005). The term “reverse payment” is a misnomer because any patent settlement involves compensation to the alleged infringer in the form of, for example, reduced damages or lower royalty payments.
- 9 See *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008), *cert. denied sub nom.* Ark. Carpenters Health & Welfare Fund v. Bayer, AG, 129 S. Ct. 2828 (2009) (“*Cipro*”); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2929 (2006) (“*Schering-Plough*”); *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294 (11th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004) (“*Valley Drug*”); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006), *amending* 429 F.3d 370 (2d Cir. 2005), *cert. denied*, 127 S. Ct. 3001 (2007) (“*Tamoxifen*”).
- 10 OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010, at 28 (2009) (proposed), *available at* [http://www.whitehouse.gov/omb/assets/fy2010\\_new\\_era/A\\_New\\_Era\\_of\\_Responsibility2.pdf](http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf).
- 11 Jon Leibowitz, Chairman, Fed. Trade Comm’n, Address at the Center for American Progress: “Pay-for-Delay” Settlements in the Pharmaceutical Industry: How Congress Can Stop Anticompetitive Conduct, Protect Consumers’ Wallets, and Help Pay for Health Care Reform (The \$35 Billion Solution) (June 23, 2009), *available at* <http://www.ftc.gov/speeches/leibowitz/090623payfordelayspeech.pdf>.
- 12 See Brief for the United States in Response to the Court’s Invitation, Ark. Carpenters Health & Welfare Fund v. Bayer, AG, No. 05-2852-cv (CON) (2d Cir. 2009).
- 13 See Preserve Access to Affordable Generics Act, S. 369, 111th Cong. (2009); Protecting Consumer Access to Generic Drugs Act of 2009, H.R. 1706, 111th Cong. (2009).
- 14 The Constitution of the United States expressly provides Congress with the power to “promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. James Madison wrote in *Federalist* #43 that “[t]he utility of [this provision] will scarcely be questioned . . . . The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.” THE FEDERALIST NO. 43 (James Madison).
- 15 See *Mead Johnson Pharm. Group v. Bowen*, 838 F.2d 1332, 1333 (D.C. Cir. 1988).
- 16 See 21 U.S.C. § 355(j)(2)(A), (8)(B). The requirements additionally require demonstrations that the generic drug contains the same active ingredient, conditions of use, route of administration, dosage form, strength, and labeling. While costs for establishing these requirements, including bioequivalence, are not trivial, the process is much less expensive than NDA clinical trials. See Requirements for Submission of In Vivo Bioequivalence Data; Proposed Rule, 68 Fed. Reg. 61,640, 61,645 (Oct. 29, 2003) (highlighting estimates of ANDA preparation and filing costs ranging between \$300,000 and \$1 million).
- 17 21 U.S.C. § 355(j)(2)(A)(vii)(III)-(IV).
- 18 35 U.S.C. § 271(e)(2).
- 19 21 U.S.C. § 355(j)(2)(B).
- 20 *Id.* at § 355(j)(5)(B)(iii).
- 21 *Id.*
- 22 *Id.* at § 355(j)(5)(B)(iv)(I).
- 23 *Id.* at § 355(j)(5)(B)(iv)(I), 355(j)(5)(D).
- 24 See *Cipro*, 544 F.3d 1323 (Fed. Cir. 2008) (“The essence of the inquiry is whether the agreements restrict competition beyond the exclusionary zone of the patent.”); *Schering-Plough*, 402 F.3d 1056 (11th Cir. 2005); *Valley Drug*, 344 F.3d 1294 (11th Cir. 2003) (holding that a “reverse payment” settlement is subject to antitrust scrutiny only if “found to have effects beyond

the exclusionary effects of [defendant's] patent"); *Tamoxifen*, 466 F.3d 187 (2d Cir. 2006) (upholding dismissal of private challenges to a Hatch-Waxman settlement and stating that "[w]e generally agree . . . that 'simply because a brand-name pharmaceutical company holding a patent paid its generic competitor money cannot be the sole basis for violation of antitrust law,' unless the 'exclusionary effects of the agreement' exceed the 'scope of the patent's protection.'")

25 See *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003); *Andrx Pharms. Inc. v. Biovail Corp. Int'l*, 256 F.3d 799 (D.C. Cir. 2001); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279 (S.D. Fla. 2005) ("Valley Drug remand").

26 See, e.g., *Schering Plough*, 402 F.3d at 1066 n.14 ("We noted that the case at bar is wholly different from [*Valley Drug remand*]. The critical difference is that the agreements at issue in *Valley Drug* did not involve final settlements of patent litigation, and, moreover, the *Valley Drug* agreements did not permit the generic company to market its product before patent expiration . . . . Given these material distinctions, the same analysis cannot apply.")

27 *Schering-Plough*, 402 F.3d at 1067.

28 Friedland, *supra* note 7.

29 *Tamoxifen*, 466 F.3d at 213.

30 *Schering-Plough*, 402 F.3d at 1075.

31 *Id.*

32 *Id.* at 1074.

33 *Id.*

34 *Hearing Before the S. Comm. on the Judiciary 3* (Jan. 17, 2007) (statement of Commissioner Jon Leibowitz), available at <http://www.ftc.gov/speeches/leibowitz/071701oralstatement.pdf>.

35 In a June 23, 2009 speech given at the Center for American Progress, Mr. Leibowitz stated that eliminating "reverse payment" settlements is one of the FTC's highest priorities. Leibowitz, *supra* note 11. Mr. Leibowitz summarizes the court decisions allowing such payments as concluding that, because a drug company's patent might block the generic's product, a drug company can pay to eliminate the possibility of competition until its patent expires. *Id.*

36 See Preserve Access to Affordable Generics Act, S. 369, 111th Cong. (2009); Protecting Consumer Access to Generic Drugs Act of 2009, H.R. 1706, 111th Cong. (2009).

37 See *supra* note 12.

38 S. 369.

39 *Id.* § 3; H.R. 1706. As recently as December 3, 2009, Senator Kohl submitted S. 369 as a bipartisan amendment to the U.S. Senate health care legislation package.

40 See Bigelow & Willig, *supra* note 8; see also *supra* note 7.

41 *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972)).

42 "We think that neither the rule of reason nor the per se analysis is appropriate in this context." *Schering-Plough*, 402 F.3d at 1065.

43 *Id.* at 1066.

44 See Supplemental Brief for the Petitioner, *Fed. Trade Comm'n v. Schering-Plough Corp.*, 126 S. Ct. 2929 (2009) (No. 05-273), 2006 WL 1647529, at \*4 ("A key drawback to [an ex post review] is that it places parties contemplating settlement in the predicament of not knowing, at the time of settlement, whether particular settlement terms will appear unreasonable to a future antitrust tribunal."); Reply Brief for the Petitioner Federal Trade Commission in support of its Petition for Writ of Certiorari, *Fed. Trade Comm'n v. Schering-Plough Corp.*, 126 S. Ct. 2929 (2009) (No. 05-273), 2005 WL 2652617, at \*5 n.4 (stating the view that an "ex post inquiry into the patent merits was neither necessary nor helpful" and "ultimately [would] have a chilling effect on the efficient settlement of patent litigation").

45 Posting of Dan Crane to Truth on the Market, Crane on Carrier's Innovation in the 21st Century, <http://www.truthonthemarket.com/2009/03/30/> (Mar. 30, 2009, 19:57 ET).

46 See Bigelow & Willig, *supra*, note 8.

47 *Id.*

48 F. Scott Kief, *Coordination, Property & Intellectual Property: An Unconventional Approach to Anticompetitive Effects & Downstream Access*, 56 EMORY L.J. 327 (2006).



INTERNATIONAL & NATIONAL SECURITY LAW  
PUTTING TERRORISTS OUT OF BUSINESS: USING SARBANES-OXLEY TO PROSECUTE  
TERROR FINANCIERS

By Adam R. Pearlman\*

Assume a charity solicited contributions from donors willing to support a religious or social cause overseas in 2000 and 2001, and that charity’s administrators funnel a portion of those funds to a State Department-designated foreign terrorist organization (FTO).<sup>1</sup> Fearing government investigations of their activities after the attacks of September 11, 2001 and the passage of the Patriot Act,<sup>2</sup> the charity’s in-house counsel repeatedly encourages staff to “comply with” the charity’s established document retention policy with respect to the distribution of donations, which effectively is a euphemism for ordering employees to destroy whatever records that could point to the group’s activities that could be construed as material support of terrorism.<sup>3</sup> According to the Supreme Court’s decision in *Arthur Andersen LLP v. United States*,<sup>4</sup> under then-existing laws, the hypothetical charity, its officers, and counsel might not have been guilty of obstructing justice because it is not “necessarily corrupt for an attorney to persuade a client with intent to cause that client to withhold documents from the Government,” and because that persuasion to destroy documents may not have occurred with a particular government proceeding in mind.<sup>5</sup>

In 2002, however, Congress passed the Sarbanes-Oxley Act<sup>6</sup> in response to the wave of corporate scandals that came to light with Enron’s collapse. Along with increasing penalties for existing crimes and generally tightening controls on record-keeping and accounting practices, Congress revised and added criminal provisions for anticipatory obstruction of justice such as the above hypothetical (which is modeled closely on Arthur Andersen’s actions leading to the shredding of as many Enron-related documents as possible before being subpoenaed for them by the Securities and Exchange Commission<sup>7</sup>).

Section 802 of Sarbanes-Oxley, the “anti-shredding provision” codified as 18 U.S.C. § 1519, added a very broadly-worded tool to a prosecutor’s arsenal—aimed at those who physically destroy documents or other evidence, it criminalizes attempts even to “impede” any matter under federal jurisdiction.<sup>8</sup> This is markedly different from older statutes such as 18 U.S.C. § 1512, the statute at issue in *Arthur Andersen*, which outlaws attempts to “corruptly persuade” someone else to obstruct an “official proceeding.”

Furthermore, the Supreme Court has read a so-called “nexus” requirement into the older obstruction statutes: first in 1995 in *United States v. Aguilar*<sup>9</sup> with respect to 18 U.S.C. § 1503, and later reaffirming and arguably expanding the requirement in *Andersen* by applying it to § 1512. The requirement of proving a nexus between the charged obstructive

act and an existing official proceeding requires the government to show that the alleged act had the “natural and probable effect” of obstructing a particular judicial proceeding, and that the defendant so intended.<sup>10</sup>

Section 1519, like its sister statutes, does not require a nexus to a particular investigation in its text. Further, the legislative history on § 1519 is clear and explicit—Congress intended no such demand on the government when prosecuting under this law. Federal courts, however, have split as to whether a nexus should be required in § 1519 prosecutions, and have differed (in theory, anyway) in interpreting exactly how that requirement applies to such a wide-reaching law.

Specifically with regard to prosecutions of terrorists or those who provide material support to terrorists, it is unclear whether a theoretical nexus requirement for § 1519 would make any difference in a prosecutor’s case. Assuming that the Supreme Court’s purpose for imposing such a requirement is to provide defendants fair notice,<sup>11</sup> if a non-profit or “charitable” organization sends money overseas to designated FTOs, files falsified reports with the IRS to gain or maintain tax-exempt status, and destroys associated records, it will not be free from prosecution for obstruction simply because it was unaware of a specific, ongoing IRS or FBI investigation into its activities. Proof that the individuals destroying evidence contemplated such investigations as they acted will subject them to criminal culpability. Perhaps ironically, however, this principle at work in § 1519 actions is arguably less clear in counterterrorism efforts because of the legal distinctions between law enforcement versus national security-related investigations, i.e. a defendant may claim that his destructive actions were not intended to hinder a potential legal probe as much as serving a basic counterintelligence function.<sup>12</sup> But regardless of whether one takes a purely textual approach to the statute or culls its legislative history to determine Congress’ intent, that argument points to a procedural distinction without a legal difference for the defendant.

I. Background

Section 1519 was promulgated as part of the Sarbanes-Oxley Act in the wake of the Enron and Arthur Andersen accounting scandals. Generally, the Act served to tighten controls on corporate accounting and increase penalties for certain existing white-collar offenses. Section 1519 was one of two new criminal provisions called for in § 802 of the Act.<sup>13</sup> It reads:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of

\* J.D., The George Washington University Law School, B.A., University of California, Los Angeles. The opinions expressed herein are solely those of the author, not of any government agency.



any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

This provision was purposefully drafted very broadly—Senator Leahy, Chairman of the Senate Judiciary Committee, envisioned § 1519 as a law that “could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter” within federal jurisdiction.<sup>14</sup> Importantly, that a matter be “within the jurisdiction of the United States” is meant to be a jurisdictional requirement, *not* an element of the offense to be proved.<sup>15</sup> A defendant therefore need not be aware of any *particular* agency, etc. that could institute “a matter” which could be obstructed by his destruction of evidence. In other words, this law is *not* restricted to obstruction of an “official proceeding,” as is required by other obstruction laws such as 18 U.S.C. § 1512, nor was its reach limited to those who act with the heightened, though undefined “corrupt” intent required by statutes including §§ 1503 and 1512, apparently to avoid the judiciary’s narrow reading of those terms.

Although neither § 1503 nor § 1512 includes the element in their respective texts, for each the Supreme Court has read-in a requirement that the alleged obstructive act “have a particular ‘nexus’ with the official proceeding and have the ‘natural and probable effect of interfering with the due administration of justice.’”<sup>16</sup> Courts and commentators alike have differed on whether to impose a nexus requirement for § 1519 prosecutions, in spite of what appears to be Congress’ clear intent to the contrary. Senator Leahy explained that “it is sufficient that the act is done ‘in contemplation’ of or in relation to a matter or investigation.”<sup>17</sup> Section 1519 is designed to go after the “individual shredder” in a way that the earlier statutes could not reach.<sup>18</sup> There is no persuasion element here, nor a “corrupt” element, as in other obstruction laws. Instead, § 1519 is designed only to be bound by an intent element and a jurisdictional element.<sup>19</sup>

Still, there have not yet been true test-cases that directly compare § 1519 to its sister statutes. *United States v. Ganier*, a case which stemmed from a 2005 indictment in the Middle District of Tennessee, could have served as a particularly valuable example of how § 1519 operates alongside § 1503. Ganier, a prominent corporate CEO accused of violating government contracting rules, was charged with searching for and destroying computer files as part of an “email retention policy” initiated in light of a grand jury investigation. He was indicted with one count of violating § 1503 and three counts under § 1519,<sup>20</sup> but pleaded guilty to one misdemeanor count of unauthorized access to a computer that was used in interstate commerce before trial.<sup>21</sup>

However, the district judge in *Ganier* had earlier issued an order establishing jury instructions for trial. Along with the general overview below of how § 1519 has been used, the analysis that appears later with regard to how the law might work against terrorist financiers takes the district court’s order into account as a good example of how § 1519 is distinct from other obstruction laws.

## II. Section 1519 in Action

The strikingly wide array of criminal conduct for which § 1519 violations have been charged shows the breadth, indeed the versatility of the provision, as was suggested in its legislative history.<sup>22</sup> Although the broad applicability of the statute may lend itself to abuse of prosecutorial discretion in both its application and potentially harsh sentencing, the published cases suggest that it has not been misused thus far. Rather, § 1519 is a tool employed by prosecutors against cover-ups of criminal activity.<sup>23</sup> Section 1519 has been used to prosecute destruction or alteration of a variety of documents or electronic data and even the destruction of physical evidence. Destruction cases include destruction of a passport with a fraudulent U.S. residence stamp<sup>24</sup> and other immigration documents.<sup>25</sup> Corruption, alteration, or falsification of documents prosecutions have included cases of falsified or exaggerated police reports,<sup>26</sup> records associated with Medicare or other health care fraud schemes,<sup>27</sup> falsified environmental reports,<sup>28</sup> and falsified records for bankruptcy or business records related to government contracts.<sup>29</sup> The most common cases of electronic data destruction are those involving child pornography<sup>30</sup> and deleted emails or other documents during grand jury investigations.<sup>31</sup> The law has even been used against defendants who torched their getaway car after shooting and killing a man on the street.<sup>32</sup>

In each instance, charges were brought against those who destroyed, altered, or fabricated evidence of a potential federal crime. In the convictions won, juries decided that the defendant had acted with the intent of somehow disrupting an investigation into the activity that the defendant was attempting to cover-up.<sup>33</sup> But what remains the central legal test for applying the statute to those who, for example, anticipate a federal investigation and begin shredding incriminating documents, is how early (in the series of events during which the defendant attempts to cover-up prior criminal conduct) a court will impose liability.<sup>34</sup> This begs two separate but interconnected inquiries which some courts may confound: 1) what was the defendant’s state of mind at the time he started destroying documents, and 2) does a “nexus” have to be proved such that obstruction of an official proceeding is a “natural and probable result” of the defendant’s act?

It is clear from the statutory language that the requisite intent for § 1519 is the intent simply to obstruct—as stated above, there are no qualifiers or descriptors such as “corruptly,” nor the requirement of an “official proceeding.” The second question is more vexing—did the defendant have to know more about a proceeding, generally or particularly, and is the government required to prove that there was a sufficient nexus between the defendant’s action and that proceeding?

Some argue that fairness concerns exist above and beyond what is written in the statute and Congress’ intent. They believe an individual’s abstract thought that an action he undertakes might affect an official proceeding, with no knowledge of any particulars of and without a nexus to a particular proceeding, does not reach the level of criminal culpability.<sup>35</sup> Further, they assert that although the Court in *Andersen* “made no explicit reference to Section 1519, its observations regarding

the requirement that ‘knowing’ impediment is insufficient for criminal culpability could be read as a direct criticism of the section.<sup>36</sup> The *Anderson* decision was even described as one that declared “what was clearly out of bounds—criminality hinged upon an unforeseen proceeding.”<sup>37</sup>

At least two courts have followed the nexus route for § 1519. In *United States v. Ganier*, the jury instruction order of the district court, which was filed on June 30, 2005 (one month after the *Arthur Andersen* decision) included a nexus requirement.<sup>38</sup> In *Ganier*, the court acknowledged that § 1519’s legislative history “confirms that Congress intended that a broad scope of actions be covered,” cited arguments that the section covers destruction of documents in contemplation of an investigation,<sup>39</sup> and agreed that “it appears that Congress intended to remove the nexus requirement from § 1519.”<sup>40</sup> The court nevertheless held that, despite the statute’s intent, courts still need to determine whether a nexus requirement should be adopted to satisfy the fairness concerns of *Aguilar*. Particularly concerned that defendants may lack fair warning, the *Ganier* court ruled that “the nexus requirement guarantees that conduct is punishable where the defendant acts with an intent to obstruct a particular investigation and in a manner that is likely to obstruct that particular investigation.” More recently, in *United States v. Russell*, the court appears to have assumed without deciding that a nexus requirement applies to actions taken under § 1519.<sup>41</sup>

However, there has been clear confusion among some who have advocated for or assumed the existence of a nexus requirement for § 1519. The same article that interpreted the *Andersen* decision as declaring ‘what was clearly out of bounds’ also clearly distinguished the application of § 1519 from the *Andersen* Court’s analysis that applied § 1503’s nexus reasoning to § 1512 prosecutions. “Since the statute clearly states the required mens rea, the Court cannot easily assume that Congress intended any higher degree of scienter. As such, the Court also cannot easily apply the nexus requirement that it has imputed to § 1512(b) and other obstruction statutes to limit their reach.”<sup>42</sup>

Indeed, the most detailed discussion of § 1519’s mens rea requirement in a published judicial opinion cites Senator Leahy’s explanation of the purpose of the statute, that it was drafted specifically to avoid the requirement that the defendant know about the proceeding against him.<sup>43</sup> In *United States v. Jho*, the court invoked the same academic article examining § 1519 as did the *Ganier* court. Calling the analysis “an excellent discussion” of the intent of § 1519, the *Jho* court assumed that the statute was designed to remedy the loopholes in other obstruction laws, and stated simply that the required mens rea is that the “defendant act knowingly with the intent to obstruct justice.”<sup>44</sup> Defendant Jho, the chief engineer of a foreign vessel, was indicted for:

Knowingly [altering, concealing, covering up, falsifying, or making a false entry] in any record or document with the intent to impede, obstruct, or influence the investigation and proper administration of a matter within the jurisdiction of the U.S. [Government] and in relation to and in contemplation of a matter, namely, the

U.S. Coast Guard’s inspections to determine the [ship’s] compliance with [the international maritime pollution control protocol] and United States laws.<sup>45</sup>

In that case, the court held:

[A]ll that is required is proof that Jho knowingly made false entries in a document (the [ship’s] Oil Record Book) with the intent to impede, obstruct, or influence the proper administration of any matter within the jurisdiction of the United States Coast Guard. As noted in the legislative history, it is also sufficient that the act is done ‘in contemplation’ of or in relation to a matter or regulation.<sup>46</sup>

It is also worth noting that the district court in *Russell* cited these passages of the *Jho* decision, including that § 1519 “was specifically meant to eliminate any technical requirement, which some courts had read into other obstruction statutes, that the obstructive conduct be tied to a pending or imminent proceeding,”<sup>47</sup> signifying that the court may have confounded somewhat the questions of nexus and intent. Further, the Seventh Circuit’s decision in *United States v. Wortman* made no hint that any extra-textual requirements are required for culpability, and never suggested a problem with the jury instructions in that case, which did not include a nexus requirement. Rather, the *Wortman* court ruled that the evidence presented was sufficient to establish that the defendant did, in fact, destroy evidence (a CD-ROM) and that she acted with the intent of obstructing a federal investigation.<sup>48</sup>

### III. Application to Prosecuting Terrorist Financiers

Although neither the Patriot Act nor the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)<sup>49</sup> went as far as the United Kingdom in terms of imposing an affirmative duty to report “information . . . in preventing the commission by another person of an act of terrorism,”<sup>50</sup> U.S. courts have uniformly recognized the broad applicability of § 1519, and it certainly appears that the law may also be a valuable tool against terrorists, or, more likely, against those who finance terrorism.<sup>51</sup>

The split among the courts about the applicability of a nexus requirement in § 1519 actions, however, begs the question of whether its presence or absence is particularly important for prosecuting terror financiers under this law. There are three key scenarios in which a suspected terrorist, or one who allegedly materially supports terrorists might find himself subject to a § 1519 charge. The first is straight-forward: the defendant has or had knowledge or suspicion of an ongoing investigation at the time of his obstructive act. Here, an imposition of a nexus element seems almost certainly inconsequential.

The second case is the commonplace, *Jho*-like scenario wherein the defendant engages in “run of the mill” document or evidence destruction in contemplation or anticipation of future federal investigations. Still, the legal analysis of activities otherwise similar to Jho’s may differ somewhat in matters related to conduct supportive of terrorism, in that knowledge that one is assisting a designated FTO might obviate a nexus requirement if the broader scienter associated with helping an FTO can

be incorporated into the act of covering up that assistance. In other words, especially where the destination of funds is a designated FTO, knowledge of that fact during the course of the transaction itself implies a defendant's understanding that destroying records relating to the transaction amounts to impeding a potential federal investigation. On its face, this seems to satisfy the fairness concerns the Supreme Court expressed when creating the nexus requirement in *Aguilar*. This also comports with the *Jho* court's reasoning: *Jho*'s position as a vessel's chief engineer put him on notice of possible investigations by federal authorities (in his case, Coast Guard inspection of pollution logs). The court rejected his argument that a specific investigation must be ongoing (i.e. that routine inspections do not fall under the statute), that he must have known about that investigation, and must have acted with intent to obstruct that investigation.<sup>52</sup> Likewise, financial records of charitable organizations like the one described in the above hypothetical come under routine scrutiny by the IRS, and determining the origin of monies laundered to terrorist organizations is well within the jurisdiction of the FBI. Furthermore, the sophistication of the defendant's counter-intelligence capabilities may be circumstantial evidence of evil intent.<sup>53</sup>

Finally, there is a scenario unique to international/transnational operations, though not necessarily limited to functions of terror groups. A United States person defendant may gain knowledge or suspicion of a possible investigation into his activities due to the disruption of his foreign network or business. For businessmen as well as terrorists, a foreign law enforcement agency's raid on an overseas office or headquarters may signal trouble to come in the United States. In addition, for terrorist suspects or supporters in the U.S., the disruption may be caused either by military or intelligence activities. To what extent these occurrences would afford judicially-recognized contemplation of a U.S. federal investigation, because of which domestic persons would begin destroying documents or other evidence illustrating their association with the overseas operation, will ultimately have to be decided on a case-by-case basis, as is contemplated by § 1519.<sup>54</sup>

Importantly, there does not seem to be any contemplation of distinctions between law enforcement and intelligence operations in § 1519's legislative history, nor would one expect that of a statute whose enactment was prefaced by corporate accounting scandals. A strict reading of § 1519's text probably allows for prosecution in cases where a U.S. law enforcement investigation is contemplated, even if the target is tipped-off by non-law enforcement activity. This leaves an additional question: could § 1519 be used against those who merely destroy documents that would be useful only to the intelligence community, rather than as part of an administrative or judicial proceeding? Would shredding documents to keep them out of the hands of the CIA qualify as an attempt to impede a "matter within the jurisdiction of any department or agency of the United States"?<sup>55</sup> The answer is likely forever to remain purely academic conjecture, but would nevertheless seem to hinge upon how "jurisdiction" is defined for the purposes of this statute, i.e., in the broad sense of sheer power or authority,

versus requiring the exercise of that power to be pursuant to some sort of adjudicatory function.

Still, as noted above, in the instance of prosecuting terrorist financing operations, if the target is fronting as a non-profit or charitable organization, it seems that the organization and its principals are conceivably on notice about IRS reporting requirements by virtue of the regulated nature of their activities and status, and any intentionally falsified reporting in violation of IRS regulations would certainly have the "natural and probable" effect of interference with official proceedings. Furthermore, the "charitable" organization itself likely does not have Fifth Amendment protections against producing incriminating documents as might a sole proprietor or individual citizen.<sup>56</sup>

Beyond the judicial debate as to what properly constitutes fair notice, even for terrorists, the government needs to remain mindful of fair application of the statute, as "zealous use of [§ 1519] by prosecutors could render it vulnerable to as-applied constitutional challenges."<sup>57</sup> As a general practice, prosecutors usually do not pursue obstruction charges as primary offenses,<sup>58</sup> but § 1519 "leaves ill-defined what conduct it prohibits, and while it is not unconstitutional to criminalize 'innocuous' behavior, it is unconstitutional to leave citizens guessing as to what behavior is prohibited."<sup>59</sup> Accordingly, it is possible for § 1519 to be arbitrarily or discriminatorily enforced, but that does not appear to have happened so far.

