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The Journal of the Federalist Society Practice Groups

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Restraining Park Doctrine Prosecutions Against Corporate Officials Under the FDCA
By Richard A. Samp & Cory L. Andrews

Policy Implications of the Patient Protection and Affordable Care Act
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A U.N. Regulated Internet? The Case for Defending Against Persistent Intergovernmental Threats to Internet Freedom
By Robert M. McDowell

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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.

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An Exchange Between Don W. King and Prof. Timothy S. Jost***

U.S. Health Care Reform: Comprehensive Insurance or Affordable Care?

*By Don W. King**

In 2010, Congress passed the Patient Protection and Affordable Care Act (Affordable Care Act or ACA).[1] The ACA reflects an approach to health care reform in which insurance[2] is used as the primary means to assure access to care. Under this approach, legislation is designed to increase the percentage of the population who have comprehensive, third-party coverage to pay for the majority of their medical expenses.

Since World War II, Congress and state legislators have often taken this approach, attempting to increase access to care by enacting polices that increase the prevalence of comprehensive, third-party coverage.[3] However, for many years, prices for both health insurance and medical care have increased,[4] and health care expenditures as a percentage of gross domestic product have increased.[5] Economic theory and some data suggest that policies designed to increase comprehensive, third-party coverage may be important contributors to high prices and large expenditures.[6]

This essay recommends a different approach, one in which each individual owns the funds used for his or her health care and chooses both health insurance and medical care from a wide variety of options. To achieve greater individual ownership, Congress and state legislators will need to repeal or decrease present incentives that favor third-party payment over paying directly for both health insurance and medical care. To achieve a wider variety of options, Congress and state legislators will need to repeal or decrease the stringency of many of the regulations presently governing health insurance, professional and hospital care, and pharmaceuticals. In addition, states will need to ensure that liability for medical malpractice does not limit access to care.

The essay is divided into four sections. Section I briefly describes the effects that policies enacted prior to the ACA (pre-ACA) have had on health care prices and expenditures. Section II summarizes the likely effects that major ACA provisions will have on prices and expenditures. Section III outlines an approach to health care reform that would lead to greater individual ownership of health care funds and increase each person's options for health insurance and medical care. Section IV describes how these latter reforms may be more effective than comprehensive insurance at increasing access to care for low-income, high-risk,[7] and older Americans.

I. Effects of Pre-ACA Policies on Prices and Expenditures

When considering the effects that federal and state policies have on health care prices and expenditures, it is important to consider separately the market for health insurance and the market for medical care.

Pre-ACA policies have increased prices for private health insurance in two primary ways. Some policies provide an incentive for individuals to obtain more health insurance than they otherwise would. Other policies restrict one's options for health insurance. Similarly, pre-ACA policies have increased prices for medical care in two primary ways. Some policies provide an incentive for individuals to obtain more medical care than they otherwise would. Other policies effectively restrict one's options for medical care and medical products.

A. Incentive to Obtain Excess Health Insurance

Since 1943, the federal government has allowed an employee to exclude the value of employer-sponsored health insurance (ESI) from gross income when calculating one's income tax.[8] However, the exclusion does not apply if one purchases insurance independent of an employer (IPI), and it does not apply if one pays for medical care directly or "out-of pocket."[9] As a result, there is a strong incentive for individuals to choose ESI over IPI and a strong incentive to choose a comprehensive health plan with minimal cost sharing over a more limited plan that involves significant cost sharing.

By increasing the prevalence of comprehensive, third-party coverage, the exclusion of ESI increases access to care for some people. However, the tax preference for ESI increases the demand for private health insurance,[10] specifically the demand for more expensive, comprehensive insurance with minimal cost sharing. Greater demand for any good or service usually leads to higher prices and larger expenditures.[11] In addition, when an employer owns the funds used for an employee's health insurance, the employee has less ability to choose insurance that best meets the needs of his or her particular situation.[12]

B. Restricted Options for Health Insurance

Beginning in the 1970s, some states enacted laws that restrict health insurance underwriting.[13] For example, some states require insurers to provide insurance to all applicants (*guaranteed issue*), and some states require insurers to charge all applicants the same price (*community rating*), regardless of the insured's risk of incurring medical expenses.[14] In addition, both Congress and states have enacted laws that require insurers to offer or include certain benefits in each insurance policy they sell (*mandated benefits*). For example, Congress has required group health plans to cover at least forty-eight hours of hospital care following childbirth,[15] and some states require insurers to offer or include coverage for items such as in vitro fertilization

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or the treatment of alcoholism.[16]

The primary benefit of underwriting restrictions is that high-risk persons are able to purchase health insurance at a lower price than they otherwise would, increasing insurance prevalence among high-risk persons.[17] However, these restrictions increase prices for others,[18] decreasing insurance prevalence among low and average-risk persons.[19] One study suggests that absent a mandate to purchase health insurance, the net effect is a decrease in the overall prevalence of health insurance.[20]

Similarly, the primary benefit of mandated benefits is that persons who need the care for which coverage is mandated will have fewer out-of-pocket expenses than they otherwise would. However, most mandated benefits increase insurance prices,[21] decreasing insurance prevalence among low and average-risk persons.[22] As with underwriting restrictions, one study suggests that benefit mandates decrease the overall prevalence of health insurance.[23] In effect, both underwriting restrictions and mandated benefits prevent people from choosing less expensive insurance that may be better for their particular situation.

C. Incentive to Obtain Excess Medical Care

As noted above, the exclusion from gross income for income tax purposes applies to ESI, but not to funds that a person uses to pay for care directly.[24] As a result, it is in most persons' interest to choose a comprehensive health plan that involves minimal cost sharing. In addition, Congress in 1965 created Medicare and Medicaid, public "insurance" programs that pay for medical care for persons 65 and older and for certain low-income Americans, respectively.[25] Because these programs pay for a large majority of a beneficiary's medical expenses,[26] they create a strong incentive for eligible persons to have the federal or state government pay for their medical care.

Both the ESI exclusion and public insurance increase access to care for some people. However, third-party payment for care increases the demand for care, and greater demand usually results in higher prices and larger expenditures. While greater demand and large expenditures for medical care are not necessarily problems,[27] when a third party pays for most care, there are few constraints on the demand for care, and the greater demand may lead to costly expenditures that have relatively few benefits.[28] In addition, when a public or private health plan owns the funds used for an individual's care, an individual has less flexibility to use the funds in the most appropriate way for his or her clinical situation.[29]

Public insurance has additional disadvantages. Because of low payment rates and other factors, some physicians do not accept public insurance beneficiaries.[30] Also, public insurance requires public funding, and the taxation necessary to fund public insurance has costs to society in addition to the cost of the funds collected.[31] Finally, because public spending for health care now represents a large and growing portion of both federal and state budgets,[32] public insurance in its present form is not likely to be sustainable.[33]

D. Restricted Options for Medical Care and Medical Products

During the latter half of the 20th century, both Congress and state legislators enacted numerous regulations governing professional care, medical facility care, and pharmaceuticals. For example, states began licensing and delineating scope of practice rules for a number of relatively new health professions,[34] and many states established planning boards that require hospitals and other facilities to obtain a certificate of need (CON) before expanding facilities or purchasing major equipment.[35]

In 1962, Congress for the first time required pharmaceutical companies to gain approval from the U.S. Food and Drug Administration (FDA) before releasing a new drug to the U.S. market.[36] In 1996, Congress authorized the Department of Health and Human Services (HHS) to develop regulations related to the privacy and security of personal health information.[37] Finally, beginning around 1960, the number and monetary value of state medical malpractice lawsuits increased.[38]

Both health care regulations and the threat of malpractice liability have benefits. Potential benefits include higher quality care, safer drugs, or greater confidentiality of personal health information. However the benefits of some of these regulations appear to be small. For example, many studies suggest that stringent licensing and scope of practice rules do not increase quality,[39] and many data suggest that nurse practitioners are able to provide high quality primary care and high-quality, low-risk labor and delivery care.[40]

In addition, even beneficial regulations increase the cost of providing care, and some regulations specifically restrict the entry of competitors.[41] For example, studies suggest that stringent licensing rules increase professional wages[42] and increase prices for some types of professional care.[43] In a series of studies in the 1980s, Federal Trade Commission investigators found that CON rules do not decrease hospital costs, but in some cases increase them.[44] Similarly, the development of new pharmaceuticals is costly,[45] and regulatory compliance is likely an important component of total cost.[46] As with health insurance regulations, regulations involving medical care and medical products in effect prevent persons from choosing less expensive options.

Finally, while studies of malpractice law are subject to error, the best available data suggest that a large majority of patients injured by substandard care do not sue.[47] Other studies suggest that when a lawsuit is filed, there is not a strong correlation between substandard care and compensation of victims.[48] If these studies are correct, it is likely that most persons injured by substandard care are not receiving compensation, and malpractice law may not be having a significant deterrent effect.[49] In addition, studies suggest that malpractice law is administratively costly,[50] and the threat of a malpractice lawsuit may lead physicians to use excess resources[51] or discontinue providing certain types of care.[52]

II. ACA Provisions Designed to Increase Third-Party Coverage

The ACA includes a number of provisions designed to extend comprehensive, third-party coverage to a larger percentage of the population. For example, the ACA requires most Americans to purchase health insurance or pay a penalty (individual mandate),[53] provides persons with income between one and four times the federal poverty level (FPL) a tax credit to purchase insurance,[54] requires employers to pay an assessment if one of their employees receives a tax credit,[55] and expands Medicaid to all persons whose income does not exceed 138

percent of the federal poverty level.[56]

In addition, the ACA requires health plans and insurers to cover a standard benefit package,[57] prohibits both health plans and insurers from imposing a preexisting condition exclusion and from establishing rules for eligibility based on health status,[58] requires insurers to issue insurance and guarantee renewability to all employer and individual applicants,[59] and prohibits insurers in the individual and small group markets from varying premiums based on heath status.[60]

The individual mandate, the tax credit to purchase private insurance, and the employer assessment will undoubtedly increase the prevalence of private health insurance and may increase access to care for some people. However, each of these features will increase the demand for private insurance, and the greater demand will likely lead to higher insurance prices and larger expenditures.

Similarly, the individual mandate, tax credit, employer assessment, and Medicaid expansion will increase the overall prevalence of third-party coverage and may increase access to care for some people. However, each of these features will increase the demand for medical care, and the greater demand will likely lead to higher prices and larger expenditures. Also, because many persons may substitute Medicaid for private insurance,[61]and because many physicians do not accept Medicaid beneficiaries,[62] new Medicaid beneficiaries may have less access to care than they had prior to the ACA.

Both the ACA's tax credit and insurance regulations will make health insurance more affordable for some people.[63] However, both the credit and the regulations will increase insurance prices for others.[64] In addition, the insurance regulations will prevent insurers from developing less expensive and more innovative types of insurance for people who desire them.

Finally, the tax credit to purchase private insurance and the expansion of Medicaid will increase federal spending,[65] and the taxation necessary to fund the extra spending will have costs to society in addition to the cost of the funds collected.[66]

III. Alternative Approach to Health Care Reform

As noted in Section I, some federal and state policies provide an incentive for individuals to have a third party pay for their health insurance and medical care. Other policies in effect restrict one's options for either health insurance or medical care. As noted in Section II, the ACA will likely increase the extent of third-party payment for medical care and further restrict one's options for health insurance. Together, these features will likely lead to even higher prices and larger expenditures.

In contrast, reforms that return health care funds to individuals and reforms that allow a wider variety of health insurance and medical care options should lead to both lower prices and fewer expenditures.[67] In addition, by giving individuals more control over their health care dollars, and by allowing insurers, professionals, and pharmaceutical companies to provide a wider variety of services and products, these reforms should lead to more personalized care, greater innovation, and potentially higher quality.

Reforms to achieve greater individual ownership and a wider variety of options can be organized under five categories: (1) repeal ACA provisions that increase third-party coverage;[68] (2) equalize the tax treatment of funds used for health care; (3) replace public insurance with public subsidies and private philanthropy; (4) repeal or decrease restrictions on private health insurance; and (5) repeal or decrease restrictions on medical care and medical products.

A. Repeal ACA Provisions That Increase Third-Party Coverage

To increase individual ownership of health care funds, Congress will need to repeal ACA's individual mandate,[69] employer assessment,[70] and Medicaid expansion.[71] Repealing the individual mandate and employer assessment should prevent a large increase in the demand for private health insurance and a large increase in insurance prices and health care expenditures. Similarly, repealing the individual mandate, employer assessment, and Medicaid expansion should prevent a large increase in the demand for medical care and a large increase in medical care prices and health care expenditures.

To increase one's options for health insurance, Congress will need to repeal ACA's underwriting restrictions[72] and required benefit package.[73] Repeal of both types of requirements should prevent a large increase in insurance prices[74] and allow insurers to provide a wider variety of insurance options.

To prevent a large increase in public expenditures,[75] Congress will need to repeal ACA's tax credit [76] and Medicaid expansion.[77] Finally, repealing each of the provisions described in Section II will be necessary to achieve many of the reforms recommended below.