That in mind, terrorism prosecutions under § 1519 have both the likely advantage of making it easier to prove the evil intent of the defendant, as well as the possible disadvantage of being open to as-applied challenges, though the courts have rejected every such challenge so far. But as the statute may broadly be applied in cases ranging from child pornography possession and standard corporate crimes, to document destruction in regulated industries such as health care fraud and environmental violations, it seems that counterterrorism cases, especially those dealing with designated FTO targets, benefit from a presumption that defendants have fair notice that document destruction—in contemplation of an FBI raid, for example—is subject to § 1519.

#### IV. Conclusion

A charge under an obstruction of justice provision sometimes seems lazy—why would a prosecutor have to rely on such a charge if he has a strong case for a "primary" offense? Indeed, obstruction statutes are fundamentally different from other criminal laws, but for a very important reason: destruction of documents and/or other evidence, if successful, not only obstructs the proper administration of justice, but can prevent the possibility of justice being served altogether. Section 1519 is broad enough to incorporate acts of obstruction across the board such that society can limit, as much as possible, the survival of the fittest criminals.<sup>60</sup> By comparison, a long-held principle in immigration law is that the government has a right to investigate the backgrounds and moral character of visa and citizenship applicants.<sup>61</sup> Likewise, the government has the legitimate power to investigate criminal conduct domestically, and the destruction of evidence limits its ability to do so. As a society, we should prefer that those best at covering their tracks not be handled



lightly by the judicial system. Obstruction statutes therefore can be viewed as an effort to counterbalance criminals' attempts to "get away with it." In a macro-sense, penalties for obstructing justice should sway the cost-benefit analysis of continuing one's criminal activity via cover-ups.<sup>62</sup>

This is not to say that the job of courts is simply to make life easier for prosecutors by artificially keeping evidentiary thresholds low or generally interpreting statutes in the government's favor. Rather, legal cannons summarily reject these notions via lenity with respect to statutory ambiguity and impose all but the highest burden of proof on the evidence to win criminal convictions. This is where the tensions between liberty and justice appear—as a society, we value individuals', even criminals', liberty but also want justice done for wrongdoing. Yet courts have generally agreed that § 1519's language is very clear—it is intended to be far-reaching and was clearly written to avoid additional judicially-created conditions, such as a nexus requirement.

Criminal law, generally, governs the punishments of those who, with a blameworthy state of mind, commit acts that society deems unacceptable. Contemplating a federal investigation—*any* federal investigation—into one's own wrongdoing and acting to try to make such an investigation impossible, has long been thought of, at least in the abstract, as being criminally culpable. And such anticipatory obstruction under § 1519 is a specific intent crime; a defendant's intent to obstruct a government investigation, outside of means which are otherwise Constitutionally and/or statutorily protected, implies that the defendant had fair notice that his acts of destroying evidence were illegal. If, as applied, § 1519 seems to be only the overly harsh product of a Congress reeling from legislative loopholes exploited by major corporations throughout the 1990's, then it is up to Congress to amend the statute. But, in reading this very clear statute, with very explicit legal history, and incorporating notions of what truly constitutes fair notice of unlawful acts, the courts should steer clear of distending *Aguilar's* nexus requirement to limit § 1519's reach, especially in the case of prosecuting those who try to cover up material support of terrorism.

## Endnotes

- 1 See 8 U.S.C. § 1189.
- 2 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).
- 3 See 18 U.S.C. §2339A.
- 4 544 U.S. 696 (2005).
- 5 *Id.* at 704, 707 (internal quotes and punctuation omitted).
- 6 Corporate and Auditing Accountability and Responsibility Act of 2002 (Sarbanes-Oxley Act), Pub. L. 107-204, 116 Stat. 745 (2002).
- 7 See *Andersen*, 544 U.S. at 698-702.
- 8 See, e.g., *United States v. Ionia Management SA*, 526 F. Supp. 2d 319, 329 (D. Conn. 2007).
- 9 See 515 U.S. 593 (1995).
- 10 *Id.* at 599-601.

11 See *Aguilar*, 515 U.S. at 599; *Andersen*, 544 U.S. at 707-08.

12 Similar principles to the ones examined herein may also apply to counterespionage investigations, but particular differences between the two render such comparisons beyond the scope of this article.

13 The other new offense is codified at 18 U.S.C. § 1520, which addresses auditors' record-keeping practices. In addition, Section 1102 of the act modified 18 U.S.C. § 1512, the section under which Arthur Andersen was prosecuted, to include document destruction.

14 148 Cong. Rec S7, 418 (daily ed. July 26, 2002) [hereinafter Leahy floor comments].

15 *Id.* at 7419.

16 *Aguilar*, 515 U.S. at 599; see also *Andersen*, 544 U.S. at 708. Justice Scalia, dissenting in *Aguilar*, believed that the nexus requirement the Court ordered substituted "natural and probable effect" for intent. 515 U.S. at 611 (Scalia, J. dissenting). Possibly in light of that observation, between *Aguilar* and *Andersen* circuit courts that directly addressed the nexus issue for charges under Section 1512 refused to expand the doctrine to that statute. See Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under the Sarbanes-Oxley Anti-Spreading Statute*, 18 U.S.C. § 1519, 89 CORNELL L. REV. 1519, 1538 (2004).

17 Leahy floor comments, *supra* note 14, at 7419.

18 See *id.*

19 Hill, *supra* note 16, at 1559, cited in *United States v. Jho*, 465 F. Supp. 2d 618, 636 (E.D. Tex. 2006).

20 The pertinent filings in the district court do not appear to be readily available; the facts above come from a brief discussion of the charges that appeared in the published Sixth Circuit opinion on an interlocutory appeal, 468 F.3d 920 (2006), which addressed the government's handling of expert witness testimony. See also Milt Capps, *Ganier Pleads Guilty to Federal Charges*, NASHVILLE POST, July 24, 2007, available at <http://www.nashvillepost.com/news?id=27210>.

21 See *Ganier, Friend of Sundquist, Pleads Guilty to Misdemeanor*, KNOXNEWS.COM, July 24, 2007, <http://www.knoxnews.com/news/2007/jul/24/ganier-friend-sundquist-pleads-guilty-misdemeanor/?printer=1/>.

22 See Leahy floor comments, *supra* note 14.

23 Not all of the below-cited cases have resulted in convictions by juries, and few appellate opinions that cite the statute exist. The most complete discussions of the elements of the law can be found in trial-level opinions, *Jho* and *Ganier*, examined further below.

24 See *Khan v. Gonzales*, 2006 WL 4447634 at \*1 (W.D. Tex. 2006).

25 See *United States v. Vega*, 184 Fed. Appx. 236, 242-43 (3d Cir. 2006) (taking judicial notice that the destruction of immigration documents to obstruct an investigation would violate § 1519, which helped to establish corruption for the § 1512 charge).

26 *United States v. Hunt*, 526 F.3d 739 (11th Cir. 2008) (Defendant narcotics detective, having had prior training that the FBI may investigate claimed civil rights violations by officers, made false entries in a use of force report.); *United States v. Perkins*, 470 F.3d 150 (4th Cir. 2006) (Defendant police officer included false allegations in a police report—plead out on another charge.); *United States v. Jackson*, 186 Fed. Appx. 736 (9th Cir. 2006) (Defendant police officer wrote a deliberately vague report to protect a fellow federal officer.).

27 See *United States v. Hoffman-Vaile*, 2006 WL 2927564 at \*1 (M.D. Fla. 2006) (Defendant in Medicare fraud case removed photographs from files before turning them over to federal investigators. The judge rejected the argument that Section 1519 does not prohibit interference with a grand jury investigation.); *United States v. Mermelstein*, 2007 WL 1299162 (E.D.N.Y.) (Defendant ophthalmologist indicted for destroying, altering, and falsifying records involved in an investigation and proper administration of matters within the jurisdictions of HHS and the FBI—he falsified and altered medical records submitted as part of a health care fraud scheme.).

28 *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303 (2d Cir. 2009) (Defendant shipping company made false entries in ship's pollution logs.); *United States v. Jho*, 465 F. Supp. 2d 618 (E.D. Tex. 2006) (Defendant, chief



engineer on a foreign vessel, falsified entries in ship's pollution control logs that would be turned over to the United States Coast Guard. The district court's grant of defendants' motion to dismiss certain non-Section 1519 charges was reversed and remanded, 534 F.3d 398 (5th Cir. 2008)).

29 *United States v. Velasco*, 2006 WL 1679586 (M.D. Fla. 2006) (Defendant project manager of a construction company, in securing a contract with the Veterans Administration, back-dated an employment contract to hide a kick-back/obstruct an investigation by the VA's Office of the Inspector General.); *Thrower v. United States*, 2005 WL 1460128 (N.D. Ohio 2005) (Defendant falsified records in bankruptcy).

30 *See United States v. Wortman*, 488 F.3d 752 (7th Cir. 2007) (Defendant destroyed a CD-ROM with the intent to impede, obstruct, or influence an FBI child pornography investigation, then told someone to lie about what she did.); *United States v. Smyth*, 2007 WL 81664 (3rd Cir. 2007) (Defendant destroyed his hard drive to obstruct an FBI child pornography investigation, after being contacted by the FBI and agreeing to cooperate. Defendant pleaded guilty.); *United States v. Mays*, 2007 WL 1839480 (M.D. Fla. 2007) (Defendant deleted child pornography files from his company-issued laptop during an investigation of his alleged physical touching of a young girl on a commercial airliner.).

31 *United States v. Ganier*, 468 F.3d 920 (6th Cir. 2006) (*see* MDTN Criminal Action No. 04-193-KSF, Case 3:04-cr-00193) (Defendant deleted emails pertaining to a grand jury investigation of his company. Defendant pleaded guilty to lesser charges. *See* brief discussion in the main text, *supra*.); *In re Grand Jury Investigation*, 445 F.3d 266 (3rd Cir. 2006) (Defendant deleted files during a grand jury investigation; conduct also allowed for the application of the crime/fraud exception to the a/c privilege).

32 *See* generally the *United States v. Eye* and *United States v. Sandstrom* series of decisions in the Western District of Missouri in 2006.

33 The jury need not be instructed that a falsification must be "material." *See United States v. Ionia Mgmt. S.A.*, 555 F.3d 303, 310 (2d Cir. 2009).

34 *Hill, supra* note 16, at \*1527.

35 Jonathan D. Polkes, *Obstruction of Justice Nexus Requirement Unclear in New Statutes*, N.Y.L.J., July 7, 2003 ("Despite Congress' arguably clear intent to avoid the nexus requirement under § 1519, it is still possible that courts will consider adopting it to satisfy the fairness concerns alluded to in *Aguilar* . . . [I]n light of the Supreme Court's fairness concerns, Congress may have reached too far in attempting to prevent document destruction.").

36 Albert D. Spalding & Mary Ashby Morrison, *Criminal Liability for Document Shredding after Arthur Andersen LLP*, 43 AM. BUS. L.J. 647, 656.

37 *The Supreme Court, 2004 Term, Leading Cases*, 119 HARVARD L.REV. 404, 410 (2005).

38 Middle District of Tennessee docket number 3:04-cr-00193.

39 *See id.* (citing *Hill, supra* note 16, at 1562).

40 *Id.*

41 639 F. Supp. 2d 226, 234 (D. Conn. 2007) (where § 1512 was also at issue).

42 *Id.* at 413 (citations omitted).

43 *Jho*, 465 F. Supp. 2d at 636 (citing a letter from Senator Leahy to Attorney General Ashcroft, 8/2/02).

44 *Id.* at 635, 636 n.9. Note also that the *Jho* decision is more recent than Judge Forester's *Ganier* order.

45 *United States v. Jho*, Second Superseding Indictment, Case 1:06-cr-00065-TH, Document 46 (E.D. Tex.).

46 *Jho*, 465 F. Supp. 2d at 636.

47 *Russell*, 639 F. Supp. 2d at 237.

48 *See United States v. Wortman*, 488 F.3d 752, 754-55 (7th Cir. 2007).

49 Pub. L. 108-458.

50 *See* Anti-Terrorism, Crime and Security Act 2001, c.24, § 117 (U.K.) ("Information About Acts of Terrorism"), available at [http://www.opsi.gov.uk/Acts/acts2001/ukpga\\_20010024\\_en\\_12#pt13-pb4-l1g117](http://www.opsi.gov.uk/Acts/acts2001/ukpga_20010024_en_12#pt13-pb4-l1g117) (last visited Jan. 20, 2010). The Explanatory Notes to the Act are available at <http://www.opsi.gov.uk/acts/acts2001/en/01en24-d.htm>.

[opsi.gov.uk/acts/acts2001/en/01en24-d.htm](http://www.opsi.gov.uk/acts/acts2001/en/01en24-d.htm).

51 IRTPA did amend two statutes similar to the ones discussed in this article (18 U.S.C. §§ 1001 (fraud and false statements) and 1505 (obstruction)) to increase the maximum possible sentence of those convicted under either of those laws "if the offense involves international or domestic terrorism (as defined in section 2331)." It is outside the scope of this article but nevertheless worth noting that although there is little doubt of Congress' intent in passing IRTPA, the text of the amendments themselves leaves unclear whether those increased maximums for crimes that *involve* terrorism can be applied to defendants convicted of material support of terrorism, rather than committing terrorist acts.

52 *See* 465 F. Supp. 2d at 635.

53 Indeed, Hill's argument for a broad reading of § 1519 assumed somewhat sophisticated parties. *See Hill, supra* note 16, at 1523. Still, in the unlikely event that a court were to require that a defendant have knowledge of a particular proceeding for the statute to apply, it is unlikely that the government would want to present some such evidence in open court. Any such order, however, would clearly be contrary to Congress' intent, and where defendants have raised this issue, none appears to have been successful in the cases reported thus far.

54 *See* Leahy floor comments, *supra* note 14, at 7419.

55 18 U.S.C. § 1519.

56 *Cf. United States v. Shinderman*, 2006 WL 522105 at \*13 (D. Me. 2006).

57 *See supra*, n. 37, 119 HARV. L. REV. at 413. *See also* Albert D. Spalding & Mary Ashby Morrison, *Criminal Liability for Document Shredding After Arthur Andersen LLP*, 43 AM. BUS. L.J. 647, 684 ("Congress likely did not intend for the obstruction of justice provisions of SOX to be used oppressively."). It would seem a stretch (and belittling), for example, to call a terrorist's bombing of people or infrastructure "obstruction" simply because evidence is destroyed in the blast. There should be a logical disconnect between the act under investigation and the act of destroying evidence (presumably as a secondary offense, both legally and temporally).

58 *See Hill, supra* note 16, at 1526 (citing DOJ statistics that only 0.4% of all persons arrested for federal offenses in 2000 were arrested for obstructing justice).

59 *See supra*, n. 37, 119 Harv. L. Rev. at 413.

60 For a discussion about the philosophical and moral principles behind criminalizing obstruction and similar crimes, see Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9 (2005).

61 *See, e.g., Corrado v. United States*, 227 F.2d 780, 784 (6th Cir. 1955).

62 *But see* Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671 (2002) (doubting the Act's potential for deterring corporate crime).



---

# THE EUROPEAN UNION, THE TREATY OF LISBON, AND “JUSTICE AND HOME AFFAIRS”

By Paul Rosenzweig\*

---

With the vote of the Irish in a referendum and the signature of a reluctant Czech President, the European Union has begun the process of implementing the Treaty of Lisbon.<sup>1</sup> That treaty, which entered into force on December 1, 2009, creates new institutions in the European Union, changes voting rules, and changes the allocation of power among European institutions. It will, quite naturally, work a sea change in the operation of the EU, something that Europeans have long anticipated.

What is less well-understood is how significant the adoption of the Lisbon Treaty will be for the United States. Few outside of the diplomatic establishment have a clear understanding of how America will be affected by these changes. In the near term the changes are likely to be relatively modest; in the long run they are likely to be profound, particularly in the area of “Justice and Home Affairs” (JHA), which is the European name for areas of law and policy that Americans think of as law enforcement, homeland security (or, as the Europeans call it “internal security”), and counter-terrorism.

To put the matter simply (and to simplify greatly for introductory purposes), in the past JHA matters have, presumptively, been the responsibility of each independent sovereign nation that is a member of the EU. Thus, the basic rule has been that questions of policing, for example, were each nation’s individual responsibility. Under the law as it existed prior to adoption of the Lisbon Treaty, that presumption of individual state action could be overcome—but only with the unanimous agreement of all 27 member nations of the Union. To be sure, under this régime collective action has occurred—supranational organizations like Europol (a Europe-wide police agency), Eurojust (a Europe-wide prosecutorial organization), and Frontex (the European border security coordination agency) have been set up, and common rules for warrants and extradition are being developed—but action in this area was often perceived by Americans as slow and incremental, since consensus was required for any action.

Under the Lisbon Treaty that will change in at least two significant ways: First, the European Council (the body where each member nation has a single vote) will be authorized to act under a more majoritarian rule (it won’t be a simple majority system but rather one with weighted voting) and unanimity will no longer be required. Second, the Council will now share decision-making power with the members of the European Parliament (comprised of elected representatives from the 27 EU member states). That body had, previously, very little real authority in JHA matters—its pronouncements were mostly viewed as advisory and hortatory. As a consequence many in America perceived the Parliament as irrelevant and somewhat

irresponsible. Under the Lisbon Treaty the Parliament will now have greater relevance.

## A (Very) Brief History of the European Union

The history of the European Union is rich and complex. The changes wrought by the Lisbon Treaty can only be understood against the backdrop of that history.

The EU owes its existence to a series of supra-national treaties. At various times and in various combinations, the separate sovereign countries of Europe have adopted treaties binding themselves to participation in the supranational structures and institutions of the Union.

The EU began with the adoption of the Treaty of Rome (more formally known as the Treaty Establishing the European Community), which was signed by six nations (West Germany, France, Italy, Belgium, Netherlands, and Luxembourg) in 1957. At its inception the European project focused primarily on establishing common economic policies amongst the several nations. Battered by World War II, this first union grew out of a proposal to create a common economic market in coal and steel. It was thought that this sort of community approach to vital factors of production would “make war unthinkable and materially impossible.”<sup>2</sup>

Over time, the Community expanded its role in the economic affairs of Europe, creating various institutions and systems for fostering a common economic market. Perhaps most notably, in 1985 some members of the Community adopted the Schengen Agreement,<sup>3</sup> which led to the elimination of border controls between the signatory nations. The Schengen area has since been expanded to include twenty-five separate nations and formally incorporated into EU governing law. As a result, one may now travel from Portugal to Poland without the need to show a passport.

Later still, in 1992, European nations adopted the Maastricht Treaty (formally known as the Treaty of European Union). The treaty was notable for the transition of the European Community to a more formal Union and for beginning the process that led to the adoption of the Euro as a currency. As the Euro zone expands, one now uses the same currency in France as in Finland.

To give effect to these two treaties, the Union has developed four institutions to implement its policies. These institutions, at least in form, will be familiar to the American reader. Thus, the Union has a European Parliament, consisting of elected officials from throughout Europe, and a European Court of Justice, akin to our court system.

The executive function is split between the European Council (which consists of the heads of state of the twenty-seven member nations) and the European Commission (which is, in effect, the Brussels bureaucracy). Naturally, as the elected heads of state, the Council has a certain degree of primacy. It can act for Europe, even when no treaty directs it to do so by the simple expedient of acting with unanimous agreement. Until the adoption of the Lisbon Treaty, the Presidency of the Council rotated every six months among the member states.

---

\* Principal, Red Branch Consulting, PLLC and Adjunct Professor, National Defense University, College of International Security Affairs. The author was formerly Deputy Assistant Secretary for Policy at the Department of Homeland Security.

By contrast the Commission staff acts only insofar as they have authority to do so. Often that authority comes from a provision of one of the EU's treaties. Equally often, the Commission (which is akin to our own civil service) acts pursuant to a direction from the Council in an area where no treaty-based role for the European Union exists.

Thus, where a treaty has spoken, the Commission can act; where it has not, the Council can act on behalf of Europe, often with the help and assistance of the Commission. Of course, even if the Council has no *de jure* role over an issue of supra-national concern to Europe (since a treaty has already spoken to the question), the collective view of the members of the Council carries highly persuasive weight with the Commission in determining how to execute its authority.

But the greater significance of Maastricht, at least insofar as it applies to areas under consideration in this paper, was the steps it took to expand European-level powers of the Commission (the executive) beyond economic issues. Under Maastricht, the economic powers of the European Community were transferred to the Union and exercised under a "First Pillar" of authority. In these matters, the institutions of the European Union had, in effect, plenary authority to act.

But several member states wanted to extend the economic cooperation of Europe to the areas of foreign policy, military, criminal justice, and judicial cooperation. Others, most prominently the United Kingdom, had misgivings about giving control over these sensitive sovereign areas to the supra-national institutions of the Economic Community. As a compromise, Maastricht created two other "pillars"—one for a Common Foreign and Security Policy and one for Justice and Home Affairs. In these two pillars, unlike the First Pillar, the powers of the Commission, the Parliament, and the Court of Justice to influence these new intergovernmental policy areas were greatly limited. In effect, any supra-national action required a unanimous agreement of all the member states before the European institutions could act.

Thus, as the European Union approached the 21st Century it had a cast to it that would look almost like a federalism discussion to an American observer. Some powers (mostly in the economic arena) were principally exercised by a centralized executive (the European Commission) in Brussels. Other powers, mostly those relating to foreign and defense policy and those relating to law enforcement, were principally exercised at the independent member state level, except to the extent that the states agreed to let Brussels take the lead. To be sure, from the American perspective it is a federalism discussion that is skewed—imagine Washington having no foreign or defense policy role, but a paramount economic authority—but nonetheless the contours would be familiar.

### The Treaty of Lisbon

From its small, early beginning in 1957, the European Union has grown into a colossus. It has twenty-seven member states and spans the distance from Ireland to the newest states in the southeast, Bulgaria and Rumania. As it has grown, however, the capacity for consensus building has diminished. Where once it was comparatively easy to find agreement among six or later ten states with a common heritage, now the Union

has twenty-seven actors, many with very diverse cultural and political backgrounds. European commentators, assessing the situation, saw increasing caution and lassitude at the pan-European level.

In part to answer this, Europe has now adopted the Treaty of Lisbon.<sup>4</sup> The treaty is a further step on the road to more centralized power in Brussels, particularly in the area of Justice and Home Affairs. Whether the *de jure* changes will be followed by significant *de facto* changes remains to be seen, but there can be little doubt that Lisbon is intended to make collective action at the European level easier, with a concomitant reduction in the authority of individual sovereign nations to act.

A number of changes will push Europe down this path to centralization.<sup>5</sup> Among the most significant in the treaty (for purposes of Justice and Home Affairs issues) are:

- The European Union will now have a President, selected by the European Council (i.e., the twenty-seven heads of state).<sup>6</sup> The President will chair the Council and may become the leading voice of Europe around the world. Many years ago, Henry Kissinger was said to have asked, "Who do I call if I want to speak to Europe?"<sup>7</sup> If he had wanted to make the call, today he would dial Europe's first President: Herman Van Rompuy, formerly the Prime Minister of Belgium;
- Europe will also have a High Representative for Foreign Affairs and Security Policy, selected by the Council, with the approval of the Parliament.<sup>8</sup> It will also have a quasi-diplomatic service, known as the European External Action Service (EEAS), which will operate on behalf of the High Representative. The first appointee to the post of High Representative under the new provisions is Catharine Ashton from the United Kingdom, who will also serve as a public face of Europe.
- And, most significantly, the Treaty eliminated the Three Pillar structure adopted at Maastricht. Going forward, all issues relating to Justice and Home Affairs will be treated like those issues proposed for adoption relating to economic affairs.

This later point will work a sea-change in the legislative process for Justice and Home Affairs issues. As noted earlier, under Third Pillar rules from Maastricht, unanimity was required in the European Council to adopt a measure relating to Justice and Home Affairs for the Union. Now, matters will proceed differently, through two processes known as "Qualified Voting Majority" and "Co-Decision"—processes that are part of the "normal legislative process" in the EU for economic affairs.

Qualified Voting Majority (or QVM), as its name implies, means that unanimity within the European Council will no longer be required for Europe to collectively act on JHA matters. Instead, voting will be done by each country, which casts a ballot that is "weighted" roughly in proportion to its population. The majority requirement (to get a majority of the weighted votes) is further "qualified" by a distribution requirement—the positive votes must have fifty-five percent of the individual countries representing at least sixty-five percent of the total population.<sup>9</sup> Despite the complexity of the voting system, the end result is clear—a working majority of



the member states is now authorized to create supra-national policy on matters of law enforcement and homeland security in situations where previously unanimity was required. Minority states that do not agree will, nonetheless, be bound to follow the European lead.<sup>10</sup>

Co-Decision reflects the increased power of the European Parliament. Where, previously, the Council was merely obliged to “consult” with the Parliament, now initiatives proposed by the Council must be affirmatively adopted by the legislature. Without Parliament’s review and approval no new European initiative can proceed. In effect, the Parliament has gained a great deal of new power to control the justice and home affairs operations of the Union.

These changes in decision-making authority will operate across a broad range of EU activities. The new non-unanimity and co-decision procedures will apply to rules about visas, immigration, judicial cooperation in criminal matters, the operation of Eurojust and Europol, and matters of non-operational police cooperation. Questions of asylum policy and illegal immigration will remain areas where qualified majority and co-decision apply. Only issues of passport and identity card issuance, family law, and operational police cooperation will remain ones requiring unanimous Council approval that do not require Parliamentary assent.<sup>11</sup>

In addition to these changes in decision-making powers, the treaty also effects changes in judicial review. Prior to the Treaty of Lisbon, justice and home affairs matters had generally been deemed questions of domestic law, subject to review by the courts of each member state. Now, to the extent these JHA matters become the subject of pan-European legislation, they will also be subject to review by the European Court of Justice—adding another centralizing layer of authority to domestic practices.

Finally, and perhaps most significantly, the Treaty establishes a new standing committee within the European Council on issues relating to internal security, to be known as “COSI.”<sup>12</sup> The new committee will attempt to strengthen coordination among the member states on issues of police and customs cooperation, external border protection and judicial cooperation in criminal matters. While COSI will not make legislative proposals directly, it seems likely that its efforts will influence the Council in developing more pan-European approaches to these areas of law enforcement and homeland security.

#### What Does the Future Hold?

So, what does all of this mean for the European Union?