B. Equalize Tax Treatment of Health Care Funds

To increase individual ownership of health care funds, Congress will need to partially equalize the tax treatment of ESI, IPI, and direct payment for care.[78] For example, Congress could enact a standard tax credit for health insurance,[79] enact a standard deduction for health insurance,[80] or decrease restrictions presently placed on health savings accounts (HSAs).[81]

More equal tax treatment would allow individuals to choose between ESI and IPI, free of the tax code's influence. It also would allow persons to choose between purchasing low deductible, comprehensive plans and high deductible, less comprehensive plans, free of the tax code's influence.[82] Some people would continue to choose ESI and to choose comprehensive plans with minimal cost sharing. Others would choose IPI or pay directly for more of their care. It is likely that over time, individuals would begin to purchase insurance independent of their employer and to pay directly for more of their care. As more individuals use their own funds to purchase health insurance and pay for medical care, prices for health insurance, prices for medical care, and health care expenditures should decline.[83]

Greater individual ownership would have other benefits. If individuals owned their health care funds, insurers would have greater incentive to develop innovative types of insurance, and both professionals and medical facilities would have greater incentive to develop innovative ways to provide cost-effective care. Each of the reforms that partially equalize tax treatment would lead to less federal revenue. However, the lost revenue would be small compared to the lost revenue that presently

results from the exclusion of ESI from gross income.[84]

C. Replace Public Insurance with Subsidies and Philanthropy

Also to increase individual ownership of health care funds, Congress will need to replace public insurance with public subsidies and private philanthropy.[85] For example, Congress or states could replace public insurance with a subsidy that a person could use to purchase insurance or pay directly for care.[86] The subsidy amount could be based on a person's income, one's risk of incurring medical expenses,[87] or both. Private philanthropy could take the form of a contribution to an organization that supports medical care for persons who need assistance or a contribution to a professional organization that provides care for persons who need assistance.[88]

Replacing public insurance with a public subsidy would allow beneficiaries to choose from the same health insurance and medical care options available to non-beneficiaries. Because many physicians do not accept public insurance beneficiaries,[89] replacing public insurance with a public subsidy may improve access to care, especially among Medicaid beneficiaries. Also, if individual beneficiaries owned their health care funds, insurers would have an incentive to develop innovative and less expensive insurance, and professionals and hospitals would have an incentive to develop more innovative ways to provide cost-effective care.

In addition, replacing public insurance with a subsidy of a defined amount would allow both the federal and state governments to better control their expenditures.[90] Finally, because private philanthropy tends to be more flexible and more adaptable to the needs of each person than either public insurance or public subsidies, and because it does not entail taxation costs,[91] private philanthropy offers the possibility of even greater access to care at less cost to society.

One potential disadvantage of a subsidy for low-income persons is that some persons may not seek the care they need.[92] While most beneficiaries should be able to manage their health care funds wisely,[93] it may be necessary to require some beneficiaries to purchase a comprehensive health plan or to provide a subsidy at the point of care.[94]

D. Decrease Restrictions on Private Health Insurance

To increase one's options for health insurance, Congress and state legislators will need to repeal or decrease the stringency of many of the underwriting restrictions and mandated benefits presently governing health insurance. For example, states could repeal present requirements for community rating or requirements for insurers to pay for the treatment of alcoholism.[95] Congress could repeal the requirement that health plans that provide mental health benefits provide the same annual and lifetime limits for mental health benefits as for medical/surgical benefits.[96] Similarly, using its authority to regulate interstate commerce, Congress could exempt an insurer in one state from underwriting restrictions and benefit mandates imposed by a purchaser's state.[97]

Each of these reforms should lead to both lower health insurance premiums and greater insurance prevalence.[98] In addition, these reforms would allow insurers to design more innovative types of insurance and allow individuals to choose insurance more suited to their particular needs. The primary disadvantage is that high-risk persons and persons who require care for which payment is presently mandated would be required to pay higher premiums or incur more out-of-pocket expenses. However, there are a number of ways Congress and state legislators can facilitate greater high-risk access that do not significantly increase insurance prices for others.[99]

E. Decrease Restrictions on Medical Care and Medical Products

To increase one's options for medical care and medical products, Congress and states will need to repeal or decrease the stringency of many of the regulations presently governing professional care, medical facility care, and pharmaceuticals. For example, states could repeal or decrease the stringency of their scope of practice rules for mid-level practitioners,[100] or states could repeal their CON laws for facility expansion.[101] To increase access to new pharmaceuticals, Congress could allow private drug-certifying bodies to carry out many of the functions presently performed by the FDA,[102] allow a dual track option for access to experimental drugs,[103] maintain the requirement for safety and efficacy, but eliminate the requirement for prior approval,[104] or maintain the requirement for safety, but eliminate the requirement that pharmaceutical manufacturers demonstrate efficacy before releasing a new drug.[105]

Also to increase one's options for medical care, states that have not done so will need to reform their medical malpractice law.[106] For example, states could place a cap on non-economic damage awards[107] or enforce patient-physician contracts for malpractice protection made in advance of care.[108]

Fewer restrictions on professionals, facilities, and pharmaceutical companies should decrease the cost of providing care and should lead to lower prices. In addition, these reforms would allow professionals and hospitals to develop more innovative ways to provide care.[109] Similarly, liberalizing the rules governing new drug development may allow pharmaceutical companies to develop new drugs that cannot be cost-effectively developed under the present regulatory framework. Finally, meaningful medical malpractice reform should result in both lower prices and more readily available care.[110]

Potential disadvantages of fewer restrictions include less patient safety or less patient privacy. However, as noted previously, data suggest that many of these regulations have relatively few benefits, but often large costs. Each regulation should be evaluated, and those for which costs outweigh benefits should be eliminated or made less stringent.

IV. Effects of Reforms on Persons Who May Need Assistance

Reforms that facilitate individual ownership of health care funds and reforms that increase one's options for health insurance and medical care should lead to lower prices, and thus greater access to care for most people. However, even with lower prices, some people may need assistance in paying for care. This section discusses how the recommended reforms should improve access for low-income, high-risk, and older Americans.[111]

A. Low-Income Persons

Each of the recommended reforms should result in lower prices for either health insurance, medical care, or both. Lower

prices would be especially beneficial for low-income persons. While a standard deduction and less restrictive HSAs would have less direct benefit for a low-income person,[112] either reform would allow low-income persons on the margin to better afford both health insurance and medical care, and either would increase the ability of higher-income persons to contribute to low-income care. Unlike a standard deduction, a standard tax credit for health insurance would provide an equal benefit for low-income and high-income persons.[113] If the credit were made refundable, it could serve as a subsidy for low-income persons, significantly increasing their insurance prevalence.

Three reforms may be especially beneficial. Most people do not benefit from underwriting restrictions and required benefits. Eliminating or decreasing these requirements would allow many low-income persons to purchase less expensive insurance that covers large, unexpected expenses. Similarly, fewer restrictions on mid-level practitioner care should increase low-income access to primary and low-risk labor and delivery care.[114] Finally, allowing patients and physicians to contract for malpractice protection in advance of care may encourage more physicians to provide low-income care at either no charge or a discounted rate.[115]

For low-income individuals who do need assistance, a public subsidy or private philanthropy should provide greater access than public insurance.[116] A subsidy in advance of care would allow a recipient to choose insurance and care from the same options available to others.[117] Because private, philanthropic support is more adaptable to the needs of each individual, and because it does not entail taxation costs,[118] private philanthropy offers the possibility of even greater low-income access at less cost to society.[119]

B. High-Risk Persons

As noted previously, each of the recommended reforms should result in lower prices for either health insurance, medical care, or both. Because high-risk persons often require more care and because their insurance may be more expensive, lower prices would be especially beneficial for them. Also, high-risk persons are not necessarily low-income. Equalizing the tax treatment of ESI, IPI, and direct payment would make it possible for more high-risk persons to pay for their own care and more high-income persons to contribute to organizations that support high-risk care.

Three reforms may be especially beneficial. Many high-risk individuals do not benefit from health insurance mandates. Fewer mandates would allow these persons to obtain health insurance at lower prices. Also, high-risk persons often require care from specialized facilities.[120] Eliminating or decreasing the extent of CON laws should facilitate the development of additional specialized centers, potentially increasing high-risk access to specialized care. Finally, fewer restrictions on access to new pharmaceuticals would be especially advantageous for high-risk persons who face life-threatening illnesses.[121]

While many high-risk persons may be able to obtain affordable insurance in an unregulated market,[122] some will likely require assistance. For those who do, a public subsidy or private philanthropy is more likely than underwriting restrictions to increase access, without increasing prices for others. A subsidy could be provided to a state-created high-risk pool,[123] or a risk-adjusted subsidy could be provided directly to a high-risk individual to purchase private insurance or pay directly for care. As with low-income persons, private philanthropy offers the possibility of even greater high-risk access at less cost to society.

C. Medicare Beneficiaries

Each of the recommended reforms should result in lower prices for either health insurance or medical care. Similar to high-risk persons, older persons tend to require more care, and as a result, lower prices would be especially beneficial for them.

Congress also should consider replacing traditional Medicare with a subsidy that a beneficiary could use to purchase private insurance or pay directly for care.[124] A subsidy could be income based, risk adjusted, or both. The primary advantage of a subsidy over Medicare insurance is that a beneficiary would be able to choose from health insurance and medical care options similar to those available to younger people. Also, if beneficiaries owned the funds used for their care, insurers would have an incentive to develop innovative types of insurance for seniors, and professionals and facilities would have an incentive to develop more cost-effective ways to provide senior care. Replacing Medicare "insurance" with a subsidy of a defined amount also would allow the federal government to better control both its present expenditures and long term liabilities.[125]

Finally, Congress should consider allowing younger Americans to opt out of Medicare, placing their Medicare payroll taxes and other contributions into personal accounts to pay for retirement medical expenses.[126] By converting Medicare payroll taxes into savings for health care, it is possible that over time, both Medicare as an insurance program and public subsidies could be eliminated.[127] Low-income and high-risk seniors could be eligible for the same public subsidies and private philanthropy described earlier for other low-income and high-risk individuals.

V. Summary

During the 20th century, both the federal and state governments enacted laws that led to third parties paying for most U.S. health insurance and third parties paying for most U.S. medical care. Both also enacted laws that placed restrictions on the types of health insurance that insurers can offer and the ways that professional and hospitals can provide care. In addition, the federal government required pharmaceutical companies to gain approval before releasing a new drug to the U.S. market, and the number and value of medical malpractice lawsuits increased. While each of these developments has had benefits, together they have contributed to high prices for health insurance, high prices for medical care, and large health care expenditures.

To decrease prices for both health insurance and medical care, Congress and state legislators will need to repeal or decrease the effects of laws that favor third-party payment

over paying directly for both health insurance and medical care and to repeal or decrease the stringency of many of the regulations presently governing health insurance and medical care. In addition, the federal government will need to decrease restrictions on access to new pharmaceuticals, and states will need to enact reforms to assure that malpractice lawsuits do not limit access to care.

By making insurance and care more affordable, greater individual ownership of funds and a wider variety of options should increase access to care for most people. In addition, these reforms should lead to fewer excess expenditures, greater innovation, and potentially higher quality. Finally, these reforms may be more effective than universal, comprehensive insurance at increasing access to care for low-income, high-risk, and older Americans.

Endnotes

1 Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010). The ACA was amended by the Health Care and Education Reconciliation Act of 2010. Pub. L. 111-152, 124 Stat. 1029 (2010).

2 For health insurance to efficiently spread the risk of loss, the loss must be uncertain, measurable, and large. In addition, insurance premiums must be based on the insured's risk, and the risk pool must consist of a large number of insured. *See* John A. Boni et al., The Health Insurance Primer: An Introduction to How Health Insurance Works 3 (2000). Today, most U.S. health insurance contains a component of true insurance, as well as a large component of "prepaid benefits" that cover small, expected expenses. In addition, self-insured employee benefit plans and public programs pay for medical care for many Americans. For this paper, "health insurance" refers to the various forms of payment for medical care that include a component of true insurance.

3 Section 1 briefly describes these attempts.

4 Between 1988 and 2007, premiums for employer-sponsored insurance increased at a greater rate than the Consumer Price Index (CPI). *See* The Kaiser Family Found. et al., Employer Health Benefits: 2007 Annual Survey, Exhibit 1.1: Average Percentage Increase in Health Insurance Premiums Compared to Other Indicators, The Henry J. Kaiser Family Found. 19 (2007), *available at* http://www.kff.org/insurance/7672/upload/76723.pdf. Similarly, between 1960 and 2009, prices for medical care increased at a greater rate than the CPI (author's calculation). Databases, Tables, and Calculators by Subject, All Urban Consumers (Current Series), Bureau of Lab. Stat., http://www.bls.gov/data/.

5 *See* Table I, National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution, and Average Annual Percent Growth, by Source of Funds: Selected Calendar Years 1960-2009, Centers for Medicare and Medicaid Services, http://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf.

6 Section 1 of this essay describes the effects that federal and state policies, including policies designed to increase third-party coverage, have had on health care prices and expenditures.

7 For this essay, a high-risk person is one who because of a genetic variation, chronic disease, or other condition is more likely to incur large medical expenses than other persons.

8 26 U.S.C. § 106(a) (2006); *see also* Tom Miller, How the Tax Exclusion Shaped Today's Private Health Insurance Market, Joint Economic Committee (Dec. 2003), *available at* http://www.aei.org/docLib/20070222_Millerarticle.pdf.