At first, one suspects the answer is “not much.” The procedural changes worked by the Lisbon Treaty are immense. It will take a great deal of time simply to create and staff the new institutions for which the treaty calls. Symbolizing the difficulty in transitioning to a new legal régime, the provisions of the treaty giving the Commission and the Court of Justice authority over police matters and judicial cooperation in criminal matters will not actually take effect for five years, in December 2014.<sup>13</sup>

Even after the new treaty institutions are created and staffed, it remains to be seen how much true authority they will have. Though the intention of the treaty is clearly to centralize

more decision-making authority in Brussels, the capacity and expertise to exercise that authority will take time to develop. One sign of that developing expertise will likely be the creation of permanent staff cadres with homeland security and justice expertise at the new European institutions. One might, for example, expect to see the staff of the COSI become a repository of pan-European expertise in these areas, much as the staff of congressional committees is in the United States. And if the new President intends to exert any influence in the area, one might see the establishment of a structure akin to the NSC/HSC structure in the Executive Office of the President here in America. Conversely, the lack of these authoritative repositories of expertise will, in the end, make significant centralization of JHA affairs more difficult.

Then, too, it remains to be seen how much the QVM system changes the dynamics of the European Council. It is often said that in Europe very little gets done unless the “big” countries want it to be done—and that when they agree, things happen. Historically, the larger countries (e.g., Germany, France, Italy, Spain, and the UK) have had powerful terms as Presidents of the Council and achieved significant changes, while smaller countries have been less effective on the European stage. It seems unlikely that the QVM voting system will change that and that the continued influence of the larger European nations will continue.

The “wild card” in the equation, if there is one, is the European Parliament. In the past the Parliament has had a negligible role in justice and home affairs matters. Though “consulted” by the Council, parliamentarians were, in practice, often ignored. This, in turn, fostered within the Parliament a fairly strong mindset in opposition to EU-wide security matters. Often this opposition was couched as an objection to the encroaching of the growing EU security state, and several MPs have gained a small following as “defenders of freedom.” It remains to be seen whether the grant of greater authority to the Parliament will moderate its sometimes strident tone, or whether the parliamentarians will now interpose their objections to increased security measures with greater success. Earliest signs are not encouraging – the Parliament’s first act was to reject a terrorist financing information sharing agreement with the United States, rejecting a successful program implemented shortly after September 11.

And what does it mean for America’s trans-Atlantic relationship with the EU and with its traditional sovereign allies? Only time will tell. Some may see the new EU power structure as a more effective partner. If the QVM process works to energize European action and the Parliamentary co-decision rule does not become an obstacle, the strengthening of Brussels may work in America’s favor.

On the other hand, others see the strengthening of the EU as a challenge to the United States’ long-standing bilateral relationships with the countries of Europe. Under this view, we are more likely to achieve our political objectives with the assistance of our traditional friends than we are working with the new EU institutions. As Henry Kissinger has said:

When the United States deals with the nations of Europe individually, it has the possibility of consulting at many



levels and to have its view heard well before a decision is taken. In dealing with the European Union, by contrast, the United States is excluded from the decision-making process and interacts only after the event . . . . Growing estrangement between America and Europe is thus being institutionally fostered.<sup>14</sup>

The answer, in the end, is likely to lie somewhere in between. It will depend, to a large degree, on how the European centralization project moves forward. One suspects that, for the near (and even medium) term, America's relations with its traditional sovereign peer allies will continue to form the bedrock of our counter-terrorism operations. Unless and until Europe develops a coherent supra-national police force (not to mention a supra-national intelligence community) with whom their American equivalents can interact (if, in fact, we would want to—itsself an open question), it is likely that our exchanges of information and operational assistance with member states and their domestic justice and home affairs services will continue to predominate.

In the longer term, however, the Treaty of Lisbon signals a clear European commitment to increased Europeanization of issues traditionally thought of as state and local powers. Moving forward, America would be wise to take that trend into account.

## Endnotes

1 The full English language text of the 200+ page treaty can be accessed at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.

2 The intent was expressed in the so-called Schuman Declaration, named after Robert Schuman, a leader in Luxembourg at the time. The text of the declaration is available at <http://www.schuman.info/9May1950.htm>.

3 The original Schengen Agreement is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF>.

4 Greater efficiency was not the only reason some sought treaty revisions. Indeed, since more regulation has passed in the EU since the last enlargement in 2004 than had before, some suggest that the efficiency rationale is only part of the story and that the Lisbon Treaty is as much motivated by a desire to enforce pan-European discipline on external matters as it is by a desire to increase internal functioning.

5 As a matter of form, the Treaty of Lisbon does not serve as a stand-alone separate treaty. Rather, its provisions are in the nature of amendments to the existing treaties from Rome and Maastricht that form the basis of the Union's structure. These amendments have been consolidated with all the old treaties into a single new, unified treaty, now titled the Treaty on the Functioning of the European Union (TFEU), and citations to provisions implementing changes occasioned by the Treaty of Lisbon are commonly made to the new consolidated TFEU. Thus, Justice and Home Affairs matters are now covered in Art. 67-89 TFEU (freedom, security and justice) and Art. 196 TFEU (civil protection).

6 Art. 15 TFEU.

7 It is likely that the quote, and its attribution to Kissinger, is apocryphal. See Kissinger Never Wanted to Call Europe, <http://blogs.ft.com/rachmanblog/2009/07/kissinger-never-wanted-to-dial-europe/> (July 2009).

8 Art. 18 & 27, TFEU.

9 To illustrate the comparative complexity of the voting requirements, one might review the EU's "voting calculator," available at <http://www.consilium.europa.eu/App/calculette/default.aspx?lang=en&cmsid=1690>.

10 There is, in effect, a "qualified veto" provision in the treaty as well that

may provide minority states a means of resisting a majority decision. National parliaments are allowed to exercise a qualified negative on EU proposals. If a proposal that has been passed by the Council and the Parliament is subsequently rejected by one-third of the parliaments of the Member States, the Council must reconsider the proposition. How frequently this will occur in practice remains to be seen—though, given the arithmetic, the possibility does exist for a successive looping function where a qualified majority of the Council passes a proposal that a recalcitrant minority of national parliaments rejects.

11 Art. 77-88, TFEU.

12 Art. 71, TFEU.

13 Art. 10 of Protocol 36, TFEU. The United Kingdom has reserved the right to opt out of these provisions completely. For those who wish to understand the many political compromises that were necessary to bring the Lisbon Treaty to fruition, a perusal of the thirty-seven separate protocols (each modifying a treaty element in some way) will reward the curious reader. The protocols may be accessed at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0201:0328:EN:PDF>.

14 HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? 57 (2001).



---

# INTERNATIONAL LAW UNDER THE CONSTITUTION AND TRANSNATIONAL PROGRESSIVES

By Vincent J. Vitkowsky\*

---

**T**he U.S. Constitution created the structure for a sovereign nation operating in an international system. It recognized the importance of international law, and left the content, interpretation, force and effect of international law to the three branches of the U.S. government.

Properly understood, the creation and use of international law is an exercise of sovereignty which can advance U.S. interests and national security. It is a serious undertaking of importance to vital issues. How is this traditional conception affected by the activities of “transnational progressives,” who, according to some, place a greater premium on norms found in customary international law?

This article proceeds from the analytical principle that international law is subordinate to the Constitution. This construct has been described as the “Internal/Constitutionalist narrative.” It is in contrast to the “External/Internationalist narrative,” which would treat external public international law, tribunals and sources as the controlling forces, and the “Transnational/Intersystemic narrative,” which would look to multiple, interactive systems of law to guide interpretation and application of international law.<sup>1</sup> The Internal/Constitutionalist narrative is the only one that courts and government officials can seriously embrace. It was the construct used by the U.S. Supreme Court in the most important recent case on international law, *Medillin v. Texas*,<sup>2</sup> and used by the parties and the U.S., as amicus curiae, to brief that case.<sup>3</sup> It is worth observing, however, that unlike most courts and government officials, theorists of international law—chiefly professors and advocates in non-governmental organizations—tend to accept and promote the other narratives.

## The Constitution

Only two constitutional provisions speak directly to the status of international law. The first is the Supremacy Clause,<sup>4</sup> which addresses treaties. It provides as follows:

The Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

The second reference to international law appears in the Define and Punish Clause,<sup>5</sup> which gives Congress the power to “define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations.” The Law of

Nations was the Founding-era term for what, in part, is known today as customary international law.

## Treaties

The species of international law with the greatest force and effect is created by treaties, which are, in essence, contracts between sovereigns. When the U.S. enters into a treaty, negotiated by the President and ratified by two-thirds of the Senate, it makes commitments and undertakes obligations to the other signatory nations. Treaties can include agreements about adjudication of disputes concerning their interpretation and application.

Treaties are subject to limitations. Michael Stokes Paulsen has argued, for example, that the United States cannot agree to undertakings which are inconsistent with the Constitution.<sup>6</sup> This is typically avoided by attaching reservations, understandings, and declarations to ratification.<sup>7</sup> Next, perhaps the most important limitation is the system of checks and balances established by the Framers. The power to interpret and apply all international law, including treaties, is shared by the three branches of government, as distributed by the Constitution. To summarize Paulsen’s comprehensive analysis, the President has responsibility to interpret and apply international law consistent with his powers to serve as Commander-in-Chief and to conduct the nation’s foreign policy. Congress has responsibility pursuant to its powers to declare war, and to define and punish offenses against the law of nations by enacting legislation (or not enacting legislation) for carrying treaties into execution. The judiciary has responsibility to adjudicate cases presenting questions about treaties and customary international law which are properly before them.<sup>8</sup>

There is a crucial distinction between international commitments made by a sovereign, and legal obligations that are enforceable as a matter of binding federal law in domestic U.S. courts. All treaties give rise to international commitments, but not all give rise to legal obligations that may be enforced in U.S. domestic courts. The distinction turns on whether a treaty is “self-executing.” A self-executing treaty is one that, upon Senate ratification, has automatic domestic effect as federal law. A “non-self-executing” treaty only has domestic effect as federal law upon the passage of further implementing legislation. Even self-executing treaties are understood not to create private rights or provide for a private cause of action in domestic courts, in the absence of express language to the contrary.

The U.S. Supreme Court clearly applied these principles in the recent case of *Medillin v. Texas*.<sup>9</sup> That case followed an International Court of Justice (“ICJ”) judgment in a matter known as *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)* (“*Avena*”).<sup>10</sup> The ICJ had held that 51 Mexican nationals who had been convicted of crimes and sentenced, including Jose Medillin, were entitled to review and reconsideration of their state court convictions and sentences because they had not been informed of their rights to notify the

---

\* Vincent J. Vitkowsky is a partner at Edwards Angell Palmer & Dodge LLP and an Adjunct Fellow at the Center for Law and Counterterrorism of the Foundation for the Defense of Democracies.

Mexican consulate of their detention. The U.S. Supreme Court held that the ICJ judgment in *Avena* would not supersede state procedural rules in criminal cases, even though the President had issued a Memorandum directing the states to give effect to the ICJ judgment.

Jose Medillin was a Mexican national who had lived in the U.S. since preschool. He became a member of the “Black and Whites” gang and was convicted in the brutal gang rape and murder of two girls, ages 14 and 16, and sentenced to death. He was not informed of his right, as a Mexican national, to notify the Mexican consulate of his detention. This right arises under a treaty the U.S. has entered into known as the Vienna Convention on Consular Relations (“Vienna Convention”),<sup>11</sup> and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (“Optional Protocol”).<sup>12</sup> Under the U.N. Optional Protocol, resolution of disputes concerning the interpretation or application of the Vienna Convention is subject to the compulsory jurisdiction of the ICJ. The U.S. has withdrawn from the Optional Protocol, but had not done so at the time that the ICJ issued the judgment in *Avena*. The ICJ is the principal judicial organ of the United Nations, and was established pursuant to the United Nations Charter (“U.N. Charter”), which itself is a treaty to which the U.S. is a signatory.<sup>13</sup>

In response to the ICJ judgment in *Avena*, President George W. Bush determined, through a Memorandum to the Attorney General (Feb. 28, 2005), that the U.S. would “discharge its international obligations . . . by having state courts give effect to the [ICJ] decision.”

The State of Texas Court of Criminal Appeals declined to review and reconsider Medillin’s conviction. It dismissed his writ of habeas corpus, as an abuse of the writ, in view of Medillin’s failure to raise his Vienna Convention claim in a timely manner under Texas procedural default rules.

In *Medillin v. Texas*, the U.S. Supreme Court held that neither the ICJ judgment nor the Presidential Memorandum created federal law that could be enforced in U.S. domestic courts to preempt the procedural rules of Texas relating to habeas corpus petitions. In reaching this holding, the Court concluded that the U.N. Charter, the Vienna Convention, and the Optional Protocol did not create self-executing obligations effective in U.S. courts. It reached that conclusion based on analysis of the text of the treaties, the executive’s construction (notwithstanding the Presidential Memorandum, as Chief Justice Roberts acknowledged in his majority opinion in *Medillin*, the U.S. has unfailingly taken the position that the Vienna Convention and Optional Protocol did not, in themselves, create domestically enforceable federal law), and the post-ratification understanding and practice of other signatories.

As for the Presidential Memorandum, the Court held that in the absence of implementing legislation by Congress, the President had no authority to turn a non-self executing treaty into a self-executing treaty. It further held that the President did not have the independent power to order Texas to comply by virtue of his foreign affairs authority to resolve disputes with foreign nations.

The import of *Medillin v. Texas* is clear. Unless a treaty or its implementing legislation expressly provides to the contrary, a judgment of the ICJ—or any other international tribunal—has no binding legal effect in the U.S., and the President is without power to change that result.

Another important limitation on treaties is that Congress can always supersede or override them by enacting subsequent inconsistent legislation. This is known as the “last-in-time” rule. There is no dispute that a subsequent congressional enactment trumps a treaty. There is also a serious view that the structure of the Supremacy Clause—which mentions the Constitution, and “Laws of the United States which shall be made in pursuance thereof,” i.e., statutes, before Treaties—creates a hierarchy in which all statutes, even those enacted prior to a treaty, will control over a treaty.<sup>14</sup>

A final limitation, which is not universally accepted, is that pursuant to his foreign affairs power, the President may interpret, suspend, or repudiate a treaty in whole or in part.<sup>15</sup>

### The Law of Nations (Customary International Law)

The second potential source of international law, known today as customary international law, is in essence the common laws of nations. Customary international law is defined as: (a) a widespread and uniform practice among nations that has ripened into a customary norm; (b) that nations follow out of a sense of legal obligation.

For a norm to be considered customary international law, it must have the widespread (but not necessarily universal) support of nations concerned with the issue it addresses, and must have continued long enough to give rise to at least an inference of recognition and acquiescence. Interim norms become customary international law once a large enough number of nations having an interest in them act in accordance with them. The assent of a nation is inferred by silence, except as to “consistent objectors.”

There is a special category of customary international law, *jus cogens* or “compelling law,” which is considered to consist of peremptory norms. The argument is that no nation is permitted to act contrary to those norms, whether or not it has acquiesced.

Although there is general acceptance of the concept of customary international law, beyond *jus cogens*, there is very little agreement on its content. Some argue that many malleable and questionable concepts should be considered customary international law binding in U.S. courts. For the most part, such arguments have been rejected.

In a case addressing customary international law known as *The Paquete Habana*,<sup>16</sup> the U.S. Supreme Court began a passage with the phrase “international law is part of our law.” This is often embraced and quoted by progressive advocates. But the key portions of the passage limit the opening phrase, by explaining: “[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”<sup>17</sup>

In practice, customary international law is most relevant in U.S. domestic courts in cases brought under the Alien Tort Statute,<sup>18</sup> which contains another Founding-era reference to the Law of Nations. It provides as follows:

Alien's action for tort

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.

Since 1980, U.S. courts have permitted this statute to be used by non-U.S. citizens to sue private individuals and corporations for violations of international law. The U.S. Supreme Court has interpreted the statute only once, in *Sosa v. Alvarez-Machain*.<sup>19</sup> That case narrowed and refined the range of principles that might constitute customary international law affording a private cause of action under the ATS. Although it left open the possibility that new principles of customary international law might emerge, the Supreme Court took pains to urge judicial restraint, and gave strong indications that lower courts should limit rather than increase the emergence of new principles.<sup>20</sup>

### “International Law” and “Transnational Progressivism”

Within its proper sphere, international law is a positive instrument that can address areas of common concern among nations. Notably, as Michael Chertoff has observed, through international law “states assume reciprocal obligations to contain transnational threats emerging from within their borders so as to prevent them from infringing on the peace and safety of fellow states around the world.”<sup>21</sup>

But tensions arise when “international law” is inaccurately described to include something other than ratified, implemented treaties, or the very few undeniably accepted principles of customary international law. Witness, for example, the failure of many countries to broadly protect free speech. Some speech that the U.S. protects under the 1st Amendment is considered by much of the rest of the world to be “heresy” or “blasphemy against Islam” and thus a violation of international human rights law.

Apart from application of customary international law, some support several proposed treaties that would present significant incursions into traditional notions of sovereignty and would raise federalism issues. In May 2009, the Obama Administration sought Senate advice and consent on ratification of the United Nations Convention on the Law of the Sea (“LOST”) and the United Nations Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”). LOST mandates arbitration of maritime disputes before an international tribunal. CEDAW implicates gender quotas, pay standards, and parental leave, rules not presently embraced by domestic law. It also seems likely that the Obama Administration will seek ratification of the United Nations Convention on the Rights of the Child, which would affect state discretion on issues such as juvenile justice, education, welfare, adoption, and custody and visitation.

One key arena for conflicts concerning the interpretation and application of international law is litigation brought into the U.S. domestic courts. Advocates calling for application of an international norm will often (1) argue that treaty obligations broader than those undertaken upon ratification and execution are enforceable as a matter of U.S. domestic law; and (2) articulate the existence of broad and disputed principles

of customary international law.<sup>22</sup> At times, courts are asked to (1) ignore U.S. reservations in treaty ratifications; (2) give domestic effect, as a matter of customary international law, to an alleged “consensus” of other signatories to a treaty that is contrary to U.S. reservations; and (3) grant the U.S. government powers on social and economic issues that, under the federal system in the U.S., historically reside with the states.

### Endnotes

1 These narratives have been presented in Margaret E. McGuinness, *Three Narratives of Medillin v. Texas*, 31 SUFFOLK TRANSNAT'L L. REV. 227 (2008).

2 552 U.S. 491 (2008).

3 McGuinness, *supra* note 1, at 235.

4 U.S. CONST. art. VI, cl. 2.

5 U.S. CONST. art. I, § 8, cl. 10.

6 Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 111 YALE L.J. 1174, 1785-1788 (2009).

7 For example, with respect to interrogation of captured terrorists, the most relevant international law is arguably a treaty, the 1984 U.N. Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment. The U.S. Senate ratified it in 1994, with a reservation. It limited the treaty's prohibition against cruel, inhuman, and degrading treatment to what was already required under U.S. law by the 5th, 8th and 14th Amendments. (There are two views on what this means. One view is that cruel, inhuman, and degrading treatment restrictions do not apply to aliens captured and held in foreign countries. As to those, only the torture prohibition applies. The other view is that the reservation relates only to the definition of prohibited treatment but not to the location of the suspects.) For the purpose of criminal proceedings, the 5th, 8th and 14th Amendments bar both coerced confessions and cruel and unusual punishment. But in other contexts, there is scope for flexibility in interrogation, based on the purpose of the government action. In *Rochin v. California*, 342 U.S. 165 (1952), the U.S. Supreme Court set the test: whether the method used “shocks the conscience,” considering all the circumstances, including the importance of the information sought. That is the controlling standard.

8 Paulsen, *supra* note 6, at 1816-1834.

9 552 U.S. 491 (2008).

10 2004 I.C.J. 12 (Judgment of Mar. 31).

11 Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820.

12 Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820.

13 Art. 92, 59 Stat. 1051, T.S. 993 (1945).

14 See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 302-307 (2005).

15 Paulsen, *supra* note 6, at 1789-1792.

16 175 U.S. 677 (1900).

17 *Id.* at 700.

18 28 U.S.C. § 1350 (2000).

19 542 U.S. 692 (2004).

20 For a more detailed review and analysis of the Alien Tort Statute, *Sosa*, and some remaining open issues, see Vincent J. Vitkovsky, *Understanding the Newly-Refined Role of Customary International Law in U.S. Courts*, 7(1) ENGAGE III (2006).

21 Michael Chertoff, *The Responsibility To Contain*, 88(1) FOREIGN AFF. (January/February 2009).

22 Transnational progressives sometimes argue that the Take Care Clause, U.S. CONST. art. II, § 3, which gives the President responsibility to “take Care that the Laws be faithfully executed,” can give rise to international obligations. This argument presupposes its conclusion—that certain purported norms, mislabeled as “international law,” create international obligations or federal law which are enforceable in U.S. courts.



---

# LABOR & EMPLOYMENT LAW

## THE FUTURE OF WORK STATUS LEGISLATION AND E-VERIFY

By Samson R. Elsbernd, Esq.\*

---

In the current debate over unauthorized immigration, many policymakers have proposed improvements to the nation's ability to verify eligibility to work in the United States. Work status laws are primarily directed at closing the back door on illegal immigration by curtailing the employment opportunities that lure unauthorized immigrants into the country.<sup>1</sup> The existing work verification system is thought to be inadequate to deter these unauthorized workers, hard to enforce, and burdensome on employers. Both state and federal authorities have sought to enforce work eligibility rules through new mechanisms, including state and local mandates and a new federal electronic verification system called "E-Verify."<sup>2</sup> Yet the future of work eligibility verification programs at the state level—and mandatory E-Verify participation at the state and federal levels—remains uncertain. Congressional support of E-Verify has been uneven, and work status legislation has faced continued legal challenges in the courts. The issues before the courts are likely to turn on issues of preemption and will perhaps soon be decided by the United States Supreme Court.

Efforts to verify a person's right to work in the United States were practically unknown before the passage of the Immigration Reform and Control Act of 1986 ("IRCA"), which prohibited U.S. employers from knowingly hiring or continuing to employ unauthorized aliens.<sup>3</sup> IRCA set up a paper-based system whereby employers have been required to review documents of employees hired after the effective date of IRCA, complete a Form I-9 together with the employee, and maintain these I-9 records according to federal regulations or face fines and penalties.<sup>4</sup> Dissatisfaction with aspects of this system led Congress to make changes in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). IIRIRA required the Attorney General to create three pilot work verification programs, including a program titled the "Basic Pilot Program," for the more efficient and accurate verification of work status.<sup>5</sup> Congress also directed the President to review and assess the paper-based system, and make necessary changes, subject to its oversight.<sup>6</sup> At the same time, Congress authorized the President to designate demonstration projects to strengthen the employment verification systems.<sup>7</sup> Congress made participation in the Basic Pilot Program voluntary, with the exception of certain federal government entities and other entities subject to an order under INA §§ 274A(e)(4) and 274B(g), for whom Congress mandated participation.<sup>8</sup>

Basic Pilot Program, now renamed "E-Verify," has recently become an important part of work status laws (or employment eligibility verification law). The E-Verify program, an Internet-

based electronic system, works by checking the information and documents presented by employees as part of the I-9 employment eligibility verification process against information in Social Security Administration and Department of Homeland Security databases.<sup>9</sup> The program then produces one of three responses: 1) Confirmation (meaning that the information matches Federal government databases); 2) Tentative Non-Confirmation; and 3) Final Non-Confirmation.<sup>10</sup> Employers can only fire employees based on the results of E-Verify after receiving a Final Non-Confirmation from the E-Verify system.<sup>11</sup> Most employers are only permitted to use E-Verify prospectively and only once an employee has been hired.<sup>12</sup>

Congress has repeatedly shown an unwillingness to commit the nation permanently to the E-Verify system. Congress allowed E-Verify to expire in March 6, 2009,<sup>13</sup> although it continued to authorize funding of the operation of the system through September 30, 2009. Prior to the expiration, the Senate stalled on legislation to reauthorize the program for a five-year period.<sup>14</sup> Instead of the five-year reauthorization, Congress opted for a short-term reauthorization.<sup>15</sup> After vigorous debate in the summer and early fall of 2009, Congress passed a three-year extension of the program until the end of September 2012 and continued to make participation voluntary.<sup>16</sup> The provision for extending E-Verify also included funding to operate and improve the system.

Out of frustration with the failure of the existing work verification process to deter illegal immigration, many states and localities have sought to enforce their own work status laws and to influence whether E-Verify will be used within their jurisdictions. These state and local efforts have led to court challenges, and the few courts deciding work status legislation and E-Verify cases have been slightly more encouraging of the program than Congress. Still, there is only one circuit court of appeal case addressing any of the now-existing state legislation, and that case was before the Ninth Circuit court on a facial challenge to an Arizona law that mandated the use of E-Verify by businesses holding Arizona state licenses.<sup>17</sup> In *Chicanos Por La Causa v. Napolitano*, the Ninth Circuit dismissed the challenge to the Arizona law but noted that it considered the law "against a blank factual background of enforcement and outside the context of any particular case," thus leaving the door open for as-applied challenges.<sup>18</sup> The plaintiffs sought certiorari, however, and on November 2, 2009, the United States Supreme Court invited the Solicitor General to submit a brief on whether certiorari should be granted.<sup>19</sup>

Many of the legal challenges to state and local work status verification laws are preemption challenges. Because the Immigration Reform and Control Act (IRCA) of 1986 contains an express preemption clause, the express preemption challenges decide whether the laws at issue fall within the savings clause for "licensing and similar laws."<sup>20</sup> The implied preemption challenges decide whether requiring mandatory participation

---

\* Samson R. Elsbernd is an associate with Wilke, Fleury, Hoffelt, Gould & Birney, LLP, in Sacramento, California. Mr. Elsbernd is a member of the Federalist Society Labor and Employment Practice Group Executive Committee, and his legal practice includes business litigation, employment law, and government relations and legislative advocacy.

in the voluntary federal E-Verify program is “field” or “conflict” preempted.