9 More recently, Congress has enacted additional tax preferences that allow some people to pay directly for care with tax-free funds. These include flexible spending accounts (26 U.S.C. § 125); health reimbursement arrangements (*see* I.R.S. Notice 2002 – 45, *available at* www.irs.gov/pub/irs-drop/n-02-45.pdf; I.R.S. Bulletin 2002 – 28 I.R.B., (July 15,2002), *available at* www.irs.gov/pub/irs-irbs/irb02-28.pdf; and health savings accounts (HSAs) (26 U.S.C. § 223). HSAs will be discussed further in Section 3.

10 The tax preference for ESI increases the demand for private health insurance in at least three ways. First, the exclusion makes health insurance, which is paid with pre-tax dollars, less costly to an employee than an employee's other expenses, which are paid with post-tax dollars. Second, because an employer pays for the insurance, the cost is "hidden" from the employee. Third, because the exclusion does not apply to funds used to pay for care directly, the employee has an incentive to obtain a more costly comprehensive health plan with minimal cost-sharing.

11 In a 1973 study, Martin Feldstein showed that under the conditions present at that time, hospital prices and the demand for health insurance were mutually reinforcing, (i.e., an increase in the price of hospital care resulted in an increase in the demand for health insurance, and vice versa). He also showed that greater average coinsurance rates would result in substantial welfare gains. *See* Martin S. Feldstein, *The Welfare Loss of Excess Health Insurance,* 81 J. Pol. Econ. 251, 261–265, 275–277 (1973).

12 To take advantage of the ESI exclusion, an employee must choose from the plans offered by one's employer, and many employers are able to offer only one or a limited number of plans.

13 Insurance underwriting is the process of determining the risk of an applicant, whether to offer insurance, and the price to be charged.

14 *See* Merrill Mathews, Victoria C Bunce, & J. P. Wieske, State Health Insurance Index 2006: Methodology 1 (2006), *available at* http://www.cahi.org/cahi_contents/resources/pdf/StateIndexMethodology.pdf.

15 Pub. L. No. 104-204; 29 U.S.C. § 1185(a).

16 *See* Victoria C. Bunce & J.P. Wieske, Health Insurance Mandates in the States 2010, Council for Affordable Health Insurance 1, 3 (2010), *available at* http://www.cahi.org/cahi_contents/resources/pdf/MandatesintheStates2010.pdf.

17 *See, e.g.,* Amy Davidoff, Linda Blumberg, & Len Nichols, *State Health Insurance Market Reforms and Access to Insurance for High-Risk Employees*, 24 J. Health Econ. 725 (2005).

18 *See* Amanda E. Kowalski, William J. Congdon, and Mark H. Showalter, *State Health Insurance Regulations and the Price of High-Deductible Policies,* 11(2) Forum for Health Econ. and Pol. 1, 10–12 (2008).

19 *See, e.g.*, Bradley Herring & Mark V. Pauly, *The Effect of State Community Rating Regulations on Premiums and Coverage in the Individual Health Insurance Market* 19 (Nat'l Bureau of Econ. Research, Working Paper No. 12504, 2006), *available at* http://www.nber.org/papers/w12504.pdf.

20 *Id.* at 19.

21 *See, e.g.*, Michael J. New, The Effect of State Regulations on Health Insurance Premiums: A Revised Analysis, The Heritage Foundation 5 (2006).

22 *See, e.g.,* Frank A. Sloan & Christopher J. Conover, *Effects of State Reforms on Health Insurance Coverage of Adults,* 35 Inquiry 280, 288 (1998).

23 *Id.*

24 26 U.S.C. § 106(a) (2006); *see also* Miller, *supra* note 8.

25 Social Security Amendment of 1965, Pub. L. 89-97, 79 Stat. 286 (1965).

26 Medicare does have cost-sharing features, but traditional Medicaid does not.

27 Much of the increased health care spending over the past 40 years has likely had significant health benefits. *See, e.g.*, David M. Cutler & Mark McClellan, *Is Technological Change Worth It?* 20(5) Health Aff. 11 (Sept./Oct. 2001); *see also* Frank R. Lichtenberg, *Sources of U.S. Longevity Increase, 1960-1997* (Nat. Bureau Econ. Res., Working Paper No. 8755, 2002).

28 Many studies suggest that at least a portion of health care spending does not improve health outcomes. *See, e.g.*, Jonathan Skinner, Elliott S. Fisher & John E. Wennberg, *The Efficiency of Medicare*, (Nat'l Bureau of Econ. Research, Working Paper No. 8395, 2001); Elliott S. Fisher et al., *The Implications of Regional Variations in Medicare Spending, Part 2: Health Outcomes and Satisfaction with Care,* 138 Ann. Intern. Med. 288 (2003); *see also* Willard G. Manning, et al., *Health Insurance and the Demand for Health Care: Evidence from a Randomized Experiment,* 77 Am. Econ. Rev. 251 (1987).

29 For example, a person's health plan may pay for care a beneficiary does not need, but not pay for care a beneficiary does need.

30 *See* Peter Cunningham & Jessica May, Medicaid Patients Increasingly Concentrated Among Physicians, Tracking Report No. 16, Center for Studying Health System Change 1 (Aug., 2006), *available at* http://www.hschange.com/CONTENT/866/866.pdf.

31 Social welfare costs that result from taxation include the taxpayer cost for the Internal Revenue Service to develop rules governing taxation and to collect taxes and the cost for taxpayers to comply with the tax code. *See, e.g.*, J. Scott Moody, Andy P. Warcholik & Scott A. Hodge, The Rising Cost of Complying with the Federal Income Tax, Special Report No. 138, Tax Foundation (Dec. 2005), *available at* www.taxfoundation.org/files/sb_amicus_fiavstaxcommwv.pdf. There are also the deadweight losses resulting from the tax code's incentives for inefficient behavior. *See e.g.*, Martin A Feldstein, *The Effect of Taxes on Efficiency and Growth*, (Nat'l Bureau of Econ. Research, Working Paper No. 12201, 2006).

32 *See* Barbara S. Klees, Christian J. Wolfe, & Catherine A. Curtis, Brief Summaries of Medicare & Medicaid Title XVII and Title XIX of the Social Security Act 21 (2010), *available at* http://www.cms.gov/MedicareProgramRatesStats/Downloads/MedicareMedicaidSummaries2010.pdf.

33 *See, e.g.*, The Boards of Trustees, Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, 2009 Annual Report of The Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds 4 (2009), *available at* http://www.cms.hhs.gov/reportstrustfunds/downloads/tr2009.pdf.

34 *See, e.g.*, Gary L. Gaumer, *Regulating Health Professionals: A Review of the Empirical Literature,* 62 Milbank Memorial Fund Q., Health & Soc'y 380 (1984).

35 *See* Patrick J. McGinley, *Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a "Managed Competition" System,* 23 Fl. St. U. L. Rev. 141, 147 (1995).

36 To obtain approval, a pharmaceutical company must demonstrate that a new pharmaceutical is both safe and effective for at least one condition. *See* Drug Amendments of 1962, Pub. L. No. 87-781.

37 *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

38 *See* Paul C. Weiler, Medical Malpractice on Trial, 1–16 (Harvard University Press, 1991).

39 *See e.g.*, Deborah Haas-Wilson, *The Effect of Commercial Practice Restrictions: The Case of Optometry,* 29 J.L. & Econ. 165, 183 (1986).

40 *See, e.g.*, Sue Horrocks, Elizabeth Anderson, & Chris Salisbury, *Systemic Review of Whether Nurse Practitioners Working in Primary Care Can Provide Equivalent Care to Doctors,* 324 Brit. Med. J.819, 821 (2002); Judith Rooks et al., *Outcomes of Care in Birth Centers: The National Birth Center Study,* 321 New Eng. J. Med. 1804 (1989).

41 Higher costs and fewer competitors decrease the supply of care, and a smaller supply usually leads to higher prices.

42 *See, e.g.*, William D. White, *The Impact of Occupational Licensure of Clinical Laboratory Personnel*, 13 J. Hum. Res. 91, 101 (1978); Frank A. Sloan & Bruce Steinwald, Hospital Labor Markets 46 (1980).

43 *See, e.g.*, Lawrence Shepard, *Licensing Restrictions and the Cost of Dental Care,* 21 J.L. & Econ. 187, 189 (1978); Deborah Haas-Wilson, *The Effect of Commercial Practice Restrictions: The Case of Optometry,* 29 J.L. & Econ. 165, 183 (1986).

44 *See, e.g.*, Keith B. Anderson & David J. Kass, Certificate of Need Regulation of Entry into Home Health Care, Bureau of Economics Staff Report to the Federal Trade Commission 92 (1986); Daniel Sherman, The Effect of State Certificate-of-Need Laws on Hospital Costs, Bureau of Economics Staff Report to the Federal Trade Commission (1988).

45 *See* Joseph A. Dimasi, Ronald W. Hansen, & Henry G. Grabowski, *The Price of Innovation: New Estimates of Drug Development Costs,* 22 J. Health Econ. 151, 180 (2003) (estimating that the capitalized research and development cost for each new drug approved was $802 million); Christopher P. Adams & Van V. Brantner, *Estimating the Cost of New Drug Development: Is It Really $802 million?*, 25 Health Affairs 420, 427 (2006) (finding that a research and development cost of $802 million may be an underestimate).

46 *See, e.g.,* Adams & Brantner, *supra* note 45, at 426–27.

47 For example, in two controlled studies, less than 3% of patients injured by substandard care brought suit, *See* A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence—Results of the Harvard Medical Practice Study III*, 325 New Eng. J. Med. 245, 247 (1991); David M. Studdert et al., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado,* 38 Med. Care 250, 254–55 (2000).

48 *See e.g.*, T.A. Brennan et al., *Relation Between Negligent Adverse Events and the Outcome of Medical-Malpractice Litigation*, 335 New Eng. J. Med. 1963, 1965 (1996); David Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 New Eng. J. Med. 2024, 2029 (2006).

49 Investigators with the Harvard Medical Practice Study attempted to determine whether state malpractice law was having a deterrent effect on medical injuries. They found a trend suggesting that patients cared for by physicians who faced greater malpractice risk had fewer injuries from substandard care, but the results were not statistically significant. *See* Paul C. Weiler et al., A Measure of Malpractice, Ch. 6 (1993).

50 *See, e.g.*, Towers Perrin, 2009 Update on U.S. Tort Cost Trends 1, 10 (2009), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf.

51 *See* Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. Econ. 353, 383 (1996); Daniel Kessler & Mark McClellan, *Malpractice Law and Health Care Reform: Optimal Liability Policy in an Era of Managed Care,* 84 J. Pub. Econ. 175, 178 (2002).

52 *See* Daniel P. Kessler, William M. Sage, & David J. Becker, *Impact of Malpractice Reforms on the Supply of Physician Services,* 293 JAMA 2618, 2620–621 (2005).

53 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 1501(b) (2010). The Supreme Court recently ruled that the individual mandate was unconstitutional as a regulation under the Commerce Clause and the Necessary and Proper Clause, but that the penalty for not purchasing health insurance was constitutional as a tax. *See* National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2590–2591, 2593, 2599–2560 (2012).

54 The credit is available to eligible persons who purchase insurance through an ACA-authorized state-created exchange. Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 1401(a) (2010); Health Care & Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, § 1001(a) (2010).

55 Pub. L. No. 111-148, § 1513(a), 124 Stat. 119 (2010).

56 Pub. L. No. 111-148, § 2001(a)(1), 124 Stat. 119 (2010); Pub. L. 111-152, § 1004(e). The Supreme Court recently ruled that if states choose not to expand Medicaid, the federal government cannot withhold federal funds that states use to pay for their pre-ACA Medicaid program. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566, 2604-2607 (2012).

57 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 §§ 1302(a)-(b) (2010).

58 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 1201 (2010). *Id.*

59 *Id.*

60 *Id.*

61 A number of studies have shown that when eligibility for public insurance is expanded, many privately insured patients substitute public insurance for private insurance. *See, e.g.*, David M. Cutler & Jonathan Gruber, *Does Public Insurance Crowd Out Private Insurance?* 111 Quart. J. Econ. 391 (1996); Jonathan Gruber & Kosali Simon, *Crowd-out Ten Years Later: Have Recent Public Insurance Expansions Crowded Out Private Health Insurance?* 27 J. Health Econ. 201,209–213, 216 (2008).

62 *See* Cunningham & May, *supra* note 30.

63 ACA's tax credit will make private insurance more affordable for certain low and middle income persons, and ACA's insurance regulations will make insurance more affordable for certain high-risk persons.

64 The Congressional Budget Office (CBO) estimated that the ACA will increase 2016 insurance premiums in the individual market by 10 to 13 percent over what they otherwise would be. *See* Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to the Honorable Evan Bayh (Nov. 30, 2009), *available at* http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf.

65 The Centers for Medicare and Medicaid Services Office of the Actuary estimated that from 2014 through 2019, the ACA will increase federal spending for premium and cost-sharing subsidies by $507 billion and for Medicaid and S-CHIP expansion by $410 billion. Under the ACA, subsidies to purchase private insurance will begin in 2014, increase annually from 2014 through 2019, and continue to increase annually after 2019. *See* Memorandum from Richard S. Foster, Chief Actuary, Ctrs. for Medicare & Medicaid Servs. Office of the Actuary, Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended 4–5, tbl. 1 (Apr. 22, 2010), http://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf.