In *United States v. Illinois*, the United States filed suit seeking a declaration that federal law preempted an anti-E-Verify state law, Section 12(a) of Illinois Public Act 95-138 (hereafter “Illinois Act”), and a permanent injunction enjoining its enforcement.<sup>21</sup> The Illinois Act amended the Illinois Right to Privacy in the Workplace Act and prohibited Illinois employers from enrolling in the E-Verify electronic employment eligibility verification program until E-Verify was faster and more accurate.<sup>22</sup> The district court held that the law was preempted.<sup>23</sup> It rejected Illinois’s argument that there was no controversy for the court to decide since E-Verify expired on March 6, 2009, when the short reauthorization ended, because funds had been appropriated for the program through September 30, 2009.<sup>24</sup> The court granted the United States’s Motion for Summary Judgment, finding Congress preempted the Illinois legislation by extending E-Verify to all the U.S. states in 2003, and indicating in its House Report that it wanted to allow any employer, regardless of the state of business, to enroll in E-Verify.<sup>25</sup> The court concluded that although E-Verify was originally a test program, Congress—not Illinois—can set the terms and length of testing of a federal program.<sup>26</sup>

While Congress has temporized and the federal courts have not yet had their full say in determining the validity of work status laws, the executive branch has moved in a direction favoring the use of E-Verify. The Clinton Administration began the trend when President Clinton sought to improve economy and efficiency in government procurement practices through Executive Order 12,989,<sup>27</sup> which determined that economy and efficiency would be improved through stability and dependability.<sup>28</sup> The Order set out the government’s policy not to contract with entities that knowingly employ unauthorized aliens because contractors who employ unauthorized aliens have a less stable and less dependable workforce.<sup>29</sup> President Bush revised the Clinton Order through EO 13,465,<sup>30</sup> which specifically named E-Verify as the mechanism for promoting economy and efficiency because it is the best available means for confirming identity and work eligibility.<sup>31</sup> In accordance with the philosophy behind this Executive Order, the Administration published a rule in January 2009 mandating the use of E-Verify for federal contractors and subcontractors.<sup>32</sup>

In *Chamber of Commerce v. Chertoff*, various parties sought to challenge Executive Order 13465 and the corresponding federal contractor rule on preemption grounds.<sup>33</sup> The lawsuit managed to delay implementation of the federal contractor rule four times: the rule originally was scheduled to go into effect on January 15, 2009, but after the lawsuit was filed, the Department of Homeland Security delayed the effective date of the rule until January 15, 2009, and implementation until February 20. Later, the Obama Administration postponed the rule until May 21, 2009.<sup>34</sup> In late May, the parties in the litigation agreed to extend the applicability date to September 8, 2009.<sup>35</sup> The Administration then completed its review of the federal contractor rule and decided to reaffirm it. Following reaffirmance of the federal contracting rule by the new Administration, the U.S. District Court for the District of Maryland ruled against the plaintiffs, holding, among other

things, that the government could require federal contractors to use E-Verify as a condition of doing business with the federal government because contracting with the government is a voluntary undertaking.<sup>36</sup> The plaintiffs were unable to convince the court to stay its ruling, and the federal contractor rule therefore went into effect while the plaintiffs pursued an appeal.

The Chamber of Commerce case did not implicate preemption arguments, but state and local efforts to verify work status are generally evaluated under express preemption analysis. Whether a law is upheld under the Supremacy Clause of the United States Constitution will depend on the court’s interpretation of IRCA’s savings clause and how the court defines “licensing or similar requirement.”<sup>37</sup> A mandate to use (or not use) E-Verify will likely be analyzed under an implied preemption analysis.

The express preemption analysis, and implied preemption analysis to a lesser degree, depends upon the classification of the law as an exercise of the police power or as an interference with federal immigration policy. The United States Supreme Court has emphatically upheld the federal government’s supreme power in the field of immigration, naturalization, and deportation, emphasizing that this power is made clear by the Constitution<sup>38</sup> and by Alexander Hamilton, James Madison, and John Jay through the Federalist Papers.<sup>39</sup> However, these broad federal government powers change slightly after entry of the alien resident.<sup>40</sup> After entry, the resident alien is subject to state’s police powers, and state legislatures can pass laws applying to the alien.<sup>41</sup> Unlike the states, the federal government does not possess general police powers to regulate aliens and may act only pursuant to the powers granted it by the Constitution.<sup>42</sup>

In *Chicanos Por La Causa v. Napolitano*, the Ninth Circuit upheld the Arizona Legal Workers Act as a valid regulation within the state’s police powers to regulate the employment of aliens.<sup>43</sup> The Ninth Circuit noted the Act was passed to curb illegal immigration, and reflected the rising frustration at the state level with the U.S. Congress’s failure to enact comprehensive immigration reform.<sup>44</sup> The Act targets employers that hire illegal aliens by revoking their business licenses.<sup>45</sup> Under the Act, Arizona courts may suspend or revoke the license of employers that knowingly or intentionally hire unauthorized aliens, and the Act provides a graduated series of sanctions for non-compliance.<sup>46</sup> It requires mandatory participation by Arizona employers in the E-Verify program but fails to provide a penalty for failure to enroll and participate in the program.<sup>47</sup> The Arizona Act provides an affirmative defense for good-faith compliance.<sup>48</sup>

The Ninth Circuit Court broadly interpreted the savings clause, holding that the Arizona Act was a licensing law.<sup>49</sup> The court relied heavily on a prior U.S. Supreme Court case, *De Canas v. Bica*,<sup>50</sup> and gave the Arizona law a presumption of non-preemption because the law was within the states’ traditional power to regulate aliens after entry.<sup>51</sup> In *De Canas*, the Court upheld a state law that prohibited the employment of illegal aliens as “within the mainstream’ of the state’s police powers.”<sup>52</sup> There the preemption challenge to the State law failed because “the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a

determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.<sup>53</sup> In the Arizona case, the Ninth Circuit consulted Black's Law Dictionary to define "license," holding that the Arizona law fell within IRCA's savings clause as "a permission, usually revocable, to commit some act that would otherwise be unlawful."<sup>54</sup>

The Ninth Circuit also held that the Arizona Act was not impliedly preempted through conflict preemption because the state law did not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>55</sup> The court concluded that the mandatory use of E-Verify at the state level did not impede Congress's purpose to develop a reliable and non-burdensome work-authorization verification system.<sup>56</sup> It also found no strong evidence that Congress intended to forbid states from requiring mandatory participation in E-Verify.<sup>57</sup> Rather, the court found evidence Congress "implicitly strongly encouraged" expanded use of E-Verify because Congress extended the duration and availability of E-Verify to all the states.<sup>58</sup> Consequently, it found that Arizona's requirement that in-state employers participate in E-Verify was consistent and furthered this congressional purpose to increase usage of the electronic employee eligibility verification program, and thus was not impliedly conflict preempted.<sup>59</sup>

The district court in *Lozano v. U.S. District Court for the Middle District of Pennsylvania* reached a different result. There the court held that the ordinances it considered were expressly preempted as immigration legislation not within the IRCA saving clause.<sup>60</sup> In *Lozano*, the City of Hazleton, Pennsylvania, had passed a number of ordinances to address an increasing illegal immigrant population.<sup>61</sup> One of the ordinances prohibited the employment and harboring of illegal aliens.<sup>62</sup> Under the ordinance, participation in E-Verify was mandatory in some instances, and violations of the ordinance could result in suspension of the business permit.<sup>63</sup>

The court in *Lozano* relied on Supreme Court cases that the Ninth Circuit in the Arizona case had dismissed as irrelevant because they did not involve preemption or state regulation.<sup>64</sup> Consequently, the *Lozano* court was able to conclude that the Pennsylvania ordinances interfered with immigration policy. The Court's statements in the cases relied upon by the district court describe IRCA as a "comprehensive scheme' that prohibits the employment of unauthorized workers in the United States"<sup>65</sup> and "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law."<sup>66</sup> Therefore, the *Lozano* court narrowly interpreted the savings clause to preserve the national government power and invalidated the Hazleton ordinances.

Hazleton had asserted that its laws fell within the IRCA savings clause because they did not impose criminal or civil penalties, which are expressly preempted by the preemption clause.<sup>67</sup> Rather, Hazleton argued, its ordinances penalized businesses that employed illegal aliens in accordance with the terms of the savings clause by suspending their business permits, which amounted to a "licensing or similar law."<sup>68</sup> The district court rejected the city's argument that it could regulate employers who hire illegal employees provided that Hazleton did not impose civil or criminal sanctions but merely suspended

the employer's business permit.<sup>69</sup> The court reasoned that suspension of the business permit was "the ultimate sanction" because the city could force the employer out of business by suspending its business permit.<sup>70</sup> The court therefore concluded that the city's interpretation was at odds with the plain language of the preemption provision because "it would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty. Such an interpretation renders the express preemption clause nearly meaningless."<sup>71</sup> The court also read "license" more narrowly than the Ninth Circuit and concluded that licensing "refers to revoking a local license for a violation of the federal IRCA sanction provisions, as opposed to revoking a business license for violation of local laws."<sup>72</sup>

After finding express preemption, the *Lozano* court then discussed implied preemption for completeness reasons.<sup>73</sup> The court easily found field preemption because of the statements it imported from the Supreme Court that IRCA was a comprehensive scheme regulating immigration.<sup>74</sup> The court also found conflict preemption, in part based on the discrepancy between the local ordinance and federal law because the ordinance sometimes required mandatory participation in E-Verify, which is voluntary at the federal level except for federal contractors.<sup>75</sup>

As these cases show, the validity of E-Verify laws will likely be decided under conflict, rather than field, preemption principles during the implied preemption analysis. When courts decide whether states can mandate (or prohibit) the use of the federal E-Verify program at the state level, their focus will likely be upon the context surrounding E-Verify, including different congressional extensions of the program. The weight courts will give to the various congressional extensions of E-Verify's duration and availability will probably be the most persuasive evidence of congressional intent.

The availability of E-Verify as a voluntary or as a mandatory program will have an impact on the thousands of employers participating in the program at the state and federal level. The states have not been uniformly receptive to the E-Verify program. Whereas Arizona and Mississippi require all employers to use E-Verify, South Carolina only encourages its employers to use E-Verify.<sup>76</sup> In Colorado, Georgia, Missouri, Nebraska, Oklahoma, Rhode Island, and Utah, public contractors must participate in E-Verify.<sup>77</sup> In Colorado, Georgia, Idaho, Minnesota, Missouri, Nebraska, North Carolina, Oklahoma, Rhode Island, and Utah, state agencies must utilize E-Verify.<sup>78</sup>

In Tennessee, use of E-Verify serves as a defense to a state or local charge that the employer has knowingly hired an illegal alien.<sup>79</sup> To date, Illinois is the only State that attempted to prevent its employers from participating in E-Verify.<sup>80</sup> At the federal level, the federal contractors rule applies to all federal contractors and subcontractors as of September 8, 2009.<sup>81</sup>

E-Verify has not yet been made a permanent part of the nation's work status verification landscape, but some form of enhanced federal workplace status verification is likely in the cards, particularly as the Administration and Congress begin debating comprehensive immigration reform in coming months. In prior attempts at immigration reform, improved

work status verification was key to gaining support for any proposed legislation that would legalize the undocumented. Whether state and local laws mandating work status verification will survive preemption challenges may turn on the language of any forthcoming immigration reform bill, particularly if the current workplace verification provisions of IIRIRA are modified or strengthened.

## Endnotes

1 P.L. 99-603 “IRCA,” H.R. Rep. No. 99-692(I) (1986) (“This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions . . . . Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.”).

2 48 CFR 22.1800 et seq.

3 8 U.S.C. § 1324a, Pub. L. No. 99-603, 100 Stat.3359 (1986).

4 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.1.

5 See Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) §§ 401-405, Pub. L. 104-208, Div. C, Title IV, Subtitle A, 110 Stat. 3009-655 through 3009-666, codified as a note to 8 U.S.C. § 1324a.

6 8 U.S.C. § 1324a(d).

7 8 U.S.C. § 1324a(d)(4).

8 See IIRIRA §§ 402(a), (e).

9 USCIS, E-VERIFY USER MANUAL: FOR GENERAL USERS, PROGRAM ADMINISTRATORS AND DESIGNATED AGENTS 4 (2008).

10 USCIS, E-VERIFY USER MANUAL: FOR GENERAL USERS, PROGRAM ADMINISTRATORS AND DESIGNATED AGENTS (2008).

11 *Id.* at 37.

12 *Id.* at 8.

13 See Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 Pub. L. No. 110-329 Division A, § 106, 122 Stat. 3574 (2008).

14 See Employee Verification Amendment Act of 2008, H.R. 6633 [110th Congress].

15 Consolidated Security, Disaster Assistance, and Continuing Appropriations Act.

16 The three-year extension of E-Verify was included in a \$42.8 billion appropriations bill for the Department of Homeland Security (DHS), which was signed into law by President Barack Obama on Oct. 28, 2009. See Department of Homeland Security Appropriations Act of 2010, P. L. 111-83 (Oct. 28, 2009).

17 *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2009).

18 *Id.* at 861.

19 *Chamber of Commerce of the U.S. v. Candelaria*, Order, Nov. 2, 2009, 2009 US LEXIS 7708.

20 See 8 U.S.C. § 1324a(h)(2) (The provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, recruit, or refer for a fee for employment unauthorized aliens.)

21 *United States v. Illinois*, U.S. Dist. LEXIS 19533 ((C.D. Ill., March 11, 2009) [not reported in F.Supp.2d].)

22 *Id.* at 4-5.

23 *Id.* at 8-9.

24 *Id.* at 7-8.

25 *Id.* (referencing H.R. REP. NO. 108-304(I), at 6 (2003)).

26 *Id.* at 7.

27 Exec. Order No. 12,989, 61 Fed. Reg. 6091 (Feb. 13, 1996).

28 *Id.*

29 *Id.* at § 1(a).

30 Exec. Order No. 13,465, 73 Fed. Reg. 33285 (June 6, 2008).

31 *Id.* at § 1(b).

32 74 Fed. Reg. 5621 (January 30, 2009); see also 73 Fed. Reg. 67650-51 (Nov. 14, 2008).

33 *Chamber of Commerce of the U.S. v. Chertoff*, 2008 WL 5644799 (D. Md. 2008) (Trial Pleading [complaint] filed Dec. 23, 2008). For docket, see 8:08cv03444.

34 74 Fed. Reg. 5621 (January 30, 2009).

35 74 Fed. Reg. 26981 (June 5, 2009).

36 *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726 (D. Md., Aug. 25, 2009). For docket, see 8:08cv03444-AW.

37 See 8 U.S.C. § 1324a(h)(2).

38 U.S. CONST. art. I, § 8 (“The Congress shall have the power . . . to establish a uniform rule of naturalization.”).

39 *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (referencing, in particular, *Federalist Papers* Nos. 3, 4, 5, 42, and 80).

40 *Id.* at 76.

41 *Id.*

42 *Id.*

43 *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 869 (9th Cir. 2009).

44 *Id.* at 860.

45 *Id.*

46 *Id.* at 862.

47 *Id.*

48 *Id.*

49 *Id.* at 866.

50 *De Canas v. Bica*, 424 U.S. 351 (1976).

51 *Chicanos*, 558 F.3d at 865.

52 *Id.* at 864 (citing *De Canas*, 424 U.S. at 356, 365).

53 *Id.* at 864 (citing *De Canas*, 424 U.S. at 355).

54 *Id.* at 865 (citing BLACK’S LAW DICTIONARY 938 (8th ed. 2004)).

55 *Id.* at 866 (referencing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000)).

56 *Id.* at 866.

57 *Id.* at 867.

58 *Id.*

59 *Id.*

60 *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519-21 (M.D. Pa. 2007).

61 *Id.* at 484.

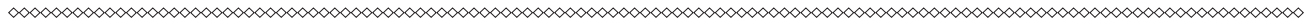
62 *Id.*

63 *Id.* at 519, 527.

64 *Chicanos*, 558 F.3d at 865 (distinguishing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002); citing *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194 (1991)).

65 *Lozano*, 496 F. Supp at 518 (citing *Hoffman Plastic*, 535 U.S. at 147).





66 *Id.* at 518 (citing *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. at 194).

67 *Id.* at 519; *see* 8 U.S.C § 1324a(h)(2) (The provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ or recruit or refer for a fee for employment, unauthorized aliens.).

68 *Id.* at 519.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 521.

74 *Id.* (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-148 (2002)).

75 *Id.* at 527 (paraphrasing Illegal Immigration Relief Act Ordinance ("IIRA") § 4.C (providing that all Hazleton city agencies must participate in E-Verify); paraphrasing IIRA § 4.D (requiring all businesses that seek a city contract or grant to participate in E-Verify)).

76 *Id.*

77 *Id.*

78 *Id.*

79 *See* T.C.A. §§ 12-4-124 (Contracts with persons utilizing the services of illegal immigrants), 50-1-103 (Definitions).

80 *See* 820 ILCS § 55/12 (Restrictions on Use of Employment Eligibility Verification Systems).

81 74 Fed. Reg. 26981 (June 5, 2009); USCIS, FEDERAL CONTRACTORS REQUIRED TO USE E-VERIFY BEGINNING SEPT. 8, 2009 (2009).



---

# LITIGATION

## RAND ISSUES REPORT ON ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION

By Mark A. Behrens & Corey Schaecher\*

---

In June 2005, United States District Court Judge Janis Graham Jack of the Southern District of Texas declared that all but one of 10,000 cases aggregated under Multidistrict Litigation (MDL) 1553 were based on “fatally unreliable” diagnoses.<sup>1</sup> Judge Jack found that the claims “were driven by neither health nor justice: they were manufactured for money.”<sup>2</sup>

The RAND Institute for Civil Justice recently issued a report that carefully examines the MDL 1553 litigation to identify lessons that can be learned about the civil justice system’s ability to detect and address abusive medical diagnostic practices in mass personal injury litigation.<sup>3</sup>

### I. SILICA LITIGATION: BACKGROUND AND MDL 1553

#### 1. Knowledge and Regulation

Silica—quartz in its most common form—is a ubiquitous mineral. In its natural form, silica is not especially harmful. When fragmented into tiny particles, however, silica can be dangerous if inhaled in excess of certain levels for a prolonged period. Workers in many industries, including mining, quarrying, construction, abrasives, and ceramics, can be exposed to silica.

The risks of silica exposure have been well-known for a long time. For instance, as far back as 1949 the United States Supreme Court noted, “It is a matter of common knowledge that it is injurious to the lungs and dangerous to the health to work in silica dust . . . .”<sup>4</sup>

The federal Occupational Safety & Health Administration (OSHA) has regulated workplace silica exposure since the early 1970’s. Today, OSHA provides detailed regulations requiring employers to protect employees from overexposure to silica through the enforcement of permissible exposure limits (PELs) for occupational exposure to airborne silica and the OSHA Hazard Communications Standard. States also have acted to protect workers from overexposure.

The Centers for Disease Control (CDC) & Prevention and National Institute for Occupational Safety & Health (NIOSH) have reported that nationwide silicosis deaths declined sharply, from 1,157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999, to 148 in 2002—a 93% decline in overall mortality.<sup>5</sup> RAND found that “[b]etween 1995 and 2004, silicosis-related deaths were generally stable or decreasing in all states.”<sup>6</sup>

.....

\* Mark Behrens is a partner and Corey Schaecher is an associate in Shook, Hardy & Bacon L.L.P.’s Washington, D.C.-based Public Policy Group. Mr. Behrens provided RAND with comments on drafts of the subject report and represents the Coalition for Litigation Justice, one of several groups which helped sponsor RAND’s research. The views in the RAND report are those of the authors and do not necessarily reflect those of the sponsors.

For years, silica litigation generally reflected this public health success. The litigation was stable with only a low number of people pursuing silica claims in any given year.<sup>7</sup>

#### 2. A Spike in Silica Claims

“[P]laintiffs’ lawyers filed an unprecedented number of silica cases from 2002 to 2004—a total of 20,479 cases in Mississippi alone—an amount ‘five times greater than one would expect over the same period in the entire United States.’”<sup>8</sup> The drastic rise in claims against U.S. Silica, a leading supplier, exemplified this surge. In 1998, U.S. Silica fielded 198 silicosis claims; the number of claims jumped to 1,356 in 2001 before soaring to 5,277 in 2002 and skyrocketing to 19,865 in 2003.<sup>9</sup> Nearly two-thirds of the claims filed against U.S. Silica between 2001 and 2003 were filed in Mississippi state courts; most of the other cases were filed in Texas state courts.<sup>10</sup>

If legitimate, this spike would have suggested “perhaps the worst industrial disaster in recorded world history.”<sup>11</sup> Within two years, however, the litigation was essentially over. According to RAND, “The proceeding in Judge Jack’s court exposed gross abuses in the diagnosing of silica-related injuries, and, due in large part to her findings, the litigation collapsed.”<sup>12</sup>

#### 3. Judge Jack: The Phantom Epidemic

MDL 1553 began in September 2003 when over 10,000 individual silicosis claims that primarily originated in Mississippi state court were removed to federal court and centralized for pretrial purposes before Judge Jack.<sup>13</sup>

As a trained nurse, Judge Jack appreciated that the surge in claims defied medical explanation. She observed, “The claims do not involve a single worksite or area, but instead represent hundreds of worksites scattered throughout the state of Mississippi, a state whose silicosis mortality rate is among the lowest in the nation.”<sup>14</sup>

The events that would lead to the exposure of “gross deficiencies in the diagnosis underlying the silica claims” were spurred by the review of fact sheets submitted by the plaintiffs.<sup>15</sup> Early in the litigation, Judge Jack required each plaintiff to submit a sworn fact sheet specifying their diagnosis and all pertinent medical and diagnostic information, as well as the results of B-reads of chest x-rays.<sup>16</sup> If a plaintiff failed to do so, his or her claim would be dismissed.<sup>17</sup>

The fact sheets revealed several suspicious patterns.

First, in almost all cases, the fact sheets showed that the plaintiff’s claim was not based on a diagnosis provided by the plaintiff’s treating physician.<sup>18</sup> “Rather than being connected to the Plaintiffs, these doctors instead were affiliated with a handful of law firms and mobile x-ray screening companies.”<sup>19</sup>

Second, “although almost all the plaintiffs had different treating physicians, a very small number of B-readers accounted for almost all of the plaintiffs’ B-reads and diagnoses.”<sup>20</sup>

More than 9,000 plaintiffs submitted fact sheets and listed approximately 8,000 different doctors.<sup>21</sup> “Remarkably, however, only twelve . . . doctors diagnosed more than 9,000 plaintiffs with silicosis.”<sup>22</sup>

Third, the defense attorneys recognized that some of the B-readers who figured prominently in the silica litigation had been involved in asbestos litigation.<sup>23</sup>

Armed with information from the fact sheets, the defendants began deposing a few of the diagnosing doctors in late 2004. Dr. George Martindale “testified that he had not intended to diagnose these individuals with silicosis and withdrew his diagnoses.”<sup>24</sup> Dr. Martindale “purportedly diagnosed 3,617 MDL plaintiffs with silicosis while retained by the screening company N&M.”<sup>25</sup> According to Judge Jack, “These 3,617 diagnoses were issued on only 48 days, at an average rate of 75 diagnoses per day.”<sup>26</sup>

The defendants subsequently deposed two other screening doctors, Glyn Hilbun and Kevin Cooper, “who had been listed as the diagnoses doctors on 471 and 225 plaintiff fact sheets, respectively.”<sup>27</sup> “Both doctors essentially echoed Martindale’s testimony.”<sup>28</sup>

In February 2005 *Daubert* hearings before Judge Jack, it was established that N&M “helped generate approximately 6,757 claims in th[e] MDL, while [another screening firm,] RTS . . . helped generate at least 1,444 claims.”<sup>29</sup> N&M generated these 6,500-plus claims in just ninety-nine screening days.<sup>30</sup> To place this accomplishment in perspective, “in just over two years, N&M found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period.”<sup>31</sup> Furthermore, at least 4,031 N&M-generated plaintiffs had previously filed asbestosis claims with the Manville Personal Injury Settlement Trust, although “a golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis.”<sup>32</sup>

The most prolific MDL diagnosing physician, Dr. Ray Harron, was involved in the diagnosis of approximately 6,350 of the silica MDL plaintiffs in just ninety-nine days<sup>33</sup> and was listed as the diagnosing physician for approximately 2,600 plaintiffs.<sup>34</sup> “He seemed at a loss to explain how permanent signs of asbestosis he’d diagnosed disappeared years later when he diagnosed the same workers with silicosis.”<sup>35</sup> His testimony “abruptly ended when the Court granted his request for time to obtain counsel.”<sup>36</sup>

“It became clear during the testimony of James Ballard, another of the diagnosing physicians, that similar practices were followed for plaintiffs screened by RTS.”<sup>37</sup> Dr. Ballard performed nearly 1,500 x-ray readings. “Like Harron, he also read a number of x-rays differently depending on what the hiring firm was looking for—initially asbestosis, then silicosis.”<sup>38</sup> The defendants presented over a dozen examples where Dr. Ballard had previously diagnosed the same individuals with lung conditions consistent with asbestosis.<sup>39</sup>

Dr. Barry Levy diagnosed almost 1,400 plaintiffs,<sup>40</sup> including 800 in seventy-two hours.<sup>41</sup> “He spent only four minutes on each diagnoses.”<sup>42</sup>

Another screening doctor, Todd Coulter, diagnosed 237 MDL plaintiffs in eleven days as part of a contract with

a company, Occupational Diagnostics, which was run from a Century 21 realty office and would hold screenings from a “trailer in the parking lots of restaurants and hotels.”<sup>43</sup>

In June 2005, Judge Jack issued a scathing opinion stating, “the Court is confident . . . that the ‘epidemic’ of some 10,000 cases of silicosis ‘is largely the result of misdiagnoses.’”<sup>44</sup> Judge Jack concluded that “the failure of the challenged doctors to observe the same standards for a ‘legal diagnosis’ as they do for a ‘medical diagnosis’ render[ed] their diagnoses . . . inadmissible . . .”<sup>45</sup> She then remanded all but one case to state court, citing lack of jurisdiction while questioning the validity of virtually every claim.

In the one case Judge Jack retained, she found that the plaintiffs’ law firm multiplied the proceedings unreasonably and vexatiously, describing the firm’s behavior as part of a larger process to “overwhelm the defendants and the judicial system.”<sup>46</sup> She then prorated her estimate of the costs of the litigation and set the fine at \$8,250,<sup>47</sup> explaining that “[t]he Court trusts that this relatively minor sanction will nonetheless be sufficient to serve notice to counsel that truth matters in a courtroom no less than in a doctor’s office.”<sup>48</sup>

#### 4. *The Fall Out*

By mid-January 2006, “more than half” of the claims remanded to Mississippi and Texas state courts had been dismissed,<sup>49</sup> “most of them voluntarily by the law firms that filed them.”<sup>50</sup> In addition, silica filings plummeted following Judge Jack’s order.<sup>51</sup> For example, “[n]ew filings against U.S. Silica fell to 1,900 claims in 2005 and to 227 claims in 2006. Only 15 claims were filed against U.S. Silica in the first half of 2007.”<sup>52</sup> Legal reforms enacted in several states during this time also contributed to a decline in the number of claims, especially statutes that require plaintiffs to demonstrate reliable evidence of physical impairment in order to proceed with a silica-related claim.<sup>53</sup>

Commentators have described Judge Jack’s opinion as “a critical turning point in mass tort litigation because for the first time it allowed a comprehensive examination of the mass tort scheme—a look behind the curtain of secrecy that had guarded the ‘forensic identification of diagnoses’ or as it is more commonly known, litigation screening.”<sup>54</sup> The Director of the Federal Judicial Center, United States District Court Judge Barbara Rothstein of the Western District of Washington, has said, “One of the most important things is I think judges are alert for is fraud, particularly since the silicosis case . . . and the backward look we now have at the radiology in the asbestos case.”<sup>55</sup>

## II. RAND’S RECOMMENDATIONS

As the RAND report appreciates, “The prospect of large financial gain provides a powerful incentive to utilize inappropriate diagnostic procedures in order to manufacture large numbers of claims.”<sup>56</sup> Thus, while the uncovering of fraudulent diagnostic procedures in MDL 1553 “was a significant success for the tort system in handling a mass tort,”<sup>57</sup> there are no guarantees that similar practices would be uncovered in the future. The abuses in MDL 1553 were brought to light as a result of a perfect storm of events. If not

for the strategy adopted by defense counsel and Judge Jack's leadership, "litigation based on abusive diagnostic practices might have continued."<sup>58</sup>

The RAND report, therefore, discusses several changes to judicial practices and procedures and attorney practices that might help ensure that similar abuses do not occur in the future.

### 1. Changes to Judicial Practices and Procedures

RAND identifies several changes to judicial practices and procedures that "could create conditions that would increase the likelihood that abuses in diagnostic practices in mass personal-injury litigation would be routinely uncovered regardless of the judge assigned to the case."<sup>59</sup>

First, the report suggests that trial judges follow Judge Jack's example and require disclosure of diagnosis, the identity of the diagnosing physician, and relevant medical records "up front" once litigation has achieved sufficient size to "help ensure adherence to defensible diagnostic practices and allow defendants to more rapidly evaluate claims."<sup>60</sup>

Second, RAND states that parties should be required to present evidence on appropriate diagnostic practices and whether they were followed.<sup>61</sup> "Diagnoses should be based on reasonable medical standards or consistent with accepted medical practice, and, once litigation has reached sufficient scale, it would be beneficial for courts to routinely require that these standards and practices be identified early on in the case."<sup>62</sup> At the same time appropriate practices are identified, the court could also require evidence showing that these practices were in fact followed.<sup>63</sup>

Third, RAND suggests that more guidance should be provided to federal and state judges on how they should handle mass personal injury torts.<sup>64</sup> For example, RAND suggests that it "may be appropriate to enhance the Federal Judicial Center's (2004) *Manual for Complex Litigation, Fourth*, to provide an assessment of which types of judicial practices have been effective in mass personal-injury litigation and which have not."<sup>65</sup> The manual might identify a set of "best practices" to be followed by judges to effectively manage mass torts.

Finally, RAND recommends that the mechanisms for aggregating information across claims for pretrial purposes should be enhanced. As options, RAND lists: (1) creating an infrastructure for voluntary coordination between state and federal judges; (2) creating a mechanism to allow federal courts to aggregate claims in state courts for the purpose of developing information about the cases; and (3) facilitating pretrial consolidation of cases already in federal court.<sup>66</sup>

### 2. Changes to Conduct of Plaintiff and Defense Bars

RAND recommends that more serious sanctions should be considered for plaintiffs' lawyers that pursue cases based on grossly inadequate diagnoses.<sup>67</sup> In particular, RAND recommends that judges should consider fines that would deter misbehavior rather than just cover excess costs.<sup>68</sup> In addition, RAND suggests that policymakers might add "teeth" to the sanctions available under Federal Rule of Civil Procedure 11.<sup>69</sup>

RAND also recommends that closer attention be paid to the performance of the defense bar. For example, RAND

notes, "[w]hile it might seem like a pedestrian observation, a critical action by the defense attorneys in the silica multidistrict litigation was to challenge the diagnoses."<sup>70</sup> RAND points out that there are legitimate reasons that some defense counsel may be reluctant to challenge plaintiff diagnoses, such as fear of retaliation against their client and recognition that in the short-run it can be cheaper to quickly settle claims. On the other hand, according to some of those interviewed by RAND, "some defense attorneys increase their revenue by churning a case for a while, mediating the case for a while, and then settling,"<sup>71</sup> without any concerted effort to challenge suspect diagnoses.<sup>72</sup> RAND acknowledges that it is "not obvious" how to deter such practices because they are "difficult to observe."<sup>73</sup> RAND suggests that policymakers and practitioners consider what types of responses might be effective.<sup>74</sup>

## III. CONCLUSION

RAND's latest report makes an important contribution with regard to identifying and addressing the potential for abusive diagnostic procedures in mass torts. If RAND's recommendations are adopted, then abuses such as those uncovered in MDL 1553 may be less likely to occur.

## Endnotes

1 See *In re Silica Prods. Liab. Litig.* (MDL No. 1553), 398 F. Supp. 2d 563, 675 (S.D. Tex. 2005).

2 *Id.* at 635.

3 See STEPHEN J. CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA (2009), available at [http://www.rand.org/pubs/technical\\_reports/2009/RAND\\_TR774.pdf](http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf).

4 *Urie v. Thompson*, 337 U.S. 163, 180 (1949).

5 See DEPT. OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, WORKER HEALTH CHARTBOOK 2004 (Pub. No. 2004-146), available at <http://www.cdc.gov/niosh/docs/2004-146/detail/imagetail.asp@imgid234.htm>; Dept. of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Silicosis Mortality, Prevention and Control—United States, 1968-2002*, MMWR WKLY., Apr. 29, 2005, at 401-405, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm>.

6 CARROLL ET AL., *supra* note 3, at 44.

7 See Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 MEALEY'S LITIG. REP.: ASBESTOS 33 (Feb. 21, 2005).

8 David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and The Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253, 258 (2007).

9 See Kimberly A. Strassel, Editorial, *He Fought the Tort Bar—and Won*, WALL ST. J., May 4, 2009, at A14.

10 See CARROLL ET AL., *supra* note 3, at 3.

11 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 572.

12 CARROLL ET AL., *supra* note 3, at ix.

13 See *In re Silica Prods. Liab. Litig.* (MDL No. 1553), 280 F. Supp. 2d 1381 (Jud. Pan. Mult. Lit. 2003).

14 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 572.

15 CARROLL ET AL., *supra* note 3, at ix.

16 See *id.* at x, 7.

17 See *id.* at 7.



- 18 *See id.* at 8.
- 19 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 580.
- 20 CARROLL ET AL., *supra* note 3, at 8.
- 21 *See* John P. Hooper et al., *Undamaged: Federal Court Establishes Criteria for Mass Tort Screenings*, American Bar Association Section of Litigation, 5:3 MASS TORTS 12, 12-13 (Summer 2007).
- 22 *Id.* at 13.
- 23 CARROLL ET AL., *supra* note 3, at 8.
- 24 David M. Setter & Andrew W. Kalish, Commentary, *Recent Screening Developments: The MDL Silica 1553 Daubert Hearing*, 20:9 MEALEY'S LITIG. REP.: ASBESTOS 38, 39 (June 1, 2005).
- 25 *Id.* at 39.
- 26 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 581; *see also* CARROLL ET AL., *supra* note 3, at 8-9.
- 27 CARROLL ET AL., *supra* note 3, at 9.
- 28 *Id.*
- 29 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 596.
- 30 *See* Setter & Kalish, *supra* note 24, at 40.
- 31 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 603.
- 32 *Id.*
- 33 *See* Setter & Kalish, *supra* note 24, at 43.
- 34 *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 606.
- 35 Lynn Brezosky, *Judge: Diagnoses Methods in Silicosis Case 'Frightening' West Virginia Doctor Involved in Multistate Lawsuit in Texas*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 19, 2005, at 6D, available at 2005 WLNR 2702789.
- 36 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 608.
- 37 CARROLL ET AL., *supra* note 3, at 12.
- 38 *Id.*
- 39 *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 609.
- 40 *See id.* at 611.
- 41 *See* Setter & Kalish, *supra* note 24, at 40.
- 42 CARROLL ET AL., *supra* note 3, at 12.
- 43 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 616.
- 44 *Id.* at 632 (internal citation omitted).
- 45 *Id.* at 634.
- 46 *Id.* at 676.
- 47 *See id.* at 678.
- 48 *See id.* at 679.
- 49 Peter Geier, *Silica Cases Drawing Resistance Nationwide*, 233:8 LEGAL INTELLIGENCER 4 (Jan. 12, 2006).
- 50 Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. TIMES, Mar. 8, 2006, at C3, abstract available at 2006 WLNR 3870056.
- 51 *See* Paul Davies, *Plaintiffs' Lawsuits Against Companies Sharply Decline*, WALL ST. J., Aug. 26, 2006, at A1, abstract available at 2006 WLNR 14914829.
- 52 CARROLL ET AL., *supra* note 3, at 4.
- 53 *See* OHIO REV. CODE §§ 2307.84 et seq.; TEX. CIV. PRAC. & REM. CODE §§ 90.001 et seq.; FLA. STAT. ANN. §§ 774.203 et seq.; KAN. STAT. ANN. §§ 60-4901 et seq.; TENN. CODE ANN. §§ 29-34-301 et seq.; S.C. CODE ANN. §§ 44-135-30 et seq.; GA. CODE ANN. §§ 51-14-1 et seq.; OKLA. STAT. tit. 76 §§ 60 et seq.
- 54 Maron & Jones, *supra* note 8, at 261.
- 55 Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733, 739 (2008).
- 56 CARROLL ET AL., *supra* note 3, at 1.
- 57 *Id.*
- 58 *Id.* at 26.
- 59 *Id.* at 28.
- 60 *Id.*; *see also id.* at xiii.
- 61 *See id.* at xiii.
- 62 *Id.* at 29.
- 63 *See id.*
- 64 *See id.* at xiii.
- 65 *Id.* at 30.
- 66 *Id.* at 30-32; *see also id.* at xiv.
- 67 *See id.*
- 68 *Id.* at 34.
- 69 *See id.*
- 70 *Id.* at 21.
- 71 *Id.* at 22.
- 72 *Id.* at 34.
- 73 *Id.* at 34.
- 74 *See id.* at xiv, 34.





defendants than the risks of an adverse judgment. With this swing in the pendulum, the Supreme Court recently acted once again to prevent abuses of the judicial process. In *Twombly* and *Iqbal*, the Court held that the sue-first-discovery-later paradigm that had emerged following *Conley* was unacceptable, and it tightened the pleading standards to put an end to this practice.

The Supreme Court took its first big step away from *Conley* in *Bell Atlantic Corporation v. Twombly*.<sup>8</sup> In *Twombly*, the Supreme Court focused squarely on the abuses that had arisen in the wake of the *Conley* “no set of facts” pleading standard. The Court explained that “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.’”<sup>9</sup>

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries”; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.<sup>10</sup>

Thus, the Court held that “something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a ‘largely groundless claim’ be allowed to ‘take up the time of a number of other people with the right to do so representing an *in terrorem* increment of the settlement value.’”<sup>11</sup>

After placing *Conley* in its original factual context, the Court squarely rejected the “no set of facts” pleading standard:

We could go on, but there is no need to pile up further citations to show that *Conley*’s “no set of facts” language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion’s preceding summary of the complaint’s concrete allegations [of discrimination], which the Court quite reasonably understood as amply stating a claim of relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement.<sup>12</sup>

The Court then announced a new pleading standard: to survive a motion to dismiss for failure to state a claim, a complaint must have enough “factual enhancement [to bring it across] . . . the line between possibility and plausibility of entitlement to relief.”<sup>13</sup> With that, the new “plausibility” pleading standard was born.

Although courts and commentators initially debated the reach and import of the *Twombly* plausibility standard because of the antitrust context in which it arose, the Court resolved the debate in 2009 with its decision in *Ashcroft v. Iqbal*,<sup>14</sup> in which

it stated that its “decision in *Twombly* expounded the pleading standard for *all civil actions*.”<sup>15</sup> The Court also elucidated its new plausibility pleading standard, making it clear that Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”<sup>16</sup> The Court stated:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility [only] when the plaintiff *pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged*. The plausibility standard is not akin to a “probability requirement,” but *it asks for more than a sheer possibility that a defendant has acted unlawfully*. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”<sup>17</sup>

Applying this plausibility standard in *Iqbal*—where the plaintiff alleged that following the September 11th attacks the Attorney General and others designated him a suspected terrorist and then detained him in violation of his Constitutional rights—the Court focused on the essential elements of the plaintiff’s claim and concluded that the plaintiff “must plead sufficient factual matter to show that [the Attorney General and others named in the complaint] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.”<sup>18</sup> Looking for factual matter, the Court disregarded the plaintiff’s “bare” and “conclusory” allegations, which it determined were “not entitled to the assumption of truth.”<sup>19</sup> Looking to the factual matter set out in the plaintiff’s complaint, the Court noted that the plaintiff had alleged “that ‘the [FBI], under the direction of [the defendants], . . . arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.’”<sup>20</sup> The plaintiff had further alleged “that ‘[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were “cleared” by the FBI was approved by Defendants . . . in discussions in the weeks after September 11, 2001.’”<sup>21</sup> Assuming these allegations were true, the Court nonetheless determined that the plaintiff had “not ‘nudged [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”<sup>22</sup> Although the plaintiff’s factual allegations arguably were consistent with a discriminatory purpose, the Court relied upon “its judicial experience and common sense”<sup>23</sup> to conclude that the pleaded facts likely demonstrated a non-discriminatory purpose behind the defendants’ conduct. “[G]iven [the] more likely explanations, [the plaintiff’s allegations] d[id] not plausibly establish” a cause of action against the defendants.<sup>24</sup>

The depth of the Supreme Court’s analysis in *Iqbal*—indeed, the very notion that factual context and common sense play a role in the evaluation of every plaintiff’s complaint—stands in stark contrast to the deference previously paid to plaintiff’s allegations under the *Conley* “no set of facts” standard. The *Twombly* and *Iqbal* decisions make clear that it is no longer sufficient for plaintiffs to allege facts that are consistent with

their theory of liability. Rather, plaintiffs must now set forth facts that provide a plausible basis to believe they can establish each element of their legal claims.

## II. The Impact Of The Plausibility Standard on Pharmaceutical Product Liability Litigation

In one sense, the impact of the *Twombly* and *Iqbal* decisions may be measured by the response to them. In just over two and a half years, *Twombly* has been cited in over 22,700 opinions. And as of January 10, 2010, less than eight months after the opinion was issued, *Iqbal* had been cited in over 4,500 judicial opinions. On the flip side, *Twombly* and *Iqbal* have been roundly criticized for placing too onerous a pleading burden upon plaintiffs. United States Senator Arlen Specter of Pennsylvania recently called for legislation to reinstate the *Conley* “no set of facts” standard. The Senator introduced Senate Bill 1504, called the “Notice Pleading Restoration Act of 2009,”<sup>25</sup> which provides:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson* . . . .<sup>26</sup>

The bill was co-sponsored by Senator Feingold. After it was introduced, it was immediately referred to the Senate Judiciary Committee, which held a hearing on December 2, 2009. At that hearing, John Payton, the President and Director of the NAACP’s Legal Defense and Educational Fund, called the plausibility pleading standard “nothing short of an assault on our democratic principles.”<sup>27</sup> Likewise, on October 27, 2009, the U.S. House of Representatives Judiciary Committee’s Subcommittee on the Constitution, Civil Rights and Civil Liberties held a hearing entitled “Access to Justice Denied—*Ashcroft v. Iqbal*.” At that hearing, Arthur R. Miller, co-author of the treatise *Federal Practice and Procedure*, testified that the heightened pleading standard has “come at the expense of the values of access to the federal courts and the ability of citizens to secure an adjudication of the merits of their claims.”<sup>28</sup>

While it is clear that there has been a paradigmatic shift in the legal landscape, the specific parameters of the new environment are still taking shape. In pharmaceutical product liability litigation, only a handful of cases to date provide any detailed analysis of the plaintiffs’ burden under the new pleading standard. While these cases demonstrate the possibilities inherent in a disciplined application of the plausibility pleading standard, the full impact of *Twombly* and *Iqbal* with regard to the fundamental premises of pharmaceutical product liability litigation arguably has not yet been felt.

The initial promise of *Twombly* and *Iqbal* is demonstrated in a recent opinion from the Southern District of Ohio in which a defendant succeeded in securing dismissal of a panoply of different legal causes of action allegedly arising from the plaintiff’s ingestion of a prescription medication.<sup>29</sup> As is typical in prescription drug product liability litigation, the plaintiff in *Frey* alleged a variety of different legal causes of action for

which she claimed the right of monetary relief, including failure to warn, manufacturing defect, and design defect, relying particularly in her non-warnings claims on formulaic recitations of the elements of each legal theory. Prior to *Twombly*, plaintiffs routinely were allowed to pursue discovery on these claims despite the lack of any specific factual support in their complaint because defendants could not establish “beyond doubt that the plaintiff[] [could] prove no set of facts in support of his claim which would entitle him to relief.”<sup>30</sup> As the *Frey* Court recognized at the very first pre-trial conference shortly after *Twombly* was issued, however, and once again in its ruling on defendant’s motion to dismiss, *Twombly* has shifted the burden to plaintiffs to set forth a plausible factual basis for his claimed entitlement of relief. In *Frey*, the defendant argued that the plaintiff had not made such a showing with respect to their manufacturing defect and design defect claims.<sup>31</sup> The court agreed.

The *Frey* plaintiff’s allegations in support of her manufacturing defect and design defect claims were typical of those commonly seen in pharmaceutical product liability litigation. *Frey*’s manufacturing defect claims were fully stated as follows:

[1.] The product which was consumed by Plaintiff was defective in design or construction at the time it left the Defendants’ control.

[2.] Defendants failed to design, manufacture, test, and control the quality of [the product] such that when it left the control of the Defendant, it deviated in a material way from the design specifications, formula or performance standards of the manufacturer, or from otherwise identical units manufactured to the same design specifications, formula or performance standards.

[3.] As a direct and proximate result of the defect in manufacture or construction by Defendants, Plaintiff, suffered the injuries and damages set forth herein.<sup>32</sup>

While somewhat more fulsome, *Frey*’s design-defect claim consisted mainly of the following allegations:

[1.] When [the product]... left the control of the Defendants, the foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation.

....

[2.] At the time the product left the control of the Defendants, a practical and technically feasible alternative design or formulation was available that would have prevented the harm for which the claimant seeks to recover compensatory damages without substantially impairing the usefulness or intended purpose of the product.

....

[3.] As a direct and proximate result of defect in design or formulation by Defendants, Plaintiff suffered, and will continue to suffer, the injuries and damages set forth herein.<sup>33</sup>



In granting defendant's motion to dismiss, the court made clear that the familiar recitation of these legal claims is no longer sufficient in the post-*Twombly* world to state a cause of action. The court held that Frey's manufacturing defect claim did "nothing more than provide a formulaic recitation of the elements of a claim under the [product liability] statute," and therefore the complaint "failed to allege any facts that would permit the Court to conclude that a manufacturing defect occurred and that the defect was the proximate cause of Amanda Frey's alleged injuries."<sup>34</sup> Thus, the court found that Frey's "allegations in this regard fall far short of the sufficiency standard set forth in *Twombly*."<sup>35</sup> Likewise, the court held that Frey's design defect claim "once again simply provided a formulaic recitation of the elements of a claim under the [product liability] statute," and therefore the complaint failed to "allege[] any facts that would permit the Court to conclude that there was a defect in the design or formulation of [the product] and that the defect was the proximate cause of Amanda Frey's alleged injuries."<sup>36</sup> Notably, the Court also rejected the plaintiffs' request for leave to amend and dismissed the claims with prejudice because the plaintiffs "failed to demonstrate that an amendment to the complaint would not be futile."<sup>37</sup>

### III. The Promise Of The Plausibility Pleading Standard in Pharmaceutical Product Liability Litigation

*Frey* is a leading indicator of the changes that are to come in pharmaceutical product liability litigation under the new plausibility pleading standard. By weeding out the plaintiffs' formulaic legal claims, the *Frey* court's ruling will limit the burdens that would otherwise be imposed on the defendant in responding (through discovery and otherwise) to legal theories devoid of any factual support and will focus the litigation on the plaintiff's burden under her narrower failure to warn theory. With the subsequent expansion of the *Twombly* holding in *Iqbal* (which was issued after the *Frey* briefing), however, and as the courts become more familiar with the requirements imposed by this new pleading standard, a larger question arises: what facts must a pharmaceutical product liability plaintiff allege before being allowed to proceed to discovery on a failure to warn claim?

To date, few published decisions discuss the impact of the *Twombly/Iqbal* plausibility standard in the context of failure-to-warn claims. In *Bailey v. Janssen Pharmaceutica, Inc.*, the Eleventh Circuit affirmed dismissal of failure-to-warn claims after finding the plaintiff's allegations insufficient to show either that the warning was inadequate or that the failure to warn proximately caused the plaintiff's injury.<sup>38</sup> In *Lewis v. Abbott Laboratories*, the district court dismissed a *pro se* plaintiff's failure-to-warn claims because the plaintiff did not plead facts to show that the defendant failed to provide adequate warnings to her doctors.<sup>39</sup> However, these two cases cite the *Twombly* and *Iqbal* cases only in passing and offer little substantive discussion of the heightened pleading standard and its true impact on failure-to-warn allegations.

The Supreme Court's analyses in *Twombly* and *Iqbal*—and particularly the Court's rejection of detailed factual allegations because of their failure to address each of the necessary elements of the plaintiffs' claims—suggests that pharmaceutical product

liability plaintiffs will in the future be required to conduct a far more thorough pre-filing investigation and identify a far more complete factual basis for a failure to warn claim than has heretofore been the case. In both *Twombly* and *Iqbal*, the plaintiffs alleged specific facts in support of their complaints. In *Twombly*, the plaintiffs' antitrust complaint included detailed factual recitations of specific actions taken by or among local telephone operating carriers (the "Baby Bells" or "ILECs"), which the plaintiffs alleged impeded the entry into the marketplace of competing local carriers ("CLECs").<sup>40</sup> In *Iqbal*, the plaintiffs' constitutional claims were premised upon an even more-detailed factual discussion of the detention and treatment both of the named plaintiff and Arab Muslims generally following the September 11 attacks.<sup>41</sup>

In each case, however, the Court explained that the recitation of facts in a complaint that is merely consistent with a plaintiff's theory of liability—even a detailed recitation of such facts—is not enough. As the Court explained in *Iqbal*, "Where a complaint pleads facts that are merely consistent with the defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief."<sup>42</sup> The Court instructed that "[d]etermining whether a complaint states a plausible claim for relief will... be a context-specific task that requires the reviewing court to draw upon its judicial experience and common sense."<sup>43</sup> This analysis requires a court to test a plaintiff's factual allegations against each of the elements needed to support the legal claim. Thus, for example, in *Iqbal*, the Court held that the plaintiffs' specific factual allegations of mistreatment—even if indicative of unconstitutional discrimination in some respects—did not state a cause of action because the plaintiffs had not set forth facts plausibly showing that the defendants "purposefully adopted a policy of classifying post-September 11 detainees as 'of high interest' because of their race, religion, or national origin," as necessary under the specific legal theory of recovery proffered in the case.<sup>44</sup>

If the Supreme Court's plausibility standard is faithfully applied to pharmaceutical product liability complaints, many failure-to-warn claims will never advance beyond the pleadings stage. With minor variations among jurisdictions, a cause of action in strict liability for failure to warn is comprised of five essential elements:

- (1) a risk of harm that is inherent in the product or that may arise from the intended or reasonably anticipated use of the product;
- (2) a reasonably foreseeable or actually foreseen risk of harm at the time the product is marketed;
- (3) a failure to provide any warning of the danger or a failure to provide an adequate warning (or instructions) of the danger;
- (4) the absence of the warning (or instruction) must render the product unreasonably dangerous; and
- (5) the failure to warn (or instruct) must constitute a causative nexus in the product user's injury.<sup>45</sup>

Using these basic elements as the framework for their complaints, many pharmaceutical plaintiffs allege little more than that a

drug was prescribed, its labeling contained inadequate warnings, and the failure to warn proximately caused the plaintiff's injuries. This is particularly the case in pharmaceutical mass tort litigation, where plaintiffs' attorneys often generate cut-and-paste pleadings for hundreds or thousands of plaintiffs, revealing little about the facts—let alone the *essential* facts behind any particular plaintiffs' claims. But *Twombly* and *Iqbal* make it clear that such unsubstantiated, conclusory allegations cannot sustain a claim. Rather, every plaintiff asserting failure-to-warn allegations must plead *sufficient factual matter* demonstrating a *plausible* cause of action that is not subject to an "obvious alternative explanation."<sup>46</sup>

What then should be required of a plaintiff alleging a cause of action for failure to warn? Under the Court's decisions in *Twombly* and *Iqbal*, it does not appear to be enough to merely allege that a drug manufacturer should have known about the alleged risks of their product absent some plausible factual showing that this risk was apparent to the defendant at the time the drug was prescribed. Nor, as is often the case, does it seem that a subsequent FDA-mandated labeling change alone would set forth a plausible basis for a claim that the manufacturer reasonably or actually new of the alleged risk at the time of prescription, given the "obvious alternative explanation" that the labeling change was required due to new, previously unrecognized risks. Likewise, plaintiffs cannot rest on simple formulaic allegations that the prescribing physician was unaware of the alleged risk or that a different warning label would have changed the physician's prescribing decision. The plausible bases for such factual allegations are a necessary predicate under *Twombly* and *Iqbal* for plaintiffs to state a cause of action.

Plaintiffs in pharmaceutical product liability litigation can be expected to argue that they should not be held to strict application of the *Twombly/Iqbal* standard because of an alleged inequity of information between plaintiffs and corporate defendants. However, defendants would counter that this objection overlooks the plaintiffs' pre-existing, pre-suit duty to investigate the validity of their claims<sup>47</sup> and the fact that this modern age provides plaintiffs with myriad fact-generating and fact-gathering tools. For example, plaintiffs often can gather significant information about a drug's known or anticipated risk event profile from information that is publicly available on the FDA website or obtainable through FOIA requests, from clinical trial information available on the drug manufacturer's website, or through published literature, most of which is also available online. Furthermore, product liability plaintiffs, unlike defendants, have the ability to speak with their prescribing physicians and thereby obtain facts necessary to support allegations that a warning was inadequate and that the inadequacy proximately caused the plaintiff's injuries.

Given these readily available sources of pre-filing information, defendants argue, plaintiffs who rely upon only formulaic recitations of fact in their complaints either have not satisfied their Rule 11 inquiry obligations or do not have the required factual basis to demonstrate the required plausible basis for recovery. As the Supreme Court noted, although "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, ... it does not unlock the doors of discovery for a plaintiff armed with nothing

more than conclusions."<sup>48</sup> Courts should not "forget that proceeding to . . . discovery can be expensive,"<sup>49</sup> and therefore "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."<sup>50</sup> With its rulings in *Twombly* and *Iqbal*, the Supreme Court thus has provided pharmaceutical defendants with a powerful weapon against unsubstantiated, formulaic claims of wrongdoing and has imposed discipline upon plaintiffs in the filing of pharmaceutical product liability complaints.