66 *See* discussion and references cited, *supra* note 31.

67 Many data suggest that when persons use their own funds and pay directly for care, both prices and expenditures decline. For example, most people pay directly for cosmetic surgery and LASIK surgery. While inflation-adjusted prices for health insurance and most medical care have increased during the past fifteen years, inflation-adjusted prices for both cosmetic surgery and LASIK surgery have decreased. *See* Devon M. Herrick, *Health Care Entrepreneurs: The Changing Nature of Providers*, Nat'l Ctr. of Pol'y Analysis, Pol'y Rep. No. 318, Dec. 2008. Similarly, centers that cater to individuals who pay directly, e.g., "medical tourist" destinations both in foreign countries and in the United States, charge considerably less for the same procedures than do most U.S. medical centers. *Id.* Finally, most Singaporeans own the funds used for their care and pay directly for most care. *See* Rob Taylor & Simon Blair, Financing Health Care: Singapore's Innovative Approach, The World Bank Group, Note No. 261, (May 2003), http://rru.worldbank.org/documents/publicpolicyjournal/261Taylo-050803.pdf. In 2005, health care expenditures in Singapore were $944 dollars per capita (3.5% of GDP), much lower than in any other advanced country. World Health Org., World Health Statistics 2008 88 (2008), *available at* http://www.who.int/whosis/whostat/EN_WHS08_Full.pdf. In addition, while comparison studies of health outcomes in persons with specific diseases are not available, Singapore's neonatal mortality rates are among the lowest in the world, and life expectancy rates are among the highest. *Id.* at 42.

68 The ACA is a complex statute that includes many provisions not discussed in this essay. While this author supports repeal of the entire statute, the recommendations in this section are limited to provisions discussed in Section 2.

69 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 1501(b) (2010).

70 Pub. L. No. 111-148, § 1513(a), 124 Stat. 119 (2010).

71 Pub. L. No. 111-148, § 2001(a)(1), 124 Stat. 119 (2010); Pub. L. No. 111-152, § 1004(e).

72 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 1201 (2010).

73 *Id.*

74 *See* discussion and references cited, *supra* note 64.

75 *See* discussion and references cited, *supra* note 65.

76 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 1401(a) (2010); Health Care & Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, § 1001(a) (2010).

77 Pub. L. No. 111-148, § 2001(a)(1), 124 Stat. 119 (2010); Pub. L. 111-152, § 1004(e).

78 The only way to completely equalize tax treatment would be to repeal the tax preference for ESI and all other preferences for health care. However, because most Americans under age 65 take advantage of the preference for ESI, it is unlikely that Congress would consider repeal without providing other preferences. The recommendations included in this paper partially equalize the tax treatment of funds used for health care, decreasing, but not eliminating, the economic distortions introduced by the preference for ESI.

79 *See e.g.*, Sue A Blevins, Restoring Health Freedom: The Case for a Universal Tax Credit for Health Insurance, Cato Inst., Pol'y Analysis No. 290, Dec. 12, 1997, at 18–20.

80 *See, e.g.*, Office of the Press Secretary, The White House, George W. Bush, *Fact Sheet: Making Private Health Insurance More Affordable for Low-Income Americans* (Feb. 23, 2007), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/02/print/20070223-4.html.

81 HSAs, established by Congress in 2003, allow individuals who meet certain criteria to pay out-of-pocket expenses with pre-tax dollars. Pub. L. No. 108-73; 26 U.S.C.§ 223. However, HSAs are presently subject to annual contribution limits, HSA owners cannot purchase their primary health insurance using HSA funds, and HSA owners must purchase a high-deductible health plan. For a discussion that includes eliminating many of these restrictions, see Michael F. Cannon, Large Health Savings Accounts: A Step Toward Tax Neutrality for Health Care, 11(2) Forum for Health Econ. & Pol'y, Art. 3, pp. 1–27 (2008).

82 As noted earlier, for health insurance to efficiently spread the risk of loss, losses must be uncertain and large. Thus, insurance is most efficient when people purchase insurance for large, unexpected expenses and pay directly for small or expected expenses. *See* discussion and reference cited, *supra* note 2.

83 *See* discussion and references cited, *supra* note 67.

84 The Joint Committee on Taxation estimated that in 2010, the lost federal revenue associated with the exclusion of employer contributions for health care, including insurance premiums, was $105.7 billion. The lost revenue associated with HSA contributions was $0.9 billion. *See* Joint Committee on Taxation, *Estimates of Federal Tax Expenditures for Fiscal Years 2010-2014,* 47–48 (Dec. 15, 2010), *available at* http://www.jct.gov/publications.html?func=startdown&id=3718.

85 Since the nineteenth century, private philanthropy, *see, e.g.,* Paul Starr, The Social Transformation of American Medicine, Book 1, Ch. 4, (1982), and mutual aid, *see, e.g.,* David T. Beito, From Mutual Aid to the Welfare State: Fraternal Societies and Social Services, 1890-1967, Ch. 6, 9, & 10, (2000), have played an important role in providing medical care for Americans who need assistance. While the federal and state governments cannot provide philanthropy, they could facilitate it by repealing or decreasing the effects of laws that may inhibit private philanthropy. For example, there are data suggesting that public provision of social services "crowds out" private contributions to social services. *See, e.g.*, Daniel M. Hungerman, *Are Church and State Substitutes? Evidence from the 1996 Welfare Reform*, 89 J. Pub. Econ. 2245 (2005); Jonathan Gruber & Daniel M. Hungerman, *Faith-Based Charity and Crowd-Out During the Great Depression,* 91 J. Pub. Econ. 1043 (2007). Also, the threat of a malpractice lawsuit may prevent some physicians from providing discounted care to low-income persons. Finally, high tax rates decrease personal wealth that individuals would otherwise be able to contribute to those who need assistance. As a result, decreasing public assistance for health care, reforming medical malpractice law (see below), and decreasing marginal income tax rates may significantly increase philanthropic support for care.

86 The federal government presently matches funds that a state allocates for its Medicaid programs. As a result, states have an incentive to spend more on their programs than they otherwise would. To eliminate this incentive, Congress could replace the jointly-funded Medicaid program with a block grant and allow states the flexibility to replace their present Medicaid programs with subsidies provided to individual recipients.

87 For a discussion of risk adjustment, see Robert Kuttner, *The Risk-Adjustment Debate,* 339 New Engl. J. Med. 1952 (1998).

88 For example, the National Association of Free Clinics estimates that free clinics provide up to $3 billion of care annually for low-income patients. *See* Letter from Bonnie A. Beavers, Exec. Dir., Nat'l Assoc. of Free Clinics, to Members of the Citizens Health Care Working Group (Aug. 28, 2006), *available at* http://govinfo.library.unt.edu/chc/recommendations/orgs/nafc.pdf; *see also* Mohan M. Nadkarni & John T. Philbrick, *Free Clinics: A National Survey,* 330 Am. J. Med. Sci. 25 (2005). In addition, many professionals and hospitals provide care for low-income persons at no charge or at a discounted rate.

89 *See, e.g.*, Cunningham & May, *supra* note 30.

90 A public subsidy of a defined amount would have fewer administrative costs than public insurance and would not be open-ended as is traditional Medicare and Medicaid.

91 *See* discussion and references cited, *supra* note 31.

92 One randomized, controlled study found that low-income persons with certain health conditions who had a high co-insurance rate, and thus had to pay with their own funds for a portion of their care, had poorer health outcomes than did low-income persons who were not required to make co-insurance payments. *See* Manning, et al., *supra* note 28.

93 *See, e.g.*, Leslie Foster, Randall Brown, Barbara Phillips, et al., *Improving the Quality of Medicaid Personal Assistance through Consumer Direction*, Health Affairs W3-163 (Mar. 26, 2003).

94 One way Singapore subsidizes medical care for low-income persons is by providing the subsidy at the time care is provided. *See* Taylor & Blair, *supra* note 67.

95 *See, e.g.*, Matthews et al., *supra* note 14.

96 29 U.S.C. § 1185a (a) (2009).

97 *See e.g.*, Health Care Choice Act of 2007, H.R. 4460, 110th Cong. § 1–4 (2007).

98 *See* Kowalski, et al., *supra* note 18; New, *supra* note 21; Herring and Pauly, *supra* note 19; Sloan and Conover, *supra* note 22.

99 Section 4 describes how the recommended reforms should increase access to care for high-risk persons.

100 *See, e.g.*, Julie A Fairman, John W. Rowe, Susan Hassmiller, et al., *Broadening the Scope of Nursing Practice,* 364(3) N. Engl. J. Med. 193 (Jan. 20, 2011).

101 *See*, *e.g.*, Department of Justice and Federal Trade Commission, Competition in Health Care and Certificates of Need, Joint Statement Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/237153a.pdf.

102 *See* Henry I. Miller, To America's Health: A Proposal to Reform the Food and Drug Administration Ch. 5 (2000).

103 *See* Bartley J. Madden, *A Dual Track System To Give More-Rapid Access to New Drugs: Applying a Systems Mindset to the U.S. Food and Drug Administration (FDA)*, 72 Med. Hypotheses 116, 116 (2009).

104 The FDA used monitoring and removal of harmful drugs successfully prior to the 1962 requirement of prior approval. *See* Miller, *supra* note 102, at Ch. 1.

105 *See* Daniel B. Klein & Alexander Tabarrok, *Who Certifies Off-Label?*, 27 Regulation 60, 63 (2004).

106 Federal proposals for substantive reform of malpractice law are likely unconstitutional and are not recommended. *See* Michael I. Krauss & Robert A. Levy, Can Tort Reform and Federalism Coexist?, Pol'y Analysis No. 514 (Cato Institute, Washington, D.C.), 1 (Apr. 2004).

107 For a review of the effects of caps on damage awards, see Michelle M. Mello, Robert Wood Johnson Foundation, Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms, Synthesis Project Report No.10 at 24 (May 2006).

108 For a review of the use of pre-care contacts between patients and physicians, see generally Don W. King, *Contract as a Means of Medical Malpractice Reform*, Pol'y Resource No. 4 (Mercatus Center/George Mason University, Arlington, Va.), Mar. 2007.

109 For example, liberalizing scope of practice rules for nurse practitioners would allow professional groups to better use their professional resources, and repeal of CON laws would allow hospitals to more easily purchase equipment for expansion of existing programs or development of new programs.

110 *See, e.g.*, Towers Perrin, *supra* note 50; Kessler & McClellan (1996), *supra* note 51; Kessler and McClellan (2002) supra note 51; Kessler et al., *supra* note 52.

111 Most previous attempts to increase third-party coverage were designed to assist one of these three groups, *e.g.,* Medicare for seniors, Medicaid for low-income persons, and underwriting restrictions for high-risk persons.

112 Because persons with larger incomes have higher tax rates, both a standard deduction and less restrictive HSAs would allow persons with larger incomes to decrease their income tax bill by a larger amount than they would persons with less income.

113 *See* Blevins, *supra* note 79.

114 *See* Fairman, Rowe, Hassmiller, et al., *supra* note 100.

115 *See generally* King, *supra* note 108.

116 As noted earlier, many physicians do not accept Medicaid patients. *See* Cunningham & May, *supra* note 30.

117 However, for some recipients, it may be better to provide a comprehensive health plan or provide a subsidy at the point of care. *See* discussion and references cited, *supra* notes 92–94.

118 *See* discussion and references cited, *supra* note 31.

119 *See* discussion and references cited, *supra* note 85.

120 For example, Duke University's congestive heart failure program is a specialized program that produces excellent outcomes at low cost. *See* David J. Whellan et al., *The Benefit of Implementing a Heart Failure Disease Management Program*, 161 Archives Intern. Med. 2223, 2228 (2001).

121 *See, e.g.*, Madden, *supra* note 103.

122 It may not be necessary to subsidize all high-risk persons. Even in an unregulated market, most individuals are able to obtain guaranteed renewability as a feature of their insurance policy. Voluntary guaranteed renewability allows a person to renew his or her policy at a price similar to one's original rating class, even if one later becomes high-risk. *See e.g.*, Mark V. Pauly, *Regulation of Bad Things That Almost Never Happen, But Could: HIPAA and the Individual Insurance Market*, 22 Cato J. 59, 64 (2002). Similarly, health-status insurance would allow a low-risk person to purchase insurance to cover the cost of future premiums if one later becomes high risk. *See* John H. Cochrane, *Health-Status Insurance: How Markets Can Provide Health Security*, Pol'y Analysis No. 633 (Cato Institute, Washington, D.C.), (Feb. 2009). Finally, in an unregulated market, moderately high-risk patients are often able to obtain health insurance at a price only slightly higher than the price for average-risk persons. *See* Herring & Pauly, *supra* note 19, at 21.

123 For a discussion of high-risk pools, see Lori Achman & Deborah Chollet, The Commonwealth Fund, Insuring the Uninsurable: An Overview of State High-Risk Pools (2001).