## Endnotes

1 Lisa Girion, *State Vioxx Trial Is Set as Drug Suits Boom; An Explosion in Litigation Spurs Calls for Legal Reform and Regulatory Changes*, L.A. TIMES, June 27, 2006.

2 *Id.*

3 Information concerning the number and nature of product liability MDL proceedings was distilled from reports made available via the official website of the Judicial Panel on Multidistrict Litigation. See [http://www.jpml.uscourts.gov/General\\_Info/statistics/statistics](http://www.jpml.uscourts.gov/General_Info/statistics/statistics) (2009).

4 355 U.S. 41 (1957).

5 See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007).

6 *Conley*, 355 U.S. at 45-46.

7 *Id.* at 47-48.

8 550 U.S. 544 (2007).

9 *Id.* at 558 (quoting 5 Wright & Miller § 1216, at 233-34).

10 *Id.* at 559 (citations omitted).

11 *Id.* at 557-58 (quotation marks and citation omitted).

12 *Id.* at 562-63.

13 *Id.* at 557 (quotation marks and citation omitted).

14 129 S. Ct. 1937 (2009).

15 *Id.* at 1953 (quotation marks and citation omitted) (emphasis added).

16 *Id.* at 1949. Quoting *Twombly*, the Court also reiterated that a "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

17 *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 556, 557, 570) (citations omitted) (emphasis added).

18 *Id.* at 1948-49.

19 *Id.* at 1951 ("We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.' The complaint alleges that Ashcroft was the 'principal architect' of this invidious policy, and that Mueller was 'instrumental' in adopting and executing it. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy because of, not merely in spite of, its adverse effects upon an identifiable group. As such, the allegations are conclusory and not entitled to be assumed true . . . It is the conclusory nature of [the plaintiffs'] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." (citations and quotation marks omitted)).

20 *Id.*

21 *Id.*

22 *Id.* (quoting *Twombly*, 550 U.S. at 570).

23 *Id.* at 1950.

24 *Id.* at 1951.

25 See, e.g., David Ingram, *Specter Proposes Return to Prior Pleading Standard*, NAT'L L.J. July 24, 2009, available at [www.law.com/jsp/article.jsp?id=1202432493166](http://www.law.com/jsp/article.jsp?id=1202432493166).

26 S. 1504, 111th Cong. § 2 (2009).

27 *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of John Payton, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.), available at <http://judiciary.senate.gov/pdf/12-02-09%20Payton%20Testimony.pdf>. In opposition, the U.S. Chamber of Commerce and forty business associations and individual companies sent a letter to the Senate committee arguing that the “drastic change in standards” proposed in the legislation “would impose enormous costs on already struggling businesses and further impede economic recovery” and “would overwhelm[] the federal judicial system with frivolous lawsuits.” See Letter from U.S. Chamber of Commerce et al. to Senators Patrick J. Leahy and Jeff Sessions, at 1 (Dec. 1, 2009), available at <http://www.uschamber.com/issues/letters/2009/091201s1504.htm>.

28 Prepared Statement of Prof. Arthur R. Miller, N.Y.U. School of Law, submitted to the United States House of Representatives, Subcommittee on the Constitution, Civil Rights and Civil Liberties of the Committee on the Judiciary, Oct. 27, 2009 at 6, available at <http://judiciary.house.gov/hearings/pdf/Miller091027.pdf>.

29 See *Frey v. Novartis Pharmaceuticals Corporation*, 642 F. Supp. 2d 787 (S.D. Ohio 2009). In the interest of full disclosure, the authors represent the defendant in this litigation.

30 *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

31 The defendant initially sought dismissal of plaintiff's failure-to-warn claim on the ground of preemption, but this part of the defendant's motion was withdrawn following the United States Supreme Court's ruling in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

32 Plaintiff's Amended Complaint at 5-6, *Frey v. Novartis Pharms. Corp.*, (No. 1:07-cv-00317-HJW (S.D. Ohio) (filed Sept. 5, 2008) (Doc. 18).

33 *Id.* at 6-7.

34 *Frey*, 642 F. Supp. 2d at 795.

35 *Id.*

36 *Id.*

37 *Id.* at 796.

38 288 F. App'x. 597, 608-09 (11th Cir. 2008).

39 2009 WL 2231701, at \*5 (S.D.N.Y. July 24, 2009).

40 *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). For example, the plaintiffs alleged that the anticompetitive conduct included “making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers.” *Id.* at 550-551.

41 *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The complaint alleged, for example, that the named plaintiff's jailors

kicked him in the stomach, punched him in the face, and dragged him across his cell without justification, subjected him to serial strip and body-cavity searches when he posed no risk to himself or others and refused to let him and other Muslims pray because there would be “[n]o prayer for terrorists.”

*Id.* at 1944 (internal record citations omitted). More broadly, the complaint alleged that the defendants had “arrested and detained thousands of Muslim men . . . as part of its investigation of the events of September 11 . . . and that the policy of holding post-September 11th detainees in highly restrictive

conditions of confinement until they were ‘cleared’ by the FBI was approved by” the specifically-identified, government-official defendants. *Id.*

42 *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 557) (quotation marks omitted).

43 *Id.* at 1950.

44 *Id.* at 1952.

45 See, e.g., *Reese v. Mercury Marine Div. of Brunswick Corp.*, 793 F.2d 1416, 1420 n.1 (5th Cir. 1986) (applying Texas law); *Strong v. U-Haul Co. of Mass., Inc.*, 2007 WL 433268, at \*3 (S.D. Ohio Feb. 2, 2008) (“[T]he basic common elements of all of plaintiffs' failure to warn claims are: (1) defendants knew or should have known of the risks associated with the product; (2) defendants failed to warn plaintiffs about those risks; and (3) the failure to warn was the proximate cause of plaintiffs' injuries.”) (applying Ohio law).

46 *Twombly*, 550 U.S. at 568.

47 Rule 11 of the Federal Rules of Civil Procedure “stresses the need for some prefiling inquiry into both the facts and the law to satisfy [counsel's] affirmative duty [to investigate].” *Albright v. Upjohn Co.*, 788 F.2d 1217, 1221-1222 (6th Cir. 1986); see also *Pretrial Order #39, In Re Digitek Prod. Liab. Litig.*, MDL No. 1968 (S.D. W. Va. Aug. 26, 2009) (reciting pre-suit obligations imposed by Rule 11 and permitting limited discovery to determine whether plaintiffs' counsel had reasonable basis for a claim prior to filing the suit alleging adverse reaction caused by a defective drug product).

48 *Iqbal*, 129 S. Ct. at 1950.

49 *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 558 (2007).

50 *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)) (quotation marks omitted).



AUTHORITIES SPLIT AFTER THE SUPREME COURT'S *HALL STREET* DECISION: WHAT IS LEFT OF THE MANIFEST DISREGARD DOCTRINE?

By Stephen J. Ware\* & Marisa C. Maleck\*\*

Arbitration is a private-sector court.<sup>1</sup> Rather than litigating in a government court (in which a judge or jury resolves the dispute), many parties form contracts obligating themselves to have their disputes resolved by an arbitrator. The arbitrator's decision in such a case, typically called an arbitration "award," can be enforced in court. To do this, the party that won in arbitration can get a court order "confirming" the arbitration award.<sup>2</sup> A confirmed award in favor of the plaintiff (or 'claimant') is enforced in the same manner as other court judgments,<sup>3</sup> and an arbitration award in favor of the defendant precludes the plaintiff from reasserting in court the claim the plaintiff lost in arbitration.<sup>4</sup> So arbitration awards are generally final and binding.

A court's main alternative to confirming an arbitration award is to vacate it, but courts do not vacate arbitration awards very often.<sup>5</sup> This is largely because the Federal Arbitration Act (FAA),<sup>6</sup> which governs nearly all arbitration in the United States,<sup>7</sup> contains narrow grounds for vacatur. Section 10(a) of the FAA says a court may vacate an award:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>8</sup>

Importantly, the FAA's grounds for vacating arbitration awards do not include "error of law" by the arbitrator. Courts generally do not review whether the arbitrator's decision correctly applied the law, and "courts have directly acknowledged that '[a]rbitrators are not bound by rules of law.'" However, courts may be uncomfortable confirming arbitration awards that misapply the law. Perhaps for this reason, courts have gone beyond the FAA's statutory grounds for vacatur to create two additional grounds for vacatur. Under these two judicially-created grounds, "an arbitration award may be vacated if (1) the arbitrator 'manifestly disregarded' applicable law, or (2)

enforcement of the arbitration award would violate 'public policy.'"<sup>10</sup>

In addition, some courts have enforced contractually-created grounds for vacating arbitration awards. For example, a panel of the Ninth Circuit enforced an arbitration agreement providing that "[t]he Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous."<sup>11</sup> Such clauses are apparently motivated by parties' fear of a "knucklehead" arbitration award being confirmed under the FAA's narrow grounds of vacatur.<sup>12</sup> This fear leads some parties to try to add (by contract) additional grounds for vacatur to enable courts to better police the legal accuracy of arbitrator's rulings.

The Supreme Court, however, rejected such contractually-created grounds for vacatur in the 2008 case of *Hall Street Associates v. Mattel*.<sup>13</sup> In *Hall Street*, the Supreme Court stated that the FAA's four grounds for vacatur are "exclusive."<sup>14</sup> The Court viewed the FAA's provisions on confirmation and vacatur of arbitration awards

as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process and bring arbitration theory to grief in post-arbitration process.<sup>15</sup>

This rationale, along with *Hall Street's* statement that the FAA's four grounds for vacatur are "exclusive," has led some courts and commentators to conclude that *Hall Street* does away with not only contractually-created grounds for vacatur, but also a judicially-created one, the "manifest disregard of law" doctrine.<sup>16</sup> By contrast, other courts continue to use the manifest disregard doctrine to vacate awards, even after *Hall Street*.<sup>17</sup>

The manifest disregard doctrine is traced to the Supreme Court's decision in *Wilko v. Swan*,<sup>18</sup> which stated (in dicta) that "interpretations of the law by arbitrators in contrast to manifest disregard are not subject . . . to judicial review for error in interpretation."<sup>19</sup> This statement might be read to say that, although courts should not overrule arbitrators who try to apply the law but make an error in doing so, courts should overrule arbitrators who refuse even to try to apply the law. And lower courts applying *Wilko's* manifest disregard doctrine often summarize it as permitting vacatur if "the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it."<sup>20</sup>

*Wilko* and the manifest disregard doctrine were relied upon by the petitioner in *Hall Street*. As the Supreme Court explained:

\* Stephen J. Ware is a Professor of Law at the University of Kansas and faculty advisor to the KU chapter of the Federalist Society.

\*\* Marisa C. Maleck is a second year student at the University of Chicago Law School and a student liaison to the Federalism/Separation of Powers and Litigation Practice Groups' Executive Committees of the Federalist Society.



Hall Street [the petitioner] reads [*Wilko*] as recognizing “manifest disregard of the law” as a further ground for vacatur on top of those listed in § 10, and some Circuits have read it the same way. Hall Street sees this supposed addition to § 10 as the camel’s nose: if judges can add grounds to vacate (or modify), so can contracting parties.

But this is too much for *Wilko* to bear. Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator’s legal errors. Then there is the vagueness of *Wilko*’s phrasing. Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.” We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.<sup>21</sup>

This passage has left uncertainty in its wake.

Courts and commentators have split three ways on *Hall Street*’s implications for the manifest disregard doctrine. One approach is that the manifest disregard doctrine is dead, killed by *Hall Street*,<sup>22</sup> so courts must now confirm arbitration awards that manifestly disregard the law. At the other extreme, some courts treat the manifest disregard doctrine as though it was unaffected by *Hall Street*; in these courts, “manifest disregard of the law” remains a judicially-created ground for vacatur in addition to the four statutory grounds found for vacatur found in the text of the FAA.<sup>23</sup> A third group of courts takes an intermediate position. In these courts, the manifest disregard doctrine survives, but not as an independent, judicially-created ground for vacatur. Rather, the manifest disregard doctrine is folded into FAA Section 10(a)(4), so arbitrators who manifestly disregard the law are held to have “exceeded their powers”; thus the statutory ground for vacatur is triggered.<sup>24</sup>

This three-way split of authority may not last. As more appellate courts have a chance to address *Hall Street*’s impact on the manifest disregard doctrine, they may converge on a single view. If not, the law may remain unsettled enough for the Supreme Court to take another arbitration case in order to clarify the status of the manifest disregard doctrine. Of course, Congress could amend the FAA to provide this clarification,<sup>25</sup> and one of us has proposed statutory language to do so.<sup>26</sup> But until the law is clarified, litigants seeking to vacate arbitration awards increase their chances by casting their manifest disregard arguments as arguments under FAA §10(a)(4), rather than as arguments relying on a judicially-created ground for vacatur.<sup>27</sup> Of course, litigants defending arbitration awards against manifest disregard arguments can argue that the arbitrator did not manifestly disregard the law and, even if she did, arbitrators have every right to manifestly disregard the law. In sum, we still

do not know whether arbitrators must try to apply the law or else have their awards vacated. A strikingly important gap in arbitration law remains.

## Endnotes

- 1 STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION § 2.1 (2d ed. 2007).
- 2 9 U.S.C. § 9 (2000).
- 3 WARE, *supra* note 1, § 2.40.
- 4 *Id.* § 2.41 (discussing claim-preclusive—or res judicata—effect of arbitration awards).
- 5 *Id.* § 2.43.
- 6 9 U.S.C. §§ 1 - 16 (2000).
- 7 WARE, *supra* note 1, § 2.4(c).
- 8 9 U.S.C. § 10(a) (2000).
- 9 WARE, *supra* note 1, § 2.45(a)(1) (quoting *Aimcee Wholesale DCorp. v. Tomar Prods., Inc.*, 237 N.E.2d 223, 225 (N.Y. 1968)).
- 10 WARE, *supra* note 1, § 2.45.
- 11 *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 990-91 (9th Cir. 2003). For discussion of the split of authority on this issue, see WARE, *supra* note 1, § 2.45(c).
- 12 See, e.g., Christopher R. Drahozal, *Contracting Around RUA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 Pepp. Disp. Resol. L.J. 419, 426-27 (2003); Carroll E. Neesemann, *Contracting for Judicial Review: Party-Chosen Arbitral Review Standards Can Inspire Confidence in the Process, and Is Good for Arbitration*, DISP. RESOL. MAG., Fall 1998, at 18.
- 13 128 S.Ct. 1396 (2008).
- 14 *Id.* at 1403.
- 15 *Id.* at 1405 (internal quotation omitted).
- 16 See, e.g., *The Householder Group v. Caughran*, 576 F. Supp. 2d 796, 800 (E.D. Tex. 2008) (“The Fifth Circuit previously recognized the following two common law grounds for vacating an arbitration award: (1) manifest disregard of the law; and (2) contrary to public policy. But “[t]he Supreme Court has recently held that the provisions of the FAA are the exclusive grounds for expedited vacatur and modification of an arbitration award, which calls into doubt the non-statutory grounds which have been recognized by [the Fifth Circuit].” In light of the Supreme Court’s holding in *Hall Street*, the court will limit its analysis to the statutory grounds enumerated in the FAA.” (internal citations omitted)); see also *Prime Therapeutics LLC v. Omnicare Inc.*, 555 F. Supp. 2d 993, 999 (D. Minn. 2008) (“[D]oes this suggest that courts can no longer vacate an arbitration award based on judicially-created grounds such as ‘manifest disregard of the law’? After *Hall Street*, this Court believes the answer to that question is yes.”); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008) (“As the Second Circuit’s traditional understanding of *Wilko* and §10—that *Wilko* endorsed manifest disregard and that §10’s grounds are not exclusive—is inconsistent with the basis for the holding in *Hall Street*, the Court finds that the manifest disregard of the law standard is no longer good law.”); *Hereford v. D.R. Horton, Inc.*, No. 1070396, 2008 WL 4097594, \*5, 2008 Ala. LEXIS 186, \*12-13 (Ala. Sept. 5, 2008) (““In light of the fact that the Federal Arbitration Act is federal law, and in light of the Supremacy Clause of the Constitution of the United States, Art. VI, we hereby overrule our earlier statement in *Birmingham News* that manifest disregard of the law is a ground for vacating, modifying, or correcting an arbitrator’s award under the Federal Arbitration Act, and we also overrule any such language in our other cases construing federal arbitration law.”).
- Two other cases suggesting that *Hall Street* ended the manifest disregard doctrine include *Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 123 n.3 (1st Cir. 2008), and *ALS & Assocs. Inc. v. AGM Marine Constructors Inc.*, 557 F. Supp. 2d 180, 185 (D. Mass. 2008); however, these cases conflict with a First Circuit decision vacating an award under the manifest disregard doctrine. *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68 (1st Cir. 2008). *Kashner Davidson*, however, did not acknowledge *Hall Street*’s existence.

Commentators supporting the view that *Hall Street* ended the manifest disregard doctrine or at least seriously calling into question the doctrine's continuing vitality include Albert G. Besser, *Arbitration Vacatur: The Supreme Court Bars One Route and Muddles the Other—Manifest Disregard is Dead!*, 34 FALL VT. BAR J. 67, 68 (2008), AND Mauricio Gomm-Santos & Quinn Smith, *On Dangerous Footing: The Non-Statutory Standards for Reviewing An Arbitral Award*, 18 Am. Rev. Int'l Arb. 353, 367 (2007).

17 See, e.g., *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1283 (9th Cir. 2009), cert. denied, 130 S.Ct. 145 (2009) (vacating an award on manifest disregard grounds post-*Hall Street*); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 419 (6th Cir. 2008) (same).

18 346 U.S. 426 (1983), overruled on other grounds, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

19 346 U.S. at 436-437. For a strong argument "that the 'manifest disregard' doctrine as it stands is legally baseless and should be abandoned," see Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 585-86 (2005) ("[T]he authorities on which the *Wilko* majority relied for its 'manifest disregard' dicta do not support the doctrine in its current form—that is, as a check on an arbitrator's intentional departure from established law. On the contrary, courts and commentators contemplated judicial intervention as a means to give effect to the arbitrator's intent. Courts following this rationale would vacate an award when the arbitrator manifested an intention to adhere to the law but erred in executing this intention, not when the arbitrator consciously disregarded legal rules, as the modern 'manifest disregard' standard allows.").

20 See Jill Gross, *Hall Street Blues: The Uncertain Future of Manifest Disregard*, SECURITIES REGULATION LAW JOURNAL, VOL. 37: 3, 232, 236 (2009) (citing *Cytec Corp. v. Deka Prods. Ltd. P'ship*, 439 F.3d 27, 35 (1st Cir. 2006)).

21 128 S.Ct. 1396, 1403-04 (2008). For a strong criticism of this passage, see Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 497-98 (2008).

22 See *supra* note 16.

23 *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 2008 U.S. App. LEXIS 23645, \*10-11 (6th Cir. 2009) (*Hall Street* "significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10, but it did not foreclose federal courts' review for an arbitrator's manifest disregard of the law."); see also *Qorvis Comms., LLC v. Wilson*, 549 F.3d 303 (4th Cir. 2008) (noting *Hall Street* and considering a manifest disregard challenge to an arbitration award but rejecting that challenge); Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1, 5 (2009) (*Hall Street* "leaves manifest disregard and other common-law vacatur standards fully intact.").

24 See *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (2009) ("[T]he manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA, specifically 9 U.S.C. §10(a)(4), which states that the court may vacate 'where the arbitrators exceeded their powers.'"); *Stolt-Nielsen SA, v. AnimalFeeds Intern Corp.*, 548 F.3d 85, 93-96 (2d Cir. 2008) (finding *Hall Street* inconsistent with statements "treating the 'manifest disregard' standard as a ground for vacatur entirely separate from those enumerated in the FAA," but agreeing with those who "think that 'manifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards."); see also *Mastec N. Am., Inc. v. MSE Power Sys., Inc.*, No. 1:08-cv-168, 2008 WL 2704912, at \*3, 2008 U.S. Dist. LEXIS 52205, at \*\*8-9 (N.D.N.Y. July 8, 2008) ("The Supreme Court's holding in *Hall Street* limits the application of 'manifest disregard of the law' to the Section 10 bases."); *Chase Bank USA, N.A. v. Hale*, 19 Misc.3d 975, 859 N.Y.S.2d 342, 349 (2008) ("Although the Court in *Hall Street* did not settle on its own definition of the term, it rejected the notion that 'manifest disregard' embodies a separate, nonstatutory ground for judicial review under the FAA. Nonetheless . . . the *Hall Street* Court appears to have done nothing to jettison the 'manifest disregard' standard of *Wilko*. Accordingly, this court will view 'manifest disregard of law' as judicial interpretation of the section 10 requirement, rather than as a separate standard of review."). Probably also in this category is *Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."). The Fifth Circuit criticized the

Sixth Circuit's *Coffee Beanery* decision, *supra* note 23, but not *Stolt-Nielsen* and *Comedy Club*. The Fifth Circuit concluded its opinion in *Citigroup*, noting: "To the extent that our previous precedent holds that non-statutory grounds may support the vacatur of an arbitration award, it is hereby overruled." *Id.* at 358. This narrow holding suggests that the Fifth Circuit may be open to arbitration award challenges based on the manifest disregard doctrine, but recast as §10(a)(4) challenges.

For criticism of this view, see, e.g., Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L. J. 234, 238 (2007) ("[A]ttempts to derive the manifest disregard standard from the statutory grounds have not proven persuasive."); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1144 (2009) ("[M]anifest disregard review should not be viewed as synonymous with exceeding-powers review.").

25 Compare, e.g., Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234 (2007) ("argu[ing] in favor of codifying manifest disregard of the law as a ground for vacating arbitration awards"), with Kevin Patrick Murphy's note, *Alive But Not Well: Manifest Disregard After Hall Street*, 44 GA. L. REV. 285, 314 (2009) ("Congress should step in and abrogate manifest disregard itself."); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1147 (2009) ("Manifest disregard has no place in the modern structure of arbitration for general submissions to arbitration—that is, submissions to arbitration that do not call for the arbitrator to apply the law. As noted above, manifest disregard is a paternalistic remnant of the era of judicial distrust of arbitration that undermines party autonomy, relies on an unsupported rationale, and ultimately is nonsensical.").

26 Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 109-121 & App. A at 348-49 (2006) (rejecting manifest disregard in favor of vacating "[w]here the award was based on the arbitrators' error of law and, at the time of their most recent agreement submitting the controversy to arbitration, the parties could not have formed an enforceable contract to avoid such law.").

27 It is rare for a reviewing court to vacate an arbitration award on manifest disregard grounds, even prior to *Hall Street*. One study of 336 federal and state employment arbitration awards between 1975 and 2006 found that manifest disregard challenges were only successful in 7.1 percent of the cases. See Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 189 (2008).



---

# RELIGIOUS LIBERTIES

## CHRISTIAN LEGAL SOCIETY V. MARTINEZ: RELIGIOUS STUDENT GROUPS, NONDISCRIMINATION RULES, AND THE CONSTITUTION

By Gregory S. Baylor\*

---

In *Christian Legal Society v. Martinez*,<sup>1</sup> the United States Supreme Court will decide whether the Constitution permits a public university law school to exclude a religious student organization from a forum for speech solely because the group requires its officers and voting members to share its core religious commitments. The student chapter of the Christian Legal Society (CLS) at Hastings College of the Law draws its officers and voting members from among those who voluntarily sign its Statement of Faith and who strive to abide by CLS's religiously-rooted moral conduct standards. The CLS chapter welcomes all students to attend its meetings and events. Hastings concluded at the beginning of the 2004-2005 school year that CLS's voting membership and officership requirements violated the religion and sexual orientation provisions of its Policy on Nondiscrimination. It accordingly refused to confer Registered Student Organization (RSO) status upon CLS. Contradicting the Seventh Circuit's decision in a virtually identical case,<sup>2</sup> the Ninth Circuit rejected CLS's claims that Hastings violated its constitutionally protected rights of free speech, expressive association, free exercise of religion, and equal protection of the laws. The Supreme Court presumably granted review to resolve the conflict between the Seventh and Ninth Circuits in both their analytical approaches and their outcomes.

### I. Factual and Procedural Background

#### A. Registered Student Organizations at Hastings

The University of California-Hastings College of the Law encourages a broad array of student organizations to meet, express their views, and conduct activities on campus. In the 2004-2005 academic year, when the dispute arose, Hastings recognized approximately 60 RSOs.

RSOs are entitled to meet in university rooms, to apply for funding to support various group activities, and to access multiple channels for communicating with students and faculty—including posting on designated bulletin boards, sending mass emails to the student body, distributing material through the Student Information Center, appearing on published lists of student organizations, and participating in the annual Student Organizations Fair. Although it provides resources and facilities to all of these groups, Hastings makes clear that it “neither sponsor[s] nor endorse[s]” the views of any RSO.

#### B. The Christian Legal Society

Founded in 1961, the Christian Legal Society is a nationwide association of lawyers, law students, law professors,

---

\* Senior Legal Counsel, Alliance Defense Fund, Washington, DC. The author is one of the attorneys representing the CLS chapter in the U.S. Supreme Court. Parts of this article are drawn from the Brief for Petitioners filed on January 28, 2010.

and judges who share a common faith and seek to honor Jesus Christ in the legal profession. CLS provides opportunities for fellowship, as well as moral and spiritual guidance, for Christian lawyers; encourages and mentors Christian law students; promotes justice, religious liberty, and biblical conflict resolution; and encourages lawyers to furnish legal services to the poor.

The national Christian Legal Society maintains attorney and law student chapters across the country. Student chapters, such as that at Hastings, invite speakers to give public lectures addressing how to integrate Christian faith with legal practice, organize transportation to worship services, and host occasional dinners. The signature activities of the chapters are weekly Bible studies, which, in addition to discussion of the text, usually include prayer and other forms of worship.

CLS welcomes all Hastings students—regardless of “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation”—to attend and participate in its meetings and other activities. However, to be officers or voting members of CLS—and to lead its Bible studies—students must affirm their commitment to the group's core beliefs by signing the national CLS Statement of Faith and pledging to live their lives accordingly.

The CLS Statement of Faith provides:

Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.
- God, the Father Almighty, Maker of heaven and earth.
- The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
- The presence and power of the Holy Spirit in the work of regeneration.
- The Bible as the inspired Word of God.

The chapter's constitution also sets forth guiding principles for the chapter and those who publicly associate with it. “Officers must exemplify the highest standards of morality as set forth in Scripture” in order “that their profession of Christian faith is credible.” To confirm its position amid contemporary religious controversies regarding sexuality, national CLS adopted a resolution in March 2004, which explains: “In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership.” The resolution applies to “all acts of sexual conduct outside of God's design for marriage between one man



and one woman, which acts include fornication, adultery, and homosexual conduct.”

Voting members are entitled to vote on chapter policies and programs, as well as amendments to the chapter constitution, to participate in choosing the group’s officers, and to stand for election to those officer positions. Voting members share the responsibility of teaching CLS’s weekly Bible studies.

### C. *Hastings Rejects CLS’s Attempt to Register*

At the beginning of the 2004-2005 school year, CLS sought to register with Hastings. Invoking its Policy on Nondiscrimination, Hastings withheld RSO status from CLS, thereby depriving it of the benefits available to other student organizations. Hastings concluded that CLS’s officership and voting membership requirements constituted discrimination on the basis of religion and sexual orientation.

### D. *Litigation in the Lower Federal Courts*

CLS filed a civil rights lawsuit under 42 U.S.C. § 1983 in federal district court. Among other things, CLS asserted that Hastings’ refusal to accept its registration was viewpoint discriminatory (and thus a prima facie violation of the Free Speech Clause) because Hastings allowed groups to organize around secular ideas but not religious ones. In their answer and interrogatory responses, the Hastings defendants confirmed that their Policy on Nondiscrimination “permits political, social, and cultural student organizations to select officers and members who are dedicated to a particular set of ideals or beliefs.”

However, during their subsequent depositions, two Hastings officials asserted that student groups, in order to receive RSO status, must allow *all* students to serve as voting members and officers, even if those students reject the group’s core principles. The law school dean testified that, for example, the Hastings Democratic Caucus could not deny voting membership or eligibility for an officer position to a Republican and the Clara Foltz Feminist Association could not refuse membership to a chauvinist, even though the text of Hastings’ Policy on Nondiscrimination does not impose such restrictions.

The district court ruled in Hastings’ favor.<sup>3</sup> The court held that denying recognition to CLS had “no significant impact” on the ability of the CLS students to express themselves. This conclusion was based primarily on subsidiary judgments that (1) “despite Hastings’ refusal to grant CLS recognized status,” the group continued to meet without recognition and “CLS’s efforts at recruiting members and attendees were not hampered”; and (2) “CLS has not demonstrated that its ability to express its views would be significantly impaired” by “requiring CLS to admit gay, lesbian, and non-Christian students.” Even assuming that enforcement of the policy had a significant impact, however, the court held that “Hastings has a compelling interest in prohibiting discrimination on its campus.”

The CLS students appealed to the Ninth Circuit, which affirmed in a two-sentence opinion, citing its own recent decision in *Truth v. Kent School District*,<sup>4</sup> a case involving a public high school’s application of a non-discrimination rule to a student group. Significantly, the Ninth Circuit in *Truth* held that the application of expressive association doctrine

was inappropriate in cases involving allegedly unconstitutional ejections from speech forums.

Instead, the Ninth Circuit’s analysis rested on the understanding that “all groups must accept all comers as voting members even if those individuals disagree with the mission of the group.” The Ninth Circuit held that Hastings’ denial of recognition of CLS was “viewpoint neutral and reasonable.” Consistent with *Truth*, the court did not analyze whether Hastings’ refusal to accept CLS’s registration infringed the chapter’s right of expressive association or whether any such infringement was adequately justified.

## II. Constitutional Questions the Court Will Face

CLS argues that Hastings has infringed its right of expressive association; improperly denied it access to a speech forum; committed viewpoint discrimination; and abridged its right to the free exercise of religion. CLS further contends that Hastings has not sufficiently justified these prima facie abridgements of its constitutionally protected rights. Hastings denies that it infringed CLS’s constitutional rights. Hastings also asserts that its interests justify any impairment of CLS’s rights. This article will focus on CLS’s expressive association and viewpoint discrimination arguments, as well as Hastings’ asserted justifications for infringing these rights.

### A. *Abridgment of Constitutionally Protected Rights*

The Court’s first task will be to determine whether Hastings’ refusal to recognize CLS abridged the group’s constitutionally protected interests.

#### 1. The Right of Expressive Association

CLS argues that Hastings violated its right of expressive association, a right that the Supreme Court has held is implicit in the First Amendment freedoms of speech, assembly, and petition.<sup>5</sup> In so arguing, CLS relies primarily upon the Supreme Court’s decisions in *Healy v. James*,<sup>6</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,<sup>7</sup> and *Boy Scouts of America v. Dale*.<sup>8</sup> In *Healy*, the Court held that public universities violate the right of expressive association by withholding recognition from student groups without adequate justification. In *Hurley*, the Court held that forcing the private organizers of the Boston St. Patrick’s Day parade to include a “gay pride” group in the parade would violate the First Amendment. In *Dale*, the Court held that forcing the Boy Scouts to retain an openly homosexual man as a Scoutmaster would substantially affect the Scouts’ ability to communicate their chosen message regarding human sexuality.

CLS argues that *Healy* requires the Court to conclude that Hastings’ refusal to confer the benefits of recognition upon the chapter infringed its right of expressive association. Hastings attempts to distinguish *Healy* on the ground that it has given CLS some permission to meet on campus, whereas the public college involved in *Healy* did not allow the group in question (Students for a Democratic Society, or SDS) to meet as an official group on campus. However, the *Healy* Court indicated that a college’s refusal to extend other benefits—the sort Hastings has withheld from CLS—constitutes an independent abridgement of the right of expressive association. Moreover,



the members of SDS *were* permitted to meet on campus in *Healy*, just not “as SDS.”

Hastings argued in the lower courts that the forced inclusion of individuals who reject CLS’s religious commitments would not undermine the chapter’s ability to formulate and communicate its messages. However, in *Roberts v. U.S. Jaycees*, the Supreme Court stated that “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association” than forcing it to relinquish control to those who do not share its message.<sup>9</sup> Just as “the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice,”<sup>10</sup> forcing a group to offer leadership roles to outsiders entails the distortion or destruction of that voice.<sup>11</sup> And for religious groups, “[d]etermining that certain activities are in furtherance of an organization’s religious mission, and that *only those committed to that mission should conduct them*, is . . . a means by which a religious community defines itself.”<sup>12</sup> Moreover, the *Dale* Court declared that courts must “give deference to an association’s view of what would impair its expression.”<sup>13</sup>

In the lower courts, Hastings also attempted to distinguish *Dale* and *Hurley* on the ground that those cases involved police power rules whereas its rule governed access to a speech forum. Hastings essentially argued that if CLS did not want to comply with its rules, it could simply forego the benefits of recognition; it relatedly contended that forcing a group to choose between two constitutional rights (access to a speech forum and the right of expressive association) does not implicate the Constitution at all. However, the Supreme Court itself has rejected this argument.<sup>14</sup>

## 2. Viewpoint Discrimination

Hastings’ written Policy on Nondiscrimination permits groups to exclude from leadership those individuals who reject its core beliefs. A number of groups exercised that apparent freedom in order to preserve their identities and messages. For example, the student chapter of the Association of Trial Lawyers of America, for example, required all members to “adhere to the objectives of the Student Chapter as well as the mission of [national] ATLA.” The Hastings pro-life group stated that “[s]o long as individuals are committed to the goals set out by the leadership, they are welcome to participate and vote in Silenced Right elections.” The bylaws of Outlaw reserve the right to remove any officer that “work[s] against the spirit of the organization’s goals and objectives.” (In its Ninth Circuit briefing, Hastings deemed these requirements “informational only” and inconsequential.)

Hastings’ written Policy on Nondiscrimination forbids religious groups like CLS from doing likewise. CLS, for example, cannot withhold voting membership or eligibility for leadership from someone who denies the existence of God or rejects traditional sexual morality. Along the same lines, CLS must allow a person who rejects the inspiration and authority of the Bible to lead a Bible study. In short, under the written Policy on Nondiscrimination, RSOs are permitted to organize around secular ideas but not religious ideas. CLS argues that such differential treatment constitutes the viewpoint discrimination deemed presumptively unconstitutional by the

Supreme Court in cases like *Good News Club v. Milford Central School*,<sup>15</sup> *Rosenberger v. Rector of the University of Virginia*,<sup>16</sup> and *Lamb’s Chapel v. Center Moriches Union Free School District*.<sup>17</sup>

In response to this argument, Hastings asserted in the middle of discovery (and contrary to its answer and interrogatory responses) that it did not merely forbid discrimination on the basis of the things listed in its written Policy on Nondiscrimination, but actually forbid student groups from excluding *any* student from *any* position for *any* reason. Based upon this representation, the Ninth Circuit held that Hastings’ treatment of the CLS chapter was not viewpoint discriminatory.

As CLS argues, Hastings’ supposed “all comers” policy violates the First Amendment rights of *every* student group. Under this policy, a Federalist Society chapter could not deny a leadership position or voting membership to an individual who is not a conservative or libertarian, who denies that “the state exists to preserve freedom,” who denies that “the separation of governmental powers is central to our Constitution,” or who denies that “it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.”<sup>18</sup>

### B. Hastings’ Asserted Justifications

Assuming the Supreme Court concludes that Hastings abridged CLS’s constitutional rights, it will then consider whether these abridgements were adequately justified, such that Hastings’ refusal to recognize CLS did not violate the Constitution. In the courts below, Hastings argued that it wanted to make “the educational and social opportunities” that student groups provide available to all students. However, Hastings did *not* argue that non-Christians had been lining up to serve as officers and voting members of the CLS chapter. Nor did it argue that leadership or voting membership of the CLS chapter is an important “gateway” to tangible secondary benefits, such as opportunities to enhance one’s career. Hastings also asserted that its policy encourages “tolerance, cooperation, and learning among students.” Outlaw, which intervened as a defendant in the case, argued below that Hastings needed to punish the CLS chapter so that its members could “attend law school in an environment free from discrimination.” It also observed that its members pay tuition and student activity fees and objected to the extension of benefits to an allegedly “discriminatory” group. Outlaw did *not* contend that its members wanted to serve as leaders of CLS, vote in CLS officer elections, or lead CLS Bible studies.

If the Court concludes that Hastings’ application of its written Policy on Nondiscrimination to CLS was viewpoint discriminatory, it will ask whether that application was the least restrictive means of pursuing a compelling governmental interest.<sup>19</sup> More specifically, it presumably will ask questions such as whether the government officials at Hastings have a compelling interest in having an atheist lead a CLS Bible study. The Court might ask whether Hastings has a compelling interest in having a person who engages unrepentantly in sexual conduct outside marriage serve as a messenger for and representative of a group that deems such conduct sinful.

The Court has held that eliminating discrimination can in some contexts be a compelling governmental interest.<sup>20</sup>

However, it is difficult to imagine the Court concluding that the government has a compelling interest in forcing a religious group to accept as leaders and voting members individuals who reject the group's core religious commitments. To illustrate, the federal government and every state-exempt religious societies from laws that would otherwise prevent them from hiring or otherwise choosing leaders on the basis of religion.<sup>21</sup> In addition, the Court held in *Boy Scouts of America v. Dale* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*<sup>22</sup> that a compelling state interest does not underlie every application of rules barring discrimination on the basis of sexual orientation.

It is also difficult to imagine that the Court will find compelling Hastings' alleged interest in encouraging "tolerance, cooperation, and learning among students." In *Hurley*, a unanimous Court observed as follows:

It might . . . have been argued . . . that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a *decidedly fatal objective*.<sup>23</sup>

To the extent Hastings hopes to produce "more tolerant" students by punishing CLS for its alleged intolerance, it appears as though such a goal would not justify the school's impairment of CLS's First Amendment rights. It also bears noting that CLS permits *all* students to attend its meetings and participate in its events. Accordingly, Hastings essentially must prove that this is insufficient—that the school's objectives are unsatisfied unless all students have the absolute right not just to attend meetings, but to be officers and voting members.

### III. Conclusion

The dispute between CLS and Hastings is not an isolated incident. It is but one of numerous conflicts between student religious groups that desire to choose their leaders on religious grounds and college administrators who claim that such a practice is "discriminatory." The Supreme Court's resolution of *Christian Legal Society v. Martinez* is likely to provide significant guidance regarding the constitutional limits on the power of public colleges and universities to regulate the leadership requirements of student groups. The Court's decision is thus critically important to the future of student religious groups at America's public universities.

### Endnotes

- 1 U.S. No. 08-1371 (cert. granted Dec. 7, 2009).
- 2 *Christian Legal Soc'y Chapter at So. Ill. Univ. v. Walker*, 453 F.3d 853 (7th Cir. 2006).
- 3 2006 WL 997217 (N.D. Cal. May 19, 2006).
- 4 542 F.3d 634 (9th Cir. 2008).

- 5 *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006) (hereinafter *FAIR*); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).
- 6 408 U.S. 169 (1972).
- 7 515 U.S. 557 (1995).
- 8 530 U.S. 640 (2000).
- 9 468 U.S. at 623; *see also FAIR*, 547 U.S. at 69 (holding that laws that permit outsiders to become "members" of the "expressive association" touch the core of the First Amendment). Such intrusions "impair the ability of the original members to express only those views that brought them together." *Roberts* at 623; *see also* *New York Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* 791 (1978).
- 10 *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).
- 11 *Dale*, 530 U.S. at 654.
- 12 *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (emphasis added).
- 13 530 U.S. at 653.
- 14 *FAIR*, 547 U.S. at 59; *see also* *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Christian Legal Soc'y v. Walker*, 453 F.3d at 864 (citing *Healy*, which also involved denial of access to a speech forum rather than the application of a police power rule).
- 15 533 U.S. 98 (2001).
- 16 515 U.S. 819 (1995).
- 17 508 U.S. 384 (1993).
- 18 The Federalist Society for Law and Public Policy Studies, *About Us*, <https://www.fed-soc.org/aboutus/> (last visited Feb. 9, 2009).
- 19 *See, e.g., Rosenberger*, 515 U.S. at 829; *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (application of strict scrutiny).
- 20 *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).
- 21 42 U.S.C. §§ 2000e-1 & 2000e-2(e)(1) (exempting religious organizations from the religious nondiscrimination provisions of Title VII); Executive Order No. 13279 (exempting religious organizations from the religious nondiscrimination requirement applicable to federal contractors); CAL. GOV. CODE § 12926(d) (exempting religious organizations from law prohibiting religious discrimination in employment); 22 CAL. ADMIN. CODE tit. 22, §§ 98100, 98222 (exempting religious organizations from prohibition on religious discrimination by state contractors and recipients of state funds).
- 22 515 U.S. 557 (1995).
- 23 515 U.S. at 579-80 (1995) (emphasis added).



---

## POSITIVE SECULARISM AND THE AMERICAN MODEL OF RELIGIOUS LIBERTY

---

By Richard W. Garnett\*

---

At its best, the American model of religious liberty is not a freedom from religion or a freedom of religion; it is a freedom for religion.

Pope Benedict XVI has expressed his admiration for the “American model” of religious liberty and church-state liberty. For example, during his recent trip to the United States, the Pope noted, and seemed to praise, America’s “positive concept of secularism,” in which government respects both the role of religious arguments and commitments in the public square and the important distinction between religious and political authorities.

Is there, in fact, such a model, and such a concept, at work in America? What are its features? And, is it worthy of the Pope’s apparent endorsement?

Looking back, for a moment, to America’s founding, we are reminded that Thomas Jefferson regarded the religious-freedom guarantees enacted into law after the Revolution as a “fair” and “novel” experiment. Similarly, it was the confident hope of James Madison that America’s bold experiment in religious liberty—one that rejected both mere “toleration” and Jacobin anti-clericalism alike—“promised a lustre to our country.” Madison believed that a specifically “American model” of religious freedom was emerging, and that it would distinguish us, shape us, and strengthen us. He and other leaders among the founding generation were keenly aware that they were attempting something new and great, something that would change—indeed, remake—the world. At the same time, they felt the weight of great responsibility. John Adams revealed as much when he wrote that “the People in America have now the best opportunity and the greatest trust in their hands, that Providence has ever committed to so small a number, since the transgression of the first pair; if they betray their trust, their guilt will merit . . . the indignation of Heaven.”

Fortunately we have not—not yet, anyway—betrayed this trust. Today the American experiment in religious liberty is both vital and vulnerable. Our religious-freedom protections are robust, but incomplete. Our church-state arrangement is exemplary, yet confused. This much, though, seems clear: what was true at the founding remains true today, namely, that there are at work several different models, or ways of thinking about, the freedom of religion under and through law. Indeed, to quote John Witte, the various competing models of Adams’s day—and it should be emphasized that there were competing models—have “born ample progeny, and the great rivalries

among them are fought out in the courts, legislatures, and academies throughout the land.”

That said, it is possible to identify an American model of “healthy secularism” that our Constitution and laws do, and should, reflect and protect.

The freedom of religion is seen not as a quaint relic from a simpler past, or as an anachronistic, even dangerous, threat to democracy. It is embraced whole-heartedly as a fundamental, natural human right, one that is intimately connected to human dignity and flourishing. This right and its protection can and should co-exist with the political community’s obligation to secure public order and safety. In the “American model,” the law does not purport to exclude religious believers and values from public life and the civic conversation. Instead, it protects everyone—believers and non-believers alike—against coercion in religious matters. It leaves to the voluntary associations of civil society the responsibility of religious education and evangelization, but it protects their right to carry out this responsibility. The right to “public” religion is protected, as is the freedom of “private” religion. “Church” and “state” are separate, not in the sense that faith is excluded from politics—such exclusion, after all, is impossible—but in the healthy, “positive” sense that the institutions and authorities of government are separate from, and prevented from interfering with, the proper independence of the institutions and authorities of religion.

The model is “secular” in the sense that laws and policies are not supplied directly by religious authority; it is “positive,” though, in that the understanding of human flourishing that it is designed to promote includes the search for religious truth and the sanctity of religious conscience. The American experiment should be seen as an attempt to secure religious liberty and authentic human flourishing through constitutional limits on interference by government with religion, and constitutional protection of the profession and practice of faith.

These are the features of the American model at its best. At the same time, it is not the only one that is, or has been, at work in the United States. Nor is it the case that American courts, judges, and officials always act in accord with this model. Indeed, it is easy to find stories—in the media and in the law books—involving public officials who have neglected the model’s fundamental premises, even turning them upside-down, treating citizens’ public religious expression with suspicion, rather than with evenhandedness and respect. In some quarters, the view persists—not only among government regulators, but also among commentators, scholars, judges, politicians, and many of our fellow citizens—that our Constitution calls for the exclusion of religious expression and argument from the public square of civil society. Why? Why do so many seem to think that religious-inspired arguments are inappropriate, even unwelcome, in political discourse?

I do not believe that most public officials harbor ugly prejudices or deep hostility toward religious believers. Nor do I believe that they are willfully neglecting their obligations under the Constitution. Instead, I am convinced that these officials—

---

\* Richard W. Garnett is a Professor of Law at the University of Notre Dame and a contributor to *Public Discourse*. This essay is adapted from a lecture presented in Rome on January 13, 2009, at a conference, “The American Model of Church-State Relations,” organized by Ambassador Mary Ann Glendon and celebrating the 25th anniversary of formal diplomatic relations between the United States and the Holy See. This article originally appeared in *Public Discourse*, [www.thepublicdiscourse.com](http://www.thepublicdiscourse.com), and is reprinted with permission.

and also, unfortunately, many well-meaning Americans today—fail to understand and appreciate the “American model” of positive secularism. This misunderstanding is revealing. It reflects the competition, and the tension, between at least three different approaches to religious freedom in America today. The “American model,” then, is not static, but dynamic; not fixed, but in flux. And again, it is vulnerable.

These three approaches can usefully be characterized as “freedom from religion,” “freedom of religion,” and “freedom for religion.” (There is, I should note, a fourth possibility—“theocracy,” or direct rule by religious authority—but this is not a live option in America, and has not been for centuries, despite what you may have heard from some hysterical commentators.)

The first approach—“freedom from religion”—accepts religion as a social reality, but regards it primarily as a danger to the common good, and regards it as a practice that should be confined to the private, personal realm. On this view, it is “bad taste”—or worse!—“to bring religion into discussions of public policy.” Under this approach, as Professor Stephen Carter memorably put it, religion is “like building model airplanes, just another hobby: something quiet, something trivial—not really a fit activity for intelligent . . . adults.” Religious belief is protected, but the permissible implications and expressions of those beliefs are limited. The dominant concern is the domestication of religion, and its assimilation to the often-relativistic ideology of the state. The role of law and government is to maintain the boundary between private religion and public life; it is certainly not to support, and only rarely to accommodate, religious practice and formation.

This “freedom from” approach has found some expression in American law and policy, both in the past and—in some instances—today. It is not, however, true to the Constitution, to religious liberty properly understood, or to the nature of the human person, who is hard-wired and by nature drawn to search for truth and to cling to it when it is found. It is a good thing, then, that this approach’s influence seems more pronounced among academics and a few political activists, than among Americans generally.

The second approach—“freedom of religion”—tends to emphasize toleration, neutrality, and equal-treatment. Religion, on this view, is something that matters to many people, and so the law does not permit it to be singled out for special hostility or discrimination. It is recognized and accepted that religious believers and institutions are at work in society, and the stance of the law is even-handedness. Because we are all entitled to express our views and to live in accord with our consciences, religious believers are so entitled, too. The law, it is thought, should be “religion-blind.”

Although this approach is not hostile to religion, it is also reluctant to regard religion as something special. Religious liberty is just “liberty,” and liberty is something to which we all have an “equal” right. Religion is not something to be “singled out,” for accommodations and privileges, or for burdens and disadvantages. Again, religious commitment, expression, and motivation are all, in the end, matters of taste and private preference.

This approach represents an improvement on its “freedom from” competitor, and it, too, has been and is reflected in American law. In fact, it is fair to say that its influence is much more pronounced in the Supreme Court’s recent decisions. The Justices have emphasized, for example, that officials may not treat religiously-motivated speech worse than speech that reflects other viewpoints. Similarly, courts have ruled that public funds may be allocated to religiously affiliated schools and social-welfare agencies—so long as they are providing a secular public good—on the same terms as non-religious ones. At the same time, governments are not required to provide special accommodations for religious believers, or to exempt religiously motivated conduct from the reach of generally applicable laws.

Finally, a third approach: “freedom for religion.” This approach, in my view, represents the American experiment in “healthy secularism” at its best; it is the one that we should be rooting for. Under this approach, the search for religious truth is acknowledged as an important human activity. Religion, as religion, is special; its exercise is seen as valuable and good, and worthy of accommodation, even support. The idea is not, to be clear, that the public authority should demand religious observances or establish religious orthodoxy; it is, instead, that a political community committed to positive secularity can and should still take note of the fact that people long for the transcendent and are, by nature, called to search for the truth, and for God.

The appropriately secular and limited state will not prescribe the path this search should take, but it will take steps—positive steps—to make sure that “freedom for” religion and the conditions necessary for the exercise of religious freedom are nurtured. The government, under this approach, will not only refrain from discriminating against religion, it will take special care to accommodate and facilitate it—though always in a way that respects the distinction between “church” and “state” and the liberty of individual conscience. It not only avoids imposing unnecessary burdens on religion, it also looks for ways to lift such burdens where they exist.

It is often observed, and regretted, that American law and constitutional doctrine dealing with religious liberty is not entirely coherent. Given the discussion so far, though, this fact should not come as a surprise. Instead, it reflects the tensions between and among the three approaches I have identified. Indeed, it is precisely this ongoing competition that allows for the “American model,” one that—while not perfect—provides good reason to share the Pope’s hopes for it.

There is no denying that the relevant case-law and judicial opinions are riddled with clichés, unhelpful “tests,” bad history, and clunky rhetoric. Still, things could be worse. And, in my view, they have improved markedly in recent years, as we have been moving away from “freedom from” and toward “freedom of” and “freedom for.” (My former employer, the late Chief Justice William Rehnquist, deserves much of the credit for this development.) Again: the American experiment in religious liberty is both vital and vulnerable. Our religious-freedom protections are robust, but incomplete. Our church-state arrangement is exemplary, yet confused.



---

# TELECOMMUNICATIONS & ELECTRONIC MEDIA

## THE OPPORTUNITY AND PERIL OF SMART GRID

By Ray Gifford & Eric Gunning\*

---

Last year witnessed “the smart grid” going from an arcane concept about updating the electric distribution system to a full-fledged public policy priority. The Obama Administration views the deployment of smart grid technologies as a linchpin to achieving its new energy economy objectives. These goals include: lowering energy costs for consumers, achieving energy independence, promoting clean and green technologies, and reducing greenhouse gas emissions. To that end, Congress allocated approximately \$4 billion in stimulus grants and loans to smart grid deployments and tasked the National Institute for Standards and Technology (“NIST”) to develop smart grid interoperability standards.

While smart grid deserves some of the hype that it has received, the reality of smart grid deployment is much more fraught. For smart grid deployment combines familiar challenges of information technology and communications network deployment—standards and interoperability problems, intellectual property issues, and privacy and security—with regulatory issues—prudent investment, rate design, competitive, and monopoly aspects of the service. In turn, this not quite harmonious stew of issues interrelates to present challenges to utilities, information technology vendors and regulators. How these challenges are answered will decide whether smart grid delivers the energy-saving, market-enabling efficiencies that proponents’ promise, or if it becomes an industrial policy boondoggle where costs exceed the benefits.

The remainder of this article discusses the major policy issues facing smart grid deployment.

### I. What is the Smart Grid?

‘Smart Grid’ is a general description encompassing distinct components of the electricity distribution network. Analytically, the electric system can be divided into three components: generation, transmission, and distribution. Generation involves just that, generation of electricity from central station power plants. These sources can be coal, nuclear, natural gas, or renewable resources. From there, the electricity is transported over the transmission system, which is an interconnected series of high voltage power lines.<sup>1</sup> In turn, the distribution system takes high voltage power into substations, steps down the voltage and delivers it to consumers.

This is a highly abstracted description of the electric grid system but will suffice for this discussion. The smart grid, for the most part, involves the final part of the grid—the distribution system. “Smart grid” involves creating robust communications paths between end-use consumers (industrial, commercial, and residential users) and upstream to the utilities,

.....

\* Ray Gifford and Eric Gunning are attorneys with Wilkinson Barker Knauer, LLP, and lead the firm’s Smart Grid practice area. Gifford is former Chairman of the Colorado Public Utilities Commission.

or other energy service providers. This communication path, in turn, can be used to manage and monitor voltage and the “cleanness” of power, communicate price to consumers, and customize energy management and usage by consumers.