124 For example, two reformers have proposed that the federal government provide a "payment," a form of subsidy, that a Medicare beneficiary could apply to the purchase of private health insurance. However, their proposal would limit the subsidy to the purchase of insurance from a regulated, Medicare exchange. *See* Alice Rivlin and Paul Ryan, A Long-Term Plan for Medicare and Medicaid 1 (Nov. 2010), *available at* http://paulryan.house.gov/UploadedFiles/rivlinryan.pdf.

125 A subsidy of a defined amount would provide an incentive for a beneficiary to choose the most cost-effective health insurance and medical care for his or her particular situation.

126 *See, e.g.*, Martin Feldstein, *Prefunding Medicare*, 89 Am. Econ. Rev. 222, 224 (1999).

127 Since 1984, Singapore has required individuals to save 6 to 8 percent of their wages to pay for health care, and most Singaporeans now pay directly for much of their care. *See* Taylor & Blair, *supra* note 67, at 3.

The Affordable Care Act: What's There to Like About It?

*Timothy S. Jost***

I. Not the "Best Health Care System in the World"

I find myself in the awkward and ironic position of being asked to defend an essentially Republican health reform statute to a readership that I imagine largely sees the legislation as a government takeover of our health care system. The Patient Protection and Affordable Care Act (ACA)[1] is not the legislation I would have drafted to reform our health care system. It is an unwieldy construct of conservative and mainstream health policy prescriptions, sprinkled with a few progressive ideas; much closer to historically market-based Republican health reform proposals than historically Democratic proposals based on social insurance models.

The ACA, however, addresses a number of very real problems. Every other developed nation has embraced as a fundamental public policy priority the task of making the wonders of modern medicine available to all, regardless of ability to pay. Access to health care, like access to education or the vote, is essential if people are to have the opportunity to participate as productive citizens in a free society. Most developed nations have, therefore, established national health services or social insurance systems to ensure access to health care for all, regardless of ability to pay. Of course, each of these systems has its own problems, but each makes basic health care available to all at a cost that is far less than what Americans pay for health care.

The United States has pursued a different path. Since the 1930s, we have relied on an employment-based health insurance system for financing health care.[2] This system has served us reasonably well. Insurance can be purchased by employment-based groups, particularly large groups, at much lower cost than individual insurance because administrative costs are lower and insurers face lower risks.[3] Employers also benefit because they have a healthier and more productive labor force. Pushed by unions and the threat of unionization and pulled by tax subsidies—which have become our third largest national health program and our largest tax expenditure—employment-based health insurance spread very rapidly in the 1950s and 1960s.[4] In the 1960s, Congress created two programs—Medicare for the elderly and disabled and Medicaid for the poor—that filled the most important gaps left by our employment-based system. By the 1980s, private health insurance covered four in five Americans.[5]

There were always gaps in coverage, however, and employment-based coverage has deteriorated dramatically in recent years. As of 2010, 49.9 million Americans, 16.3 percent of the population, lacked health insurance.[6] Over longer periods of time, the number of Americans uninsured at least temporarily is much higher, approaching 2 in 5 Americans.[7] Many are uninsured more or less permanently, although many also move in and out of the insurance market as their life circumstances change. Although Medicaid, supplemented by the State Children's Health Insurance Program, offers coverage to the elderly, disabled, and most poor children, Medicaid does not cover childless adults and in many states only covers very poor parents.

Of course, the uninsured are not necessarily denied access to health care. We retain a tattered safety net of federally-qualified health care centers, county hospitals, and free clinics that in some parts of the country offer some health care services to some people. Also, hospitals that participate in Medicare and have emergency rooms cannot refuse to stabilize the condition of persons whose emergent medical condition puts their health in immediate jeopardy,[8] although hospitals have no responsibility to offer continuing care once the emergency abates and do not have to offer even emergency care for free. No law guarantees access, however, to primary, preventive, or continuing chronic care, and we pay a high price in terms of morbidity and mortality for this lack.[9] 45,000 Americans die each year prematurely because of lack of health care coverage.[10] International statistics also demonstrate that financial barriers to care are a much greater problem in the United States than in other developed countries.[11]

The United States also measures poorly compared to other nations when we consider the cost of care. It is common knowledge that we spend far more on health care than any other nation, whether measured by percentage of gross domestic product or per capita expenditure.[12] To some extent this is to be expected. Health care is a luxury good and national expenditures per capita rise linearly with national wealth. But the United States is far above the curve—we spend much more than a country with our wealth would be expected to spend.[13] Other developed countries are much more effective than we are in controlling the cost of health care, and thus have more to spend, publicly or privately, on other desirable goods and services, including education and social services, which arguably make a greater contribution to a healthy population than does health care.

Finally, we do not get the quality of care that our expenditures would warrant. We have high infant mortality rates and low life expectancies, although that probably has more to do with other factors—like social inequality and poor public health infrastructure—than with lack of access to medical care. Although we do very well in some things, detection and treatment of cancer, for example, health care in the United States is on the whole not exceptional.[14] For example, the United States ranks last among 19 developed nations in mortality from preventable diseases, and we have lost ground relative to other nations over the past several years. [15]

II. The Affordable Care Act: A Conservative Response

This is the situation that we faced in 2008 when Barack Obama was elected president. Although many seem now to have forgotten it, America faced a terrifying economic crisis in 2008. Profligate spending and even more profligate tax cuts, coupled with reckless deregulation of the financial industry, had driven the country to the brink of financial collapse. The

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2008 election gave the Democratic party not only the White House, but also decisive control of the House and Senate. For the first time in decades, the Democrats faced the possibility of realizing their long-cherished dream of addressing the cost, quality, and, above all, access problems that plague our health care system.

But the balance of power in both the House and Senate were held by conservative rather than progressive Democrats, and the White House was held by a moderate Democrat committed to ending political divisiveness and conflict rather than to enacting a progressive agenda. Through the summer of 2009, moreover, there was a firm hope that moderate Republicans in the Senate would join with the Democrats in adopting truly bipartisan reform.

From the beginning, therefore, the ACA was built on mainstream or conservative, rather than progressive, principles. A single-payer system—Medicare for all—was never even considered. Congress even refused Americans the choice of a public insurance system as an alternative to private insurance coverage.

The resulting legislation was built on basic principles that have traditionally been associated with conservative advocacy organizations and scholars.[16] First, expansion of access for middle-income Americans is based on extending private insurance coverage rather than by building a new public system. Second, extension of coverage for this group is accomplished through the use of tax credits rather than direct payments. Third, health insurance exchanges will be used to encourage managed competition between insurers to bring down costs. Fourth, the problem of the cost of health care services is addressed through attempts to make markets function better rather than through price controls. Fifth, assistance for the truly needy is provided through the means-tested, federal-state Medicaid program. Sixth, there is no direct rationing of services. Seventh, the states will have the option of managing much of the program themselves to avoid the creation of a new federal bureaucracy. Many of these same principles are reflected in Paul Ryan's Roadmap for America, although he would, of course, disclaim any resemblance.[17]

In fact, many provisions of the ACA come from Republican Members of Congress. In its mark-up of reform legislation in June and July of 2009, the Senate Health Education and Labor Committee adopted 161 Republican amendments in whole or in revised form.[18] In the words of John McDonough, one of the key Senate staffers who worked on the bill:

> Republican ideas permeate the ACA. The individual mandate was advanced and broadly embraced by Republicans in the Clinton era, including Hatch and Grassley. Private-market subsidies to purchase private insurance was another cornerstone of the 1993 Republican alternative. No public-plan option was a persistent Republican demand. The Elder Justice Act was a priority for Hatch and Grassley. The Physician Payment Sunshine Act was another Grassley passion. Expanded fraud and abuse was a concern for Grassley and Tom Coburn (R-OK). Limiting the tax exclusion for everyone (through the "Cadillac" excise tax) and not just for the wealthy, was a cornerstone demand for Enzi. The young "invincible" catastrophic coverage option was a Snowe priority. Allowing consumers and businesses to buy health insurance across state lines was a priority for nearly every Republican member.[19]

Not surprisingly, public opinion surveys consistently show that many (about a quarter) of Americans who oppose the legislation believe that it did not go far enough—a fact concealed by polls that simply ask whether Americans support or oppose the legislation.[20] Undoubtedly, many supporters of the legislation, including myself, do so reluctantly, wishing it had gone further to cover more uninsured Americans and had relied more on public rather than private insurance to accomplish this end. Having said this, the benefits of the law cannot be gainsaid. The remainder of this essay will address those benefits.

III. Access to Health Care

First, the ACA will extend health insurance coverage to 30 to 33 million Americans.[21] About half of these will be covered through Medicaid expansions and half through private insurance purchased through premium tax credits. It is also quite possible that additional Americans will be covered through employer-sponsored insurance, as happened in Massachusetts after it adopted its health care reform law on which the ACA is modeled.[22] It is likely that some additional higher-income, self-employed Americans will purchase health insurance because of the minimum coverage requirement. Finally, an estimated 38 percent of those who remain uninsured will be potentially eligible for Medicaid but unenrolled.[23] Because the ACA allows hospitals to enroll presumptively eligible persons in Medicaid who require hospital care, this population will effectively have coverage if they have sufficiently serious problems to require hospital care.

As previously noted, this extension of insurance protection will improve health and save many American lives. It will also save many American households from financial ruin. Americans have a right to medical care in emergencies, but they do not have the right to free emergency care, and a day in a hospital can cost far more than the liquid assets of most American families.[24] Nothing presently guarantees Americans access to chronic, non-emergent care however, and the financial burden of such treatment can be devastating.

The Medicaid expansions will cover Americans under age 65 with incomes below 138 percent of the poverty level. The ACA required all states to cover this population as a condition of participating in Medicaid, but the Supreme Court ruling in June of 2012 made the Medicaid expansion optional with the states. If all states participate, the expansion will cover 17 million additional Americans.[25] Most of these will be adults who are presently not eligible for Medicaid, but many will be children, most of whom are currently eligible but many of whom are not enrolled. The CBO projects, however, that if states opt out of the Medicaid expansion, as many as 6 million fewer Americans will be covered, with 3 million of these covered additionally by the exchanges, resulting in 3 million fewer Americans having health insurance.[26]

Medicaid has its limitations. In particular, provider payments in many states are very low compared to commercial

insurance payments and many providers, especially physicians and dentists, choose to limit or refuse Medicaid patients. Nevertheless, evidence shows that Medicaid recipients have better access to care, report better health status, and have lower mortality rates than the uninsured.[27]

Approximately 20 million middle-income Americans will gain access to health care through advance premium tax credits, which will be available to households with incomes up to 400 percent of the poverty level.[28] These advance tax credits will supplement amounts paid by exchange enrollees to purchase insurance. The premium tax credits will be larger for lower-income households, smaller for households with higher incomes. Cost-sharing (deductibles, coinsurance, and copayments) will be relatively high under these policies compared to current employer-sponsored policies.[29] Indeed, the level of cost sharing will no doubt come as a shock to many of those insured. Particularly for households that choose the highest cost-sharing level bronze policy (with a 60 percent actuarial value), the coverage will essentially be for catastrophic expenses only. Households with incomes below 250 percent of poverty, however, will also receive cost-sharing reduction payments, which will reduce their expenditures when they actually receive care. Also, preventive services will be covered for all without cost sharing.

IV. Reforming Insurance Markets

The ACA also dramatically changes the way in which health insurance is sold in the individual and small group market. Traditionally, health insurers, like other insurers, have based their willingness to offer insurance and the premiums charged on the risk presented by the insurance applicant. This has meant that individuals who most need health care often cannot get insurance at all or find the cost of insurance unaffordable.[30] Insurers also often exclude from coverage pre-existing conditions, so that even when applicants with health problems can get insurance, they cannot get coverage for the problem for which they need help.

The ACA prohibits insurers from refusing to sell insurance to or to otherwise discriminate against an applicant because of health status. It only allows premiums for coverage in the individual and small group market to vary based on age (with a maximum ratio of 3 to 1), tobacco use (maximum variation 1.5:1), geography, and family size. Insurers cannot refuse to cover preexisting conditions. Gender underwriting is not permitted. The ACA also requires insurers to consider all of their individual enrollees in a single risk pool and all of their small group enrollees in another, with an option for states to combine the two pools. Further, it creates two short term and one permanent risk mitigation programs that will reward insurers that take on a sicker population and impose a cost on those that avoid risk.

Elimination of health status and gender underwriting and restricting age underwriting will likely make health insurance less expensive for women and for persons with health problems. In the non-group market it will make health insurance less expensive for older people and more for younger, although the opposite could happen for enrollees in small group coverage who purchase insurance through the exchange if they are underwritten as individuals rather than as a group.

This is in conflict with traditional Republican proposals for health insurance reform—association health plans and sale of health insurance across state lines—which would make health insurance more affordable for young healthy people, less affordable for older people and people with health issues.[31] Which is the better approach depends on what one considers fair.[32] If one believes that it is fair for individuals to each bear the full actuarial cost of their own situation, then the ACA is unfair. If one believes that all should have equal access to health care, regardless of current health status, then the ACA vision is fairer. Of course, over time virtually all of us encounter ill health, so the person who benefits from low rates at one point in an underwritten insurance scheme is likely to face higher rates, or to be unable to purchase insurance, at another. Also, the presence of tax subsidies shifts some of the cost from the insured to taxpayers generally. This is true of both the deductions and exclusions that currently apply to the employed and self-employed, which benefit mostly the wealthy and reasonably healthy, and of the new tax credits, which will benefit lower and middle-income Americans and many who are in poor health.