Each of these smart grid capabilities promises potential benefits to consumers. Better monitoring and control of the distribution system increases reliability. Utilities can know and anticipate where outages occur or where transformers are stressed to the breaking point. In addition, “cleaner” power in the distribution system means less power needs to be generated in the first place.

The ability to communicate price in real-time (RTP) or time-of-use (TOU) promises increased efficiency and conservation. Currently, the vast majority of consumers pay for electricity on an averaged cost basis—an electron used at 4pm is priced the same as one consumed at 4am for the retail customer. Meanwhile, the underlying wholesale cost of generating that electron varies greatly depending on the time of day. During “peak demand,” wholesale electricity prices can be five or ten times higher than “off peak” prices. Because there is no price incentive for consumers to conserve during peak demand periods<sup>2</sup> and utilities have a regulatory duty to meet demand, a substantial amount of investment must go to plan and build infrastructure to meet these peaks. Smart grid then, by communicating price to consumers, promises to “shave” energy demand during peak demand times. In turn, this should bring savings to consumers and the electric system by eliminating the need to build generation to meet demand peaks.

Smart grid then is very simple and very complex. It is simple because it involves creating communications paths on the distribution system where consumers have transparency into prices and generation mix; and where distribution operators have more information about demand and system status. It is complex because the architecture and regulatory treatment of this communications path presents many questions.

We turn to those now, beginning with standard setting:

### II. NIST Interoperability Roadmap and Standards-Setting

On January 20, 2010, the National Institute of Standards and Technology (NIST) published its “*NIST Framework and Roadmap for Smart Grid Interoperability Standards, Release 1.0.*” This report is the culmination of Phase I of NIST’s three-phased approach for complying with the congressional mandate to coordinate development of interoperability standards for Smart Grid under the Energy Independence and Security Act of 2007 (EISA). From here, Phases II and III of the approach will be delegated to the newly-created Smart Grid Interoperability Panel (SGIP). This panel will be charged with refining proposed standards and developing new ones as the industry progresses.

Briefly, the NIST Report:

- Identifies seventy-five existing interoperability standards that are applicable or likely to be applicable to Smart Grid;
- Specifies fifteen high-priority gaps and another fifty-five lower-priority gaps for which standards need to be adopted, receive industry consensus and NIST (or SGIP) approval;
- Establishes priority action plans to address and resolve the identified high-priority gaps;
- Introduces a Smart Grid conceptual model to create a common language for discussing the complex “system of systems”; and
- Passes the baton to the SGIP, a public-private partnership comprised of over 400 members and twenty-two stakeholder groups, to implement Phase II of the NIST interoperability plan which includes, providing a permanent process to “support the ongoing evolution of the Smart Grid Interoperability Framework, identify and address additional gaps, reflect changes in technology and requirements in the standards, and provide ongoing coordination of [standard setting organization] efforts to support timely availability of new or revised Smart Grid Standards.” In addition, SGIP will also be responsible for Phase III: Smart Grid device conformity assessments and testing to ensure interoperability.

The issuance of the NIST report closes out on a frenetic year for the federal government in its efforts to spur development and deployment of Smart Grid technologies. These efforts included \$3.4 billion in DOE grants awarded in October 2009 as part of the American Reinvestment and Recovery Act of 2009 (ARRA). Whether these efforts will actually catalyze real and substantial growth in Smart Grid remains an open question, and it may be many years before we can assess their success or failure. This determination with respect to NIST’s efforts to “solve” interoperability will hinge on a number of practical, legal, and business issues, some of which are outlined below:

#### *A. Federal-State Jurisdictional Issues.*

The federal government has some laudable goals with respect to standard setting and spurring Smart Grid deployments. But its jurisdictional authority over the energy markets is more constrained. Through FERC, the federal government can only mandate standards for interstate transmission. It does not have authority over generation, middle-mile and last-mile distribution, or in-home energy management. Therefore, any federal standard setting efforts beyond interstate transmission must rely on condition-laden federal grants and loans (see the DOE grant program), fostering industry adoption (see the SPIG program) and pressuring/encouraging state regulatory commission to buy in. On the last point, there is no guarantee that state regulators will support the federal efforts. State regulators may even bristle on what are perceived to be federal intrusions into state regulatory turf. Standards adoption in large part will therefore depend

on states’ willingness to mandate NIST standards in state Smart Grid deployments.

Significantly, then, the federal push for standards rests on the hortatory ability of NIST, DOE, and FERC to convince the states and utilities that the federal standards should be followed, or in utility law parlance, would constitute “reasonable and prudent” investments.

#### *B. Preventing Stranded Investments.*

NIST’s standard setting efforts must avoid, if possible, stranded investments in incompatible technologies. While the over 100 demonstration projects being deployed through the federal stimulus efforts all must incorporate NIST standards, there are hundreds more AMI (automated meter infrastructure) deployments that predate the Smart Grid push. It is inevitable that certain utilities will have deployed non-compliant technologies.

State regulatory commissions will have to face the unenviable task of deciding whether to: (a) allow ratepayers to assume the costs of the utilities’ replacement of the stranded technology, or (b) allow the continued use of technologies that are not NIST-standard compliant and thus allow continued use of stranded technologies that will not be supported. Moreover, any utilities seeking cost recovery for AMI or other Smart Grid deployments that are NIST-standard compliant may face significant push-back from the state commissions.

#### *C. What If NIST Gets It Wrong?*

Mandating standards is always a tricky endeavor. If NIST focuses its efforts on bolstering a standard that turns out to be deficient or a subpar standard, the federal efforts may have the perverse effect of retarding innovation. It is not clear how nimble NIST and its Smart Grid Interoperability Panel will be in responding to these developments and being able to shift approved standards midstream.

#### *D. Picking Winners and Losers.*

Although NIST claims that its standard setting efforts are technology agnostic, there will invariably be winners and losers based on the standards NIST endorses. Again, these winners and losers may not be based entirely on merit but on business decisions regarding technology development, or on political economy factors having very little to do with the underlying technology.

For example, there has been a significant push by technology companies to ensure that Internet protocol (IP) standards are incorporated into the NIST-approved standards. Taking the cue, the NIST includes the IP suite as potential standards and defers to the Internet Engineering Task Force (IETF) to identify the suite of protocols applicable to Smart Grid. Adopting IP will benefit existing technology providers in the Internet space and allow quicker integration to other technologies and sectors. In addition, IP does provide a number of benefits; notably, it is a mature standard with widespread adoption, it enables bandwidth sharing and quality of service measures,

and it is easily scalable. NIST also strongly suggests the adoption of IPv6 (as opposed to IPv4) in developing Smart Grid standards. And yet, non-IP-based standards vendors and advocates raise security concerns about IP-based infrastructure because its very pervasiveness makes it more vulnerable.<sup>3</sup>

#### *E. Privacy Issues.*

The NIST report accurately noted that privacy, including the collection of energy consumption data from consumers and the ownership of such data are issues of significant concern to state regulators. As the state regulators strive to enact rules on these issues, it is possible that these decisions will negatively impact the standard setting efforts. This could occur if there is a disconnect between state privacy and ownership rules and the standards regime adopted at the federal level. Although the National Association of Regulatory Utility Commissioners (NARUC) adopted the “Resolution Urging the Adoption of General Privacy Principles for State Commission Use in Considering Privacy Implications of the Use of Utility Customer Information,” it is unclear how state regulatory commissions will respond or, as noted by the NIST report, whether state regulatory commissions have statutory authority to make privacy rulings.

With respect to standards setting, the Smart Grid industry is still in its infancy, with a number of hurdles to overcome before it has a comprehensive set of standards that will enable interoperability, plug-and-play interoperability, and stability. The NIST report constitutes a huge initial step—it is hoped—in the right direction.

### **III. Federal and State Tensions and the Role of the State Governments**

The federal smart grid push (through the NIST interoperability mandate) and the \$3.4 billion smart grid stimulus package in American Recovery and Reinvestment Act of 2009 (“ARRA”) has created tension between federal and state regulators as the majority of the regulatory, cost recovery and policy issues related to grid modernization will occur at the state level. While the Federal Energy Regulation Commission (“FERC”) regulates the wholesale energy markets and interstate transmission, state regulatory commissions have jurisdiction over public utilities and intrastate energy distribution and generation. FERC’s and NIST’s federal authority with respect to standards therefore can only directly impact interstate transmission, not distribution, the last mile, or home area networks, all of which are within the purview of the states. Therefore, the success of smart grid depends in large part on the actions taken by state regulators with respect to, among other things, cost recovery of smart grid investments, market structure, competitive issues, and establishing dynamic retail energy pricing (a necessary component of demand response). Despite the significant role of state regulators, they have been noticeably underrepresented in many smart grid policy discussions and debates.

This is problematic because the states are going to have the primary role in approving smart grid investment.<sup>4</sup>

Significantly, state regulators will evaluate:

- Cost recovery and prudent investment tests for utilities’ deployment decisions of smart grid technologies;
- Revising the regulatory structure for utilities to more closely align utilities’ incentives with smart grid benefits. This could entail decoupling the utilities’ profits from the amount of kilowatt-hours (kWhs) consumed and shifting to another regime that compensates utilities for adopting energy efficiency measures, akin to price cap regulation used to regulate telecommunications;
- Dynamic pricing and retail rate structures that enable, among other things, variable retail pricing based on wholesale energy prices;
- Ownership and sharing of customer data generated as a result of the smart grid; and
- Competition issues such as interoperability, unbundling, market regulation and electric network neutrality.<sup>5</sup>

Although it is the Obama Administration’s clear belief that grid modernization is a key component to many of the country’s energy problems, state regulators will actually need to evaluate the value to energy consumers. Simply put, the benefits of smart grid must prove to be greater than the costs of building out this new communications path. This is public utility law 101—investment in the smart grid must show itself to be reasonable and prudent. And that cost/benefit equation may have different answers in different utility systems.

The federal promotion of smart grid creates tension with states, as it is the state commissions that will be asked to approve utility expenditures on projects partially funded by federal stimulus dollars. Moreover, state regulators may perceive the federal efforts as an attempt to usurp some of the state powers with respect to the prudence of grid investments, interoperability mandates, and grid management.

### **IV. Network Design and Market Structure**

Despite stimulus funding and the rush to develop interoperability standards, significant questions remain regarding what is “smart grid” and what the grid of the future will look like. Debates are ongoing regarding whether the utility grid should have intelligence at the core, be based on an end-to-end architecture similar to telecommunication networks, or take on some hybrid architecture. It is likely that utilities will prefer having the control, intelligence, and innovation located within the core of their networks, as opposed to the edge of the network. This is because utilities’ current regulatory model rewards it for increasing the costs of providing electricity by investing in infrastructure, as opposed to seeking efficiency-enhancing benefits from innovative products and services provided over the network. Conversely, IT vendors such as Cisco and IBM favor more intelligence at the edge with Internet protocol being their preferred communications protocol. For now, the regulatory model pushes toward utilities increasing their capital stock, and controlling the communications path and network attachment. Until regulatory institutions like price caps or other efficiency-encouraging regulatory plans

are instituted, the distribution utility will seek to control the smart grid communications path.

In addition to network design, the smart grid industry is puzzling over answering the question: What is the business case for smart grid? For example, demand response depends on solving a number of problems: (a) creating incentives for customers to participate through price or other signals; (b) establishing the appropriate regulatory regime regarding market structure, privacy, etc.; and (c) identifying the “killer application” that will ultimately spur demand response. Beyond demand response, near-term success of grid modernization efforts could probably focus on grid optimization and efficiencies, an area where existing broadband networks could play a role by serving as the middle-mile communications network for the utilities.

For now, no one knows what the smart grid business model looks like. Utility rate design historically biases toward average cost pricing; smart grid makes real time, marginal cost pricing possible. Utility cost recovery biases toward increasing capital stock and selling more electrons; smart grid, if built on existing broadband systems at the least cost, should mean fewer electrons are sold and lower utility capital stock. Utility cost recovery encourages integration forward into the home for energy management; smart grid enables modularity and unbundled access where consumers have more choice of providers, energy management systems, and can monetize their own data.

#### IV. Conclusion—“Smart Enough Grid”

The core challenge of smart grid is a regulatory one. At the initial level, smart grid is the not-so-simple, but done-before construction of a communications path across the electricity distribution system. At the deeper level, smart grid unsettles the current cost recovery, pricing and business model of distribution utilities. Further, the benefits of smart grid are not uniform across all electric systems, and smart grid must satisfy cost/benefit criteria before regulators are going to authorize cost recovery. There remains great promise to smart grid—its market-making, efficiency-enhancing, and consumer-empowering possibilities are real and profound. In the end, smart grid transformation will have to be an evolution where “smart enough” solutions are tried, and missteps have to be tolerated.

#### Endnotes

1 The interconnectivity of the transmission grid varies across the nation, and it is not a single, interconnected national grid. The East, West, and Texas constitute separate interconnected transmission grids. Interconnection between these grids, which operate at different frequencies, can only be accomplished through a direct current (DC) tie.

2 In most parts of the country, the peak demand occurs during the summer when demand for cooling is at its greatest. As air conditioning becomes more pervasive, utility summer peaking issues have become more acute.

3 This is exactly the same phenomenon as affects computer platforms. The Windows OS systems face more security threats than, say, a Mac OS or Linux system, in part, because there are so many more machines running Windows. In turn, virus and malware attacks are more likely to focus on the most pervasive platforms because they have more potential victims.

4 Though there are exceptions, state public utility/public service commissions regulate the natural monopoly distribution systems of investor-owned (private) utilities. Publicly owned distribution systems exist in many parts of the country, and rural America is usually served by user-owned distribution co-operatives. Public power and co-operative distribution systems do not usually face a state regulatory approval process for investments like smart grid. That said, investor-owned utilities serve the largest number of customers in the country and stand to gain the most from smart grid investment. Accordingly, the state commissions remain the most important institutions that will evaluate the prudence of smart grid.

5 For example, in Colorado PUC Chairman Binz’s comments at a Gridweek conference in September 2009, he specifically indicated that in approving Xcel Energy’s SmartGridCity project, he was very interested in privacy; data ownership; market structure (whether utilities would be able to provide services in the home); unbundling of the meter; interoperability and network neutrality issues. See Comments of Chairman Ron Binz, Colorado Public Utilities Commission, GridWeek, State and Local Collaboration: Enabling a Recipe for Success Panel, September 22, 2009.





---

# BOOK REVIEWS

## Crisis and Command: A History of Executive Power from George Washington to George W. Bush

By JOHN YOO

*Reviewed by John C. Eastman\**

---

How do so-called “great” Presidents interpret and use their constitutional powers differently from average Presidents in times of emergency? What limits does the Constitution place on executive power when crises threaten our national security and the constitutional order? What are the respective roles of Congress and the courts in checking the President’s actions when he attempts to resolve these crises with his Article II powers?

These are a few of the questions Professor John Yoo, in his recent book *Crisis and Command: A History of Executive Power from George Washington to George W. Bush*, confronts as he traces, from President to President, the evolution of presidential power in the United States. The book is partly an episodic history of the response of Presidents to various crises, partly a compelling constitutional argument for an expansive interpretation of executive power, and entirely a very readable, enjoyable, and well-argued volume. Yoo argues that the Presidents who have been considered “great,” most notably George Washington, Abraham Lincoln, and Franklin D. Roosevelt, have interpreted their Article II powers broadly to resolve emergencies successfully during their tenure. He writes, “All these Presidents believed that their office was equal, and not subordinate, to Congress or the courts and took for granted that the broad exercise of that authority was essential to their success.”

As the title of the book suggests, “crisis” has been key to a President’s greatness: for instance, Yoo notes Teddy Roosevelt’s observation that “[i]f Lincoln had lived in times of peace, no one would have known his name now.” But more important is the President’s response to the exigency. Some rise to the challenge, as did Lincoln when he averted the breakup of the Union using his Commander in Chief powers, often without the prior consent of Congress. Others “withdr[aw] feebly into their shells,” as did James Buchanan when he determined that, though secession of the southern states was illegal, he had no constitutional power to prevent their exit. Beyond using these Presidents’ responses to crises as a measuring stick for greatness, Yoo also writes that such emergencies produce conflicts among the branches that more clearly reveal the extent of each branch’s power: “It is only during times of high stress on the political system when the principles of the constitutional framework clearly emerge.”

---

\*Dr. John C. Eastman, Professor and former Dean at Chapman University School of Law, is Chairman of the Federalist Society’s Separation of Powers Practice Group [and a candidate for California Attorney General].

In short, Yoo’s discussion of executive power is hardly an academic exercise focused on understanding the original meaning of or intent behind the Constitution’s Article II, which, among other things, vests in the President “[t]he executive Power,” bestows upon him the title of “Commander in Chief,” and binds him to “take Care that the Laws be faithfully executed.” These broad and ambiguous terms set out in the text of the Constitution tell us little about the Framers’ expectations of what exactly the President would become (and this is precisely why the Framers chose them), though, as Yoo points out, the Framers would hardly have intended the President to become a tool of the legislature, considering their experience under the executive-by-committee system set out by the Articles of Confederation.

Instead, the Framers favored a more flexible approach to executive power: it would not be meticulously recorded and preserved for all time within the text of the Constitution like a mosquito trapped in amber; it would be interpreted by the people who held the office as they encountered non-theoretical problems and emergencies. On the opposite side of the coin, Congress and, to a lesser extent, the courts would define the President’s power by allowing its expansion and limiting it when they felt the President overstepped his bounds. Yoo is persuasive in focusing on the practice of the political branches in defining the President’s power: given the broad terms laid out in the Constitution, we would expect the political branches, through their checks on each other, to define their meaning over time, especially during times of conflict.

Yoo spends most of *Crisis and Command* chronicling the most important episodes of the presidencies of some of the “great” Presidents: Washington, Thomas Jefferson, Andrew Jackson, Lincoln, and FDR. His discussion of each President is not comprehensive, as he readily admits at the beginning of the book. However, the purpose of the history is not to grade each President on his full performance while in office; rather, it is to evaluate each President’s use of his power during our nation’s most pressing emergencies, including the Whiskey Rebellion, the nullification crisis, and the Great Depression. During each of these episodes, the President succeeds by using his Article II powers, independent of Congress, to bring the emergency to a favorable conclusion. He may cooperate with Congress, but he does not let Congress drag him toward its own idea of a successful resolution. For instance, Yoo recounts that Congress passed four different Neutrality Acts before the United States entered World War II, but FDR, interpreting the language of the Acts loosely and even possibly contravening them, sold and leased equipment to Great Britain to prevent what FDR would have considered the national security disaster of losing Europe to the Axis powers. On the other hand, James Madison, whose presidency is not highly regarded, recognized America’s unpreparedness for war but took no active steps to prevent the war-minded Congress from leading the nation into the War of 1812, in which Washington, D.C. was conquered and burned and the United States nearly defeated.

---

\* John Yoo’s *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* is published by Kaplan Publishing.







through the litany of problems that can be expected if terrorists like KSM are tried in civilian court, one can only hope that someone who had a hand in sending KSM there read Sulmasy's analysis and at least tried to come up with a method to avoid the seemingly inevitable circus. The problems are daunting. Sulmasy describes potential problems with juries, the exclusionary rule, handling classified material, security clearances, exculpatory evidence, inconsistencies among federal courts, and the need for a unanimous vote for a guilty verdict, just to name a few. A corollary problem is that, to the extent constitutional rights of the accused need to be "relaxed" because the accused are not normally U.S. citizens, the impact eventually may be felt in the future by a concomitant dilution of citizen's rights, a problem Sulmasy describes as "bleed over." After reading Sulmasy's description of what lies in wait in federal court, one cannot but think that we need to rethink that choice of forum—fast.

In some ways, one wonders if Sulmasy's measured respect for differing points of view gets the best of him. Although Sulmasy makes a passing reference to "lawfare" in his book, it is used in a different sense than what one encounters in, for example, Jack Goldsmith's *The Terror Presidency*. In that book, Goldsmith provides a definition of lawfare as "the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective." Goldsmith further writes:

Enemies like Al Qaeda who cannot match the United States militarily instead criticize it for purported legal violations, especially violations of human rights or the law of war. They hide in mosques so that they can decry U.S. destruction of religious objects when attacked. They describe civilian deaths as "war crimes" even when the deaths are legally permissible "collateral damage." Or they complain falsely that they were tortured as we now know al Qaeda training manuals advise them to do. Lawfare works because it manipulates something Americans value: respect for law.

If there is anything missing from Sulmasy's work, it is an analysis of how lawfare may have impacted the debate surrounding military commissions. Given the methods of lawfare, human rights violations, including torture, would have been alleged concerning Guantanamo no matter how well the detainees were treated. Sulmasy cites research by Kyndra Rotunda suggesting that after a number of initial problems, detainees have in the main been treated rather well there. Others, of course, took the opportunity to call Guantanamo the "gulag of our time." Divining truth from such murkiness admittedly can be difficult. But because Sulmasy treats all viewpoints as reasonable and made in good faith, he perhaps too easily elides over the fact that some of the criticisms of the military commission process were not made in good faith at all, but rather for the political goal of undermining America's war effort. It is not only asymmetrically overmatched terrorist organizations that engage in lawfare. Other "usual suspects" tending to undermine the use of American power include nations strategically opposed to the United States, NGOs, civil liberties groups, much of the academy, and what Goldsmith describes as the "human rights industry." One wishes that the

possible impact of lawfare on the recent debates concerning military commissions had been elucidated more fully.

The salient features of Sulmasy's National Security Court system include civilian rather than Department of Defense oversight; set time periods within which a person must be tried for his alleged crimes; a respect for other nations' concerns about the death penalty (with capital punishment reserved only to those whose home countries allow for it); tailored habeas corpus rights for the accused; the creation of new Article III positions for judges well-versed in "the law of armed conflict, intelligence law, and national security law"; and a strict prohibition against torture against detainees during interrogation. In addition, Sulmasy recommends a reasonable approach to handling classified information, including keeping critical sources and methods and other critical information out of the hands of the accused. Classified information—or any information that should be kept out of our enemies' hands—is perhaps the Achilles Heel presented by Article III terrorist trials. Any defendant is going to demand all of the evidence the government possesses about him, which would normally sweep up key information concerning the government's sources and methods. U.S. forces operating in Afghanistan, Sulmasy points out, have discovered witness lists and other information culled from civilian terrorist trials in the United States. The risk is much more than a theoretical one.

Critics of military tribunals and a national security court system point to numerous successful prosecutions of suspected terrorists in civilian court. They see strategic value in "showing off" our civilian justice system to the rest of the world. On the other hand, the strategic importance of these trials to the enemy—in terms of providing a platform for the accused to stoke outrage and recruit—is difficult to measure and makes a simple tally of successful prosecutions an inappropriate metric of strategic success. Sulmasy is clearly seeking middle ground here—a system that is clearly and visibly fair, but without the risk of compromising the nuts and bolts of our nation's defense and intelligence operations.

Perhaps it is not too late for a practical effort to develop the national security court system that Sulmasy advocates—or at least a variant of it. Recent pronouncements from the Obama Administration reveal that it has not abandoned military commissions altogether, as Holder's decision to try a number of detainees by commission demonstrates. There is a chance that KSM himself may yet find himself before a military tribunal. But the decision to maintain two parallel tracks for handling suspected terrorists has the likely perverse effect of perpetuating all of the problems that military commissions present while introducing all of the new problems associated with civilian trials. It has recently been reported that attacks on foreign military installations—such as the USS Cole—will land a terrorist in a military tribunal, while a war crime against civilians—think 9/11—will entitle a terrorist to all of the constitutional protections civilian federal court provides. Many others have argued that such a policy approach makes no sense. Under such circumstances, Sulmasy's national security court system deserves serious attention.

Scott Brown now fills the "Kennedy seat" in the United States Senate in no small measure because he ran forcefully



against prosecuting detainees like KSM in places like New York or Boston. Polling from Massachusetts showed that voters disliked the idea of providing foreign terrorists the full panoply of constitutional rights to which a citizen is entitled. The Brown election has reinforced the notion that sending detainees to places like Manhattan for trial is bad politics. One hopes that Sulmasy can convince the Administration that it is also bad policy.

Sulmasy has performed a tremendous service to those who truly seek to understand the history of military commissions and who want to understand fully the policy choices in front of us. One can only hope that someone with a hand in formulating policy will listen to him.



## Practice Group Publications Committees

### **Administrative Law & Regulation**

Christian Vergonis, *Chairman*  
Daren Bakst, *Vice-Chairman*

### **Civil Rights**

Brian T. Fitzpatrick, *Chairman*

### **Corporations, Securities & Antitrust**

Michael Fransella, *Chairman*  
Carrie Darling, Robert T. Miller  
& Robert Witwer, *Vice Chairmen*

### **Criminal Law & Procedure**

Ronald J. Rychlak, *Chairman*  
William A. Hall, Jr. & Peter Thomson, *Vice Chairmen*

### **Environmental Law & Property Rights**

Donald Kochan, *Chairman*

### **Federalism & Separation of Powers**

Ilya Somin, *Chairman*  
Geoffrey W. Hymans, *Vice Chairman*

### **Financial Services & E-Commerce**

Charles M. Miller, *Chairman*

### **Free Speech & Election Law**

Reid Alan Cox, *Chairman*  
Francis J. Menton, Jr., *Vice Chairman*

### **Intellectual Property**

Mark Schultz, *Chairman*  
Steven M. Tepp & Adam Mossoff, *Vice Chairmen*

### **International & National Security Law**

Nathan Sales, *Chairman*  
Soraya Rudofsky, *Vice Chairman*

### **Labor & Employment Law**

James A. Haynes, *Chairman*  
Raymond J. LaJeunesse, Jr., *Vice Chairman*

### **Litigation**

Margaret A. Little & Christopher C. Wang  
*Co-Chairmen*

### **Professional Responsibility & Legal Education**

John J. Park, Jr., *Chairman*

### **Religious Liberties**

William Saunders, *Chairman*

### **Telecommunications & Electronic Media**

Raymond L. Gifford, *Chairman*

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars, and other individuals, located in every state and law school in the nation, who are interested in the current state of the legal order. The Federalist Society takes no position on particular legal or public policy questions, but is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We publish original scholarship on timely and contentious issues in the legal and public policy world in an effort to widen understanding of the facts and principles involved and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, not reflective of an organization stance. ENGAGE presents articles, white papers, speeches, reprints, and panels on a number of important issues, but these are contributions to larger ongoing conversations. We invite readers to submit opposing perspectives or views to be considered for publication, and to share their general responses, thoughts, and criticisms by writing to us at [info@fed-soc.org](mailto:info@fed-soc.org). Additionally, we happily consider letters to the editor.

For more information about The Federalist Society, please visit our website: [www.fed-soc.org](http://www.fed-soc.org).