Because it is expected that insurers will cover a sicker population and that health insurance for the healthy will cost somewhat more under these rules, the ACA attempts to draw healthier individuals into the pool by imposing a penalty on individuals who can afford health insurance but choose not to purchase it. This mandate has been widely misunderstood ,and misrepresented. The mandate itself has several exceptions—it does not apply to undocumented aliens, the incarcerated, religious objectors, or members of health care sharing ministries. The penalty, however, has much broader exceptions. In particular, it does not apply to anyone who cannot find a basic health insurance policy for a price equal to or less than 8 percent of household income. Given the fact that family coverage is expected to cost $12,000 to $12,500 per year by 2016,[33] this means that a family that does not qualify for premium tax credits or for employer coverage, would have to earn $150,000 or more to be subject to a penalty.[34]

This "individual mandate" is one of the least popular provisions of the ACA and has been the focus of the federal litigation concerning the ACA. The Supreme Court in its June 2012 decision held that Congress lacked the power to adopt the mandate under the Commerce Clause.[35] The Court considered the mandate to be inseparable from the penalty that enforces it, however, and held that the penalty was properly adopted by Congress under its power to tax. The mandate was, therefore, upheld.

The ACA also reforms the way in which health insurance is sold in the individual and small group markets and bans certain common insurance practices. The law instantiates the concept of managed competition, another idea to come out of conservative economic thought.[36] The ACA invites the states to create state-based insurance markets called exchanges, and empowers the federal government to create exchanges in states that decline the invitation. In these markets, insurers will compete on price and quality, not, as they do now, on risk avoidance. All insurers will offer at least an essential health benefits package, based

initially, in all likelihood, on one of the largest small group plans in the state. All plans must be arrayed into one of four levels of cost sharing based on the actuarial value of the plan—the percentage of claim costs paid by the plan. A required Summary of Benefits and Coverage will, like the nutrition labels on foods or the energy efficiency labels on appliances, make it easy for insurance consumers to compare head-to-head the features of insurance plans and choose the plan that is best for them. The exchanges will also rate plans on price and quality and provide consumer satisfaction data.

The statute imposes a number of other insurance reforms, most of which are already in place. Plans must cover young adults up to age 26 on their parents' policies. This provision, which has extended coverage to over 3 million young adults, covers a population that costs little to insure but had one of the highest levels of uninsurance.[37] Another provision bans lifetime and annual limits on coverage. Lifetime limits are rarely exceeded, but where they apply, are often a matter of life and death. The annual limit requirement revealed an entire industry of "junk" insurance that offered almost useless coverage.[38] Insurers may not rescind policies through post-claims underwriting—accepting applications but canceling insurance retroactively once an enrollee files a claim. Insurers must offer both internal and external appeals from claims denials. Most insurers must spend at least 80 percent of their premium revenues on claims and quality improvement expenses (85 percent in the large group market) or rebate the difference to consumers. Insurers must also publicly justify unreasonable premium increases.

Most of these provisions have been quite popular.[39] Most were implemented in 2010 with little detrimental effect. In fact, the actuary of the Centers for Medicare & Medicaid Services (CMS) reports that in 2011 health care costs nationally decreased .1% because of the ACA.[40] Only two reforms provoked real (as opposed to manufactured) controversy. The annual limits requirement proved problematic for so-called "mini-med" coverage—insurance with very low annual limits. To avoid depriving people covered by these plans of health insurance, HHS, pursuant to statutory authority, provided temporary waivers to plans that failed to meet this requirement. The waivers will expire in 2014 when all plans must eliminate annual limits.[41] Several states asked for adjustments of the medical loss ratio requirement because of potential disruption to their states' insurance markets.[42] These were granted in some states, but in most states fears of disruption proved unfounded. Insurers recently returned $1.1 billion dollars to consumers in medical loss ratio rebates.[43] More importantly, the medical loss ratio requirement has incentivized insurers to become more efficient and to hold their premium increases in line with increases in medical costs.

V. Improving Medicare

The ACA makes important changes to expand benefits under the Medicare program. The Medicare "doughnut hole," which resulted from the attempt by Republicans in drafting the 2003 Medicare Modernization Act to keep prescription drug coverage both affordable and attractive to relatively healthy enrollees, is being closed through a combination of brand name drug discounts and coverage expansion for generics. Preventive services are covered without cost-sharing, including a free annual wellness visit.

The ACA also expands access to care by providing significant funding for community health centers, the National Health Services Corp, and school based health care programs, and reforms the Indian Health Service. It provides significant funding for community preventive care programs and for expanding the health care workforce.

VI. Controlling Health Care Costs

While the primary focus of the ACA is on expanding access to health care, it also contains a number of cost saving initiatives. Cutting health care costs is never easy. Shifting costs is easier. Costs can be shifted to patients by increasing cost-sharing or to enrollees in public programs by capping or reducing public support, for example, by providing vouchers rather than coverage. But cutting costs requires either reducing the volume of services received or the price paid for services. Attempts to limit the provision of services result in cries of rationing while efforts to reduce prices provoke intensive (and usually effective) special interest lobbying.

The Congressional Budget Office has most recently scored the repeal of the ACA as increasing the federal budget deficit by $109 billion over the 2013–2022 period.[44] While the net cost of the coverage increases will be $1171 billion over 10 years, it will be offset by $711 billion in savings and $569 billion in new revenues.[45] Most of the savings come from reducing the growth in expenditures for Medicare providers by demanding increased productivity, cutting expenditures to cover uncompensated care provided by hospitals (since fewer uninsured will be needing free care), and decreasing payments for Medicare Advantage managed care plans, which have long been paid dramatically more than the Medicare program pays for traditional Medicare.[46] The ACA also includes a "fail-safe" mechanism to cut costs, the Independent Payment Advisory Board, which has the task of making proposals to Congress to cut Medicare spending if it exceeds set targets.

The ACA opens the door to longer term cost controls as well. The Center for Medicare and Medicaid innovation is tasked with coming up with approaches that move away from inherently inefficient fee-for-service provider payment toward payment approaches that encourage better coordinated and more efficient care. The Medicare shared savings (accountable care organization) program and bundled-payment initiatives are examples of this. The Patient Centered Outcomes Research program holds the promise of identifying useless medical interventions, and concomitant savings that can result if we stop paying for such services. An entire chapter of the ACA is dedicated to fraud and abuse provisions, including provisions to prevent as well as punish fraud and abuse. The exchanges are, of course, based on the concept of managed competition, and on the hope that requiring insurers to compete based on price and quality rather than through risk selection will bring down the cost of insurance, and possibly with it the cost of care.

VII. Improving the Quality of Health Care

The ACA also attempts to improve the quality of health

care. It calls for a national quality strategy and for initiatives to implement it. Insurers are encouraged to create programs and incentives to improve outcomes of care, reduce rehospitalizations, improve patient safety and prevent medical errors, encourage prevention and wellness, and reduce racial disparities. The ACA contains new initiatives within Medicare to pay for performance and to increase information on quality to empower consumers. A number of provisions of the ACA encourage better coordination and integration of care, including increased use of electronic medical records. In sum, the ACA includes payment incentives, public disclosure, and regulatory responses intended to reward good quality care and improve care that is deficient.

VIII. Conclusion

Will all of this work? Can we increase access to care, constrain cost growth, and improve quality? Two and a half years have elapsed since the ACA was adopted and another year remains, as of this writing, before it is fully implemented. The ACA has faced determined and virulent opposition—lawsuits; an aggressive, unprincipled, and highly effective misinformation campaign; and vigorous attempts to block any cooperation by the states with implementation. It is hard to think of an example since desegregation in the 1950s and 1960s where the implementation of federal law has faced opposition of this magnitude.

Nevertheless, we are seeing progress—a dramatic reduction in the number of uninsured young adults, better access to preventive services, reduced drug costs for Medicare beneficiaries, expanded Medicaid in some states with further expansions to come—all with no increase to date in overall health care costs. Moreover, although opponents of the ACA have repeatedly voted to repeal it, they have offered no coherent strategy to replace it. For opponents, the uninsured are, apparently in the words of Senate Minority Leader Mitch McConnell, "not the issue."[47] Republican proposals may make bare-bones coverage less expensive for the young and healthy, but they do nothing to expand coverage to the uninsured or make health care affordable to those who need it most. The ACA is not a panacea, and it is definitely not the health reform legislation I would have enacted, but it is our best chance to make progress in dealing with the very serious problems that plague our health care system. Indeed, it may be the only chance we have for the next generation.

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Restraining Park Doctrine Prosecutions Against Corporate Officials Under the FDCA

*By Richard A. Samp and Cory L. Andrews**

Note from the Editor:

This paper analyzes the FDA's "Park Doctrine" for prosecutions against corporate officials under the Federal Food, Drug, and Cosmetic Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the Park Doctrine. To this end, we offer links below to various sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- **Federal Food, Drug, and Cosmetic Act:** http://www.fda.gov/regulatoryinformation/legislation/federalfooddrugandcosmeticactfdcact/default.htm
- **Jose Sierra,** *The Park Doctrine: All Bark and No Bite*, **April 6, 2012:** http://pharmarisc.com/2012/04/the-park-doctrine-all-bark-and-no-bite/

Introduction

The Park Doctrine (also known as the Responsible Corporate Officer Doctrine) has long occupied an obscure corner of American criminal law. It allows corporate officers to be charged with a crime for wrongdoing that occurred "on their watch," without any showing of personal fault or even knowledge on their part—other than a showing that they were "in charge" at the time the wrongdoing occurred. Such no-fault crimes are rare in American jurisprudence, but the U.S. Supreme Court has upheld such convictions under narrow circumstances.

Recently, the U.S. Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA) have been pursuing Park Doctrine convictions with increased vigor against senior executives at pharmaceutical companies whose employees improperly promoted drug sales, then using those convictions to impose draconian penalties on the executives. This trend raises serious constitutional questions and concerns about the outer limits, if any, of Park Doctrine liability. A divided panel of the U.S. Court of Appeals for the District of Columbia Circuit recently upheld what may amount to a lifetime ban from the pharmaceutical industry for three senior executives after they pled guilty to misdemeanor Park Doctrine charges.[1] The appeals court upheld the exclusion without giving any meaningful consideration to the constitutional implications of imposing such severe penalties on those not proven to have any knowledge of wrongdoing.

Such consideration is long overdue. Although the Supreme Court has sanctioned criminal convictions in the absence of scienter in a narrow range of cases, it has done so with the understanding that such prosecutions are largely regulatory in nature and that those convicted are subject to only relatively mild sanctions. A lifetime ban from one's profession is not normally considered a "relatively mild" sanction. If HHS and FDA persist with their current policy, either the courts or Congress should step in to impose meaningful due process limits on this troublesome trend.

I. The Park Doctrine: A Sharp Break from the Common Law

The Park Doctrine draws its name from a 1975 Supreme Court decision: *United States v. Park*.[2] John Park was the president of a large national food chain that operated several warehouses that FDA determined to be infested with rodents. Park was convicted of a misdemeanor violation of the Federal Food, Drug, and Cosmetic Act (FDCA)[3] for having held for sale "adulterated" or "misbranded" food.[4] A federal appeals court overturned the conviction, finding that it was "predicated solely upon a showing that the defendant, Park, was the President of the offending corporation."[5] Concluding that as "a general proposition, some act of commission or omission is an essential element of every crime," the appeals court held that due process barred Park's conviction in the absence of a finding that he had engaged in some "wrongful action."[6]

The Supreme Court reinstated the conviction. The Court recognized that Park, as the president of a corporation with more than 36,000 employees nationwide, was unlikely to be in a position to directly supervise each employee and to ensure that all acted in compliance with the FDCA. The Court nonetheless determined that § 331 of the FDCA imposes on senior corporate executives an unwavering "duty to implement measures that will insure that violations will not occur."[7] The Court explained that imposition of this duty was justified by the strong "public interest in the purity of its food":

> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question

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> demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being or the public that supports them.[8]

Park was the culmination of a 20th Century trend marked by a somewhat increased willingness among American courts to uphold imposition of criminal sanctions against individuals lacking any blameworthy *mens rea*. That trend represented a sharp departure from common law tradition. English common law unqualifiedly accepted the proposition that criminal punishment was unwarranted in the absence of a showing that the defendant harbored a blameworthy mental state.[9] That common law rule persisted throughout most of the 19th Century.[10]

The increased government regulation of the business community that accompanied the industrial revolution led many government officials to seek to use the criminal laws to enforce their regulations, and to conclude that *mens rea* requirements could interfere with enforcement efforts. As the Supreme Court explained in its 1952 *Morissette* decision, the 19th Century witnessed:

> [An] accelerating tendency, discernable both here and in England, to call into existence new duties and crimes which disregard any element of intent. The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties, or activities that affect public health, safety, or welfare.[11]

By the late 19th and early 20th Centuries, American courts began to accommodate those concerns by approving criminal prosecutions without proof of *mens rea* in a limited number of cases, which came to be known as "public welfare offenses."[12] One characteristic repeatedly recognized by courts that distinguished public welfare offenses from other criminal offenses was the relatively light penalties imposed on offenses falling into the former category. Prosecutions for public welfare offenses were seen primarily as a means of encouraging compliance with government regulations, not as a means of punishing evil people.[13] Indeed, as the Supreme Court has recognized, "the small penalties attached to such offenses complemented the absence of a *mens rea* requirement: In a system that generally requires a 'vicious will' to establish a crime, . . . imposing severe punishments for offenses that require no *mens rea* would seem incongruous."[14] For example, John Park's criminal sentence was very light: the trial judge imposed a $50 fine for each of the five counts on which he was convicted.[15]

II. Criminal Sanctions in the Absence of Mens Rea Continue to be Disfavored

The U.S. Supreme Court has rejected arguments that imposition of criminal sanctions in the absence of *mens rea* violates a defendant's due process rights in all instances.[16] Nonetheless, the Court has made clear that such prosecutions continue to be "disfavored" under the law.[17] *Morissette* is but one of many instances in which the Court expressed its preference that criminal sanctions be reserved largely for those who intended an action prohibited by the law:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to.'[18]

That preference has led the Court categorically to reject prosecutors' efforts to eliminate *mens rea* requirements with respect to crimes having their origin in the common law.[19] Moreover, with respect to statutory crimes not based on the common law (many of which are silent with respect to whether *mens rea* is an element of the crime), the Court has adopted a presumption that some level of *mens rea* is a necessary element, in the absence of evidence of a contrary congressional intent.[20] Thus, in a criminal case brought under the National Firearms Act for possession of a machine gun, the Court required prosecutors to demonstrate that the defendant knew that the gun he possessed had automatic firing capability;[21] in a criminal case brought under the Sherman Act, it required prosecutors to demonstrate that the defendants knew that their challenged practice (checking on each others' prices on a daily basis) would restrain trade;[22] and in a criminal case brought under a statute prohibiting the theft of federal government property, it required prosecutors to demonstrate that the defendant knew that the government had not abandoned the property he took.[23] None of the federal statutes at issue in those cases included an explicit scienter requirement. The Court nonetheless interpreted each of the statutes as requiring prosecutors to prove intent—based largely on the disfavored status of criminal prosecutions in which criminal intent is not an element.

III. The Park Doctrine: One Step Beyond Recognition of Public Welfare Offenses

During the early 20th Century, federal and state courts generally upheld convictions for public welfare offenses (*i.e.*, prosecution in which no *mens rea* was established) only in those cases in which the defendant had some direct involvement with the offense. Thus, in 1910 the Massachusetts Supreme Judicial Court upheld the conviction of a driver for transporting a barrel of liquor into a city without a license, despite the absence

of evidence that he knew that the barrel contained liquor; but the court also made clear that the driver's supervisor could not be convicted of the crime if he was not aware that the barrel in question was being transported.[24] The Park Doctrine goes at least one step beyond traditional understandings of public welfare offenses by permitting criminal prosecution of supervisors for the acts of subordinates, even when the supervisor was unaware of those acts and even in the absence of a finding that the supervisor was negligent in failing to more closely supervise the subordinate.

The origins of the Park Doctrine are often traced to a 1943 Supreme Court decision, *United States v. Dotterweich*.[25] Like *Park*, *Dotterweich* was a prosecution for violations of § 331 of the FDCA. Joseph Dotterweich was the president and general manager of a "jobber"—a company that purchased pharmaceuticals from their manufacturer, repacked the drugs under its own label, and then distributed them for retail sales. Unbeknownst to Dotterweich, some of the drugs that his corporation purchased and later shipped were adulterated and misbranded. Dotterweich was convicted of having transported adulterated and misbranded drugs in interstate commerce, in violation of the FDCA. The statute at issue provided that "any person" who commits the offense was guilty of a misdemeanor.[26] A Second Circuit panel (which included Judge Learned Hand) overturned the conviction, holding that the term "any person" referred only to the corporation (or sole proprietor) who was sanctioned as the "drug dealer," not to individual employees of the corporation.[27] Its reading of the statute was based in large measure on its view that a literal reading of the statute—by sweeping within its purview all employees who played *any* role in the shipping process, regardless whether they were aware of the adulteration and misbranding at issue—would be patently unfair and thus could not have been what Congress intended.[28]

In a 5-4 decision, the U.S. Supreme Court reinstated the conviction, finding that the statutory term "any person" encompassed Dotterweich.[29] The Court saw no unfairness in subjecting senior-level employees like Dotterweich to criminal sanctions for public welfare offenses, viewing such prosecutions as "an effective means of regulation:"

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as an effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.[30]

In other words, Dotterweich was subject to criminal sanction based solely on his supervisory relationship to the corporation's actions, without regard to his awareness of wrongdoing and even without regard to whether his conduct could be deemed negligent.

The Court recognized the potential unfairness of the FDCA if it were construed to apply to "any person however remotely entangled in the proscribed shipment."[31] To avoid that unfairness, the Court construed the FDCA's "any person" language somewhat narrowly, deeming it to apply only to those employees who stand in "responsible share to the furtherance of the [prohibited] transaction."[32]

Four justices dissented; they would have adopted the Second Circuit's limiting construction of the FDCA.[33] The dissenters saw significant due process concerns with the majority's approach:

> It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent has no evil intention or consciousness of wrongdoing. . . . Before we place the stigma of a criminal conviction upon any such citizen the legislative mandate must be clear and unambiguous.[34]

Thirty years later, *Park* expanded *Dotterweich*'s rationale. Although Joseph Dotterweich arguably had had a direct hand in shipping the adulterated and misbranded drugs (and instead had based his defense on a lack of awareness that the drugs were either adulterated or misbranded), John Park—as the President of a corporation with 36,000 employees—as several levels removed from decisions involving rodent infestation at two warehouses and the shipment of food from the warehouses. The Court indicated in *Park* that there is a sufficient basis to impose criminal liability on a responsible corporate officer if the officer "had the power to prevent the act complained of."[35] Company presidents can virtually always be held accountable under that standard; because they generally possess hiring and firing authority over all company employees, they always have the ability to prevent wrongdoing by an employee by firing him before the employee has an opportunity to act.

As these cases make clear, the Park Doctrine does not require the government to prove that the corporate officer's acts or omissions were either unreasonable or negligent. Indeed, three justices dissented in *Park* precisely because the majority refused to require a finding of negligence as a prerequisite to liability.[36] Not only does the Park Doctrine require no proof that the officer knew of the facts creating liability, it does not even require proof that a reasonable officer *should have* known of the existence of those facts. FDA's written guidelines indicate that FDA shares this understanding of the Park Doctrine's long reach: its guidelines provide that a corporate officer can be subjected to criminal sanctions under the Park Doctrine without proof that the officer "acted with intent or even negligence."[37]

In short, under the Park Doctrine, a senior corporate officer can be held criminally liable even though a jury could have found that the officer's acts or omissions were entirely reasonable. Because the commission of a criminal act by an employee necessarily means that the corporate officer failed to prevent the violation, he will have virtually no defense to a misdemeanor charge, regardless of the reasonableness or blameworthiness of his conduct or lack of awareness.[38] As some commentators have recently suggested, under the FDA's application of the Park Doctrine, "criminal liability requires the same proof of intent or knowledge—that is to say, none whatsoever—to convict corporate managers as tort law imposes on possessors of wild animals."[39]

IV. Application of the Park Doctrine to Executives of

Purdue Frederick Co.

Federal officials have exhibited increased interest in recent years in pursuing Park Doctrine prosecutions against senior executives within the pharmaceutical industry. Most prominently, they have espoused a particularly broad application of the Park Doctrine in connection with their efforts to impose severe penalties against three former top executives of Purdue Frederick Co. A recent decision from the U.S. Court of Appeals for the District of Columbia Circuit largely endorsed those efforts, thereby opening the door to potentially troubling expansion of the Park Doctrine.

Purdue Frederick developed and originally marketed OxyContin, an opioid medication approved by FDA to treat moderate to severe pain over a 12-hour period. Because OxyContin is highly subject to abuse by addicts, it is classified as a Schedule II controlled substance by the Drug Enforcement Administration, and its label warns that it is subject to abuse.

Following a five-year investigation, federal prosecutors concluded in 2007 that certain unidentified Purdue employees, when promoting OxyContin to doctors, had deviated from the FDA-approved labeling by describing OxyContin as less addictive and less subject to abuse than other opioid medications. Under the FDCA, an FDA-approved drug is deemed "misbranded" if its manufacturer makes promotional statements about the drug that deviate from the drug's FDA-approved labeling.[40] Based on the prosecutor's findings, Purdue Frederick agreed in 2007 to plead guilty to felony misbranding charges.[41] As part of the plea deal, three senior executives of Purdue Frederick agreed to plead guilty to Park Doctrine misdemeanor offenses. Although both sides agreed that the executives themselves were unaware of the illegal promotional activity, the executives conceded that they were responsible corporate officers at the time that the activity took place.[42] Indeed, there would have been little point in contesting the charges, because their status as senior executives with hiring and firing authority during the relevant time period was not subject to serious question. The trial judge sentenced each of the executives to three years probation, 400 hours of community service, and fines of $5,000.

HHS thereafter decided to impose additional and far more substantial punishment. Based solely on their misdemeanor pleas, HHS sought to exclude the three executives from federal health care programs for 20 years (later reduced to 12 years). Given their advanced ages, that punishment essentially amounted to a lifetime exclusion from the pharmaceutical industry.[43] The Social Security Act grants HHS discretionary authority to exclude individuals from federal health care programs if they have been convicted of misdemeanors "relating to fraud."[44] Even though the three executives were never accused of fraud (nor of any bad acts, for that matter), HHS contended that they were excludable because their misdemeanors related to the fraudulent acts of others.

The executives sought judicial review of the exclusion, arguing that federal law did not permit exclusion on the basis of their misdemeanor pleas and that use of the Park Doctrine to exclude them for life from the pharmaceutical industry would violate their due process rights. In a July 2012 decision, a divided D.C. Circuit rejected both claims.[45] The majority held that federal law permits exclusion when, as here, the misdemeanor conviction is "factually related" to fraud—even when, as here, the fraud at issue was undertaken by others and the excluded individuals were unaware of the fraud.[46] The majority brushed off the executives' due process challenge in a single paragraph:

> Finally, the Appellants and their amici argue, because the Secretary's interpretation permits her to impose "career-ending disabilities" upon someone whose criminal conviction requires no *mens rea*, it raises a serious question of validity due under the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Quoting *Morissette v. United States*, 342 U.S. 246, 256 (1952), they note that the Supreme Court upheld the constitutionality of strict liability crimes "in part, because their associated penalties 'commonly are relatively small, and conviction does no grave damage to an offender's reputation." Section 1320a-7(b)(1) [the "relating to fraud" exclusion provision], however, is not a criminal statute and, although exclusion may indeed have serious consequences, we do not think excluding an individual under 42 U.S.C. § 1320a-7(b) on the basis of his conviction for a strict liability offense raises any significant concern with due process. Exclusion effectively prohibits one from working for a government contractor or supplier. Surely the Government constitutionally may refuse to deal further with senior corporate executives who could have but failed to prevent a fraud against the Government on their watch.[47]

The D.C. Circuit's rejection of the due process claims is highly problematic. The severity of the punishment being inflicted on the three Purdue Frederick executives does not lose its constitutional significance simply because it is being imposed pursuant to a civil statute. Exclusion is potentially permissible under § 1320a-7(b)(1) because the three executives pled guilty to a Park Doctrine misdemeanor and for no other reason. While HHS was entitled to convene a hearing for the purpose of determining whether the three executives were sufficiently trustworthy to continue to participate in federal health care programs (and to order their exclusion if they were deemed untrustworthy), it chose not to convene such a hearing. Instead, HHS chose to exclude the three executives based solely on their Park Doctrine pleas. Under those circumstances, the decision to exclude the executives from federal health care programs is most logically characterized as a criminal punishment.

Nor can one realistically argue that a 12-year, career-ending exclusion is not a severe punishment. Under those circumstances, the D.C. Circuit should have faced the issue of whether due process permits such severe punishments to be imposed on individuals for a Park Doctrine conviction that was based on nothing more than the defendants' status as responsible officers of a corporation at which some employees (unbeknownst to the defendants) engaged in improper promotion of an FDA-approved drug. The Supreme Court has repeatedly stated that a major reason why due process permits criminal sanctions to be

imposed in the absence of *mens rea* for public welfare offenses is that such offenses generally entail very minor penalties.[48]

The three executives have sought rehearing *en banc* in the D.C. Circuit. In light of the serious due process concerns raised by the case, further appellate review is warranted.

The three executives are not alone in receiving severe punishment following misdemeanor convictions for Park Doctrine offenses. In 2009, three former executives of Synthes, Inc., an orthopedic medical device company, pled guilty to a single misdemeanor under the FDCA based on the company's shipment of misbranded and adulterated bone cement in interstate commerce.[49] The defendants pled guilty based solely on their status in the company, and expressly did not agree to a sentence in their plea agreement. Two defendants were eventually sentenced to nine months in prison and the third was sentenced to five months in prison. Each defendant was also ordered to pay $100,000 in fines. FDA has argued that the harsh sentences were warranted because the Synthes executives had direct knowledge of the illegal activity at their company. If so, one can legitimately fault prosecutors for failing to charge the executives with those more severe offenses. Instead, they relied on an easy-to-prove Park Doctrine offense, then sought sentences far in excess of the mild sanctions that are a "cardinal principle of public welfare offenses."[50]

V. Recent FDA Pronouncements

For years, strict-liability prosecutions were rare, but regulators are increasingly viewing the Park Doctrine as a powerful tool in the government's arsenal. Prosecution of the Purdue Frederick executives was not an anomaly. Park Doctrine prosecutions are on the rise, and the FDA has begun trumpeting a newfound enthusiasm for Park Doctrine prosecutions. On March 4, 2010, FDA Commissioner Margaret Hamburg wrote a letter to U.S. Senator Charles Grassley announcing the intention of FDA's Office of Criminal Investigations (OCI) to "increase the appropriate use of misdemeanor prosecutions . . . to hold responsible corporate officers accountable."[51] Commissioner Hamburg also revealed that specific criteria had been developed internally for misdemeanor prosecutions, which would result in revised policies and procedures on the appropriate use of criminal sanctions.

On April 22, 2010, Eric M. Blumberg, FDA's Deputy Chief Counsel for Litigation, gave a highly publicized speech at the Food and Drug Law Institute (FDLI) in which he warned corporate officials of impending misdemeanor prosecutions. Blumberg, one of the authors of the government's briefs in the *Park* case, reportedly told the gathering: "Very soon, and I have no one particular in mind, some corporate executive is going to be the first in a long line."[52] He echoed these sentiments just a few months later, on October 13, 2010. Speaking at the FDLI's "Enforcement and Litigation Conference," Blumberg said "Unless the government shows more resolve to criminally charge individuals at all levels in the company, we cannot expect to make progress in deterring off-label promotion."[53]

On May 27, 2010, Deborah Autor, Director of the Center for Drug Evaluation and Research's Office of Compliance, announced at a congressional hearing that the FDA was seeking to increase criminal enforcement: "The agency is working to increase our enforcement on the criminal side and to connect carefully what we do on the criminal side with what we do on the civil side."[54] She also disclosed that a recent series of Tylenol recalls by non-prescription drug manufacturer McNeil Cosmetic Healthcare, a division of Johnson & Johnson, had been "referred to the FDA's crime division."[55]

In January 2011, following a protracted Freedom of Information Act (FOIA) litigation by the law firm Ropes & Gray, FDA released its long-awaited criteria for authorizing Park Doctrine prosecutions.[56] Unfortunately, these non-binding criteria provide little guidance to individuals who are potential targets of Park Doctrine liability. FDA insists that the criteria "do not create or confer any rights or benefits for or on any person, and do not operate to bind FDA. Further, the absence of some factors does not mean that a referral is inappropriate where other factors are evidenced."[57]

The seven listed criteria include:

(1) whether the violation involves actual or potential harm to the public;
(2) whether the violation is obvious;
(3) whether the violation reflects a pattern of illegal behavior and/or failure to heed prior warnings;
(4) whether the violation is widespread;
(5) whether the violation is serious;
(6) the quality of the legal and factual support for the proposed prosecution; and
(7) whether the proposed prosecution is a prudent use of agency resources.

Because these criteria are identical to those considered in almost every decision to seek a criminal sanction, they are not especially helpful. As one commentator has remarked, "the criteria are not really criteria at all."[58]

On November 2, 2011, Assistant Attorney General Tony West underscored the Government's newfound commitment to prosecuting corporate officers under the Park Doctrine. Addressing the 12th Annual Pharmaceutical Regulatory and Compliance Conference, West emphasized that "demanding accountability means we will consider prosecutions against individuals, including misdemeanor prosecutions under the Park Doctrine, which provides that responsible corporate officers can, in appropriate circumstances, be held strictly liable for criminal violations of the Food, Drug, and Cosmetic Act."[59]

These announcements are both noteworthy and curious. They are noteworthy because they represent a clear desire on the part of FDA and the DOJ to use the Park Doctrine to increase the numbers of criminal convictions of corporate officers. They are curious, however, to the extent that they purport to be predictive of *future* criminal activity. Take, for example, Blumberg's assertion that "very soon," "some corporate executive is going to be the first in a long line." Ordinarily, a prosecutor is unable say what crimes will be prosecuted in the future, because those crimes have not even occurred yet, much less been investigated. It is a unique attribute of the Park Doctrine that conduct that is perfectly legal in one year may, under the scrutiny of a zealous prosecutor, become illegal in the next year.

VI. Problems with Current Application of the Park Doctrine

FDA and DOJ are obviously seeking to test the boundaries of Park Doctrine liability through the creative use of their authority to exclude individuals from federal health care programs. This effort marks a crucial shift in the government's use of strict liability offenses. In many cases, especially those involving the off-label promotion of pharmaceuticals by outside sales representatives, it is virtually impossible for corporate officers to personally guarantee that each sales person is following the complex rules. As one federal judge has observed, "[t]he line . . . between a conviction based on corporate position alone and one based on a 'responsible relationship' to the violation is a fine one, and arguably no wider than a corporate bylaw."[60] Indeed, it is highly unlikely that a CEO or COO exists who cannot be convicted under the Park Doctrine, as there is little if anything within most companies' operation that is not, at least on paper, within their supervisory authority and responsibility. And because of the breadth of the FDCA's prohibitions, the very real danger exists that an FDCA misdemeanor, coupled with the harsh threat of exclusion, will be seen by federal prosecutors as a powerful leveraging tool to obtain convictions or extract pleas in vindications of suspicions that otherwise could never be proven.

Yet it is far from clear that either the Supreme Court or Congress ever intended that the Park Doctrine and the FDCA to be used in quite this way. Although the basis for allowing strict liability crimes has broadened over the years, two crucial considerations have remained: the size of the penalty and the impact on the individual's reputation.[61] The Supreme Court has justified the existence of strict liability crimes only in certain narrowly defined cases where the penalties are small and there is no grave damage to the defendant's reputation.[62] For example, in *Park*, the Court affirmed a $250 fine; in *Dotterweich*, the Court affirmed a $500 fine and 60 days probation.[63] The penalties imposed on the Purdue Frederick and Synthes executives cannot plausibly be described as small. Unlike the relatively modest penalties imposed in *Park* and *Dotterweich*, a lengthy exclusion from federal health care programs will not only ruin an executive's reputation, it will effectively end his or her career.

The Purdue Frederick case provides federal courts with an opportunity to rein in over-aggressive application of the Park Doctrine by federal officials. If neither the D.C. Circuit nor the Supreme Court agrees to further review, Congress ought to step in to make clear that it never intended to permit such severe criminal penalties to be imposed on individuals based solely on their status within a corporation. We should not so lightly abandon the centuries-old understanding that imposition of criminal sanctions in the absence of *mens rea* is highly disfavored under the law.

Endnotes

1 Friedman v. Sebelius, 686 F.3d 813 (D.C. Cir. 2012).

2 421 U.S. 658 (1975).

3 Pub. L. 75–717, 21 U.S.C. §§ 301 *et seq*., Ch. 675 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-92).

4 21 U.S.C. § 331(k).

5 United States v. Park, 499 F.2d 839, 841 (4th Cir. 1974).

6 *Id.* at 841–42.

7 United States v. Park, 421 U.S. 658, 672 (1975).

8 *Id.* at 671–72.

9 *See, e.g.*, 4 William Blackstone, Commentaries on the Law of England *21 (1769) (to constitute any crime, there must first be a "vicious will").

10 Morissette v. United States, 342 U.S. 246, 251 (1952).

11 *Id.* at 253–54.

12 *See* Francis Sayre, *Public Welfare Offenses*, 33 Col. L. Rev. 55 (1933).

13 U.S. v. Balint, 258 U.S. 250, 253–54 (1922).

14 Staples v. United States, 511 U.S. 600, 616–17 (1994) (quoting 4 William Blackstone, Commentaries *21).

15 United States v. Park, 421 U.S. 658, 666 (1975).

16 United States v. Balint, 258 U.S. 250, 252 (1922). *Balint* rejected the due process challenge of a defendant convicted of selling opium and cocaine without providing the required IRS forms (in violation of the Narcotic Act of 1914), despite the absence of a finding that the defendant knew that the substances being sold were opium and cocaine.

17 United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978) ("While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, . . . the limited circumstances in which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status.") (internal citations omitted).

18 Morissette v. United States, 342 U.S. 246, 250–51 (1952).

19 *U.S. Gypsum*, 438 U.S. at 437.

20 Staples v. United States, 511 U.S. 600, 606 (1994).

21 *Id.* at 619.

22 *U.S. Gypsum*, 438 U.S. at 443–44.

23 *Morissette*, 342 U.S. at 273.

24 Commonwealth v. Mixer, 207 Mass. 141, 142–43 (1910).

25 320 U.S. 277 (1943).

26 21 U.S.C. § 333(a) (criminalizing violations of § 301(a) of the FDCA, 21 U.S.C. § 331(a)).

27 United States v. Buffalo Pharmacal Co., 131 F. 500, 503 (2d Cir. 1942).

28 *Id.*

29 *Dotterweich*, 320 U.S. at 277.

30 *Id.* at 280–81.

31 *Id.* at 284.

32 *Id.* The Court declined further elaboration regarding just which employees would meet the "responsible role" standard, although the Court clearly intended to limit that class of employees to those at a fairly senior level within the company. *Id.* at 285. The Court stated that "there was sufficient evidence to support [the jury's] verdict" that Dotterweich—as president and general manager– had a direct and responsible role in the specific drug shipment at issue. *Id.*

33 *Id.* at 285–93 (Murphy, J., dissenting).

34 *Id.* at 286.

35 United States v. Park, 421 U.S. 658, 671 (1975).

36 See *id.* at 683 (Stewart, J., dissenting) (refusing to join the majority because "a jury must find—and must be clearly instructed that it must find—evidence beyond a reasonable doubt that he engaged in wrongful conduct amounting at least to common-law negligence").

37 *See* FDA, Inspections, Compliance, Enforcement, and Criminal

Investigations: Special Procedures and Considerations for Park Doctrine Prosecutions § 6-5-3, *available at* http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProcedures Manual/ucm176738.htm

38 *See id.* ("When considering whether to recommend a misdemeanor prosecution against a corporate official, consider the individual's position in the company and relationship to the violation, and whether the official had the authority to correct or prevent the violation.").

39 Dahlia Rin, John P. Pucci, & Robert L. Ullmann, *The Misinterpretation of the Park Doctrine as Creating Strict Liability*, FDLI Update, November/December 2011, at 9.

40 21 U.S.C. § 352.

41 *See* 21 U.S.C. § 333(b) (making it a felony to knowingly violate 21 U.S.C. § 331(a), which prohibits the introduction of misbranded drugs into interstate commerce).

42 The executives admitted to misdemeanor violations of 21 U.S.C. § 333(a), the same FDCA misbranding provision that Joseph Dotterweich was convicted of violating.

43 Because drug companies may not employ excluded individuals if they wish to participate in federal health care programs and because all drug companies obtain a substantial portion of their revenues from federal programs such as Medicare and Medicaid, an HHS exclusion renders an individual unemployable in the industry.

44 42 U.S.C. § 1320a-7(b)(1).

45 Friedman v. Sebelius, 686 F.3d 813 (D.C. Cir. 2012).

46 *Id.* at 824.

47 *Id.* at 823–24. Judge Williams dissented without reaching the constitutional issue. He concluded that HHS's application of the fraud exclusion statute violated the Administrative Procedure Act because HHS had failed to articulate any standard by which one could measure whether the misdemeanor conviction was sufficiently related to fraud to warrant exclusion. *Id.* at 829–32. Although it upheld exclusion, the majority remanded the case to HHS for reconsideration of the 12-year exclusion period. Noting that HHS had never before excluded anyone under the fraud exclusion provision for more than four years, the majority directed HHS on remand to provide a reasoned explanation regarding why a far longer exclusion period was required in this case than in past cases. *Id.* at 826–28.

48 *See, e.g.*, Morissette v. United States, 342 U.S. 246, 256 (1952); Staples v. United States, 511 U.S. 600, 616–17 (1994); *see also* Hanousek v. United States, 528 U.S. 1102, 1104 (2000) (Thomas, J., dissenting from denial of writ of certiorari) ("it is a 'cardinal principle' of public welfare offenses that the penalty not be severe") (quoting Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933)). In *Park*, the Court affirmed a $250 fine; in *Dotterweich*, the Court affirmed a $500 fine and 60 days probation.

49 *See* United States v. Norian Corp., No. 2:09 CR 403 (E.D. Pa. Nov. 2011).

50 Hanousek v. United States, 528 U.S. 1102, 1104 (2000) (Thomas, J., dissenting from denial of writ of certiorari)

51 Letter from Margaret Hamburg, Commissioner of Food and Drugs, to Sen. Charles E. Grassley, Ranking Member, Senate Committee on Finance (Mar. 4, 2010), *available at* http://finance.senate.gov/press/Gpress/2010/prg030410b.pdf (last visited Feb. 13, 2012).

52 Parija Kavilanz, *Recall Fallout: FDA Puts Execs On Notice*, CNN Money (Aug. 24, 2010) (quoting Eric M. Blumberg), *available at* http://money.cnn.com/2010/08/23/news/companies/fda_recall_prosecutions/index.htm (last visited Feb. 16, 2012).

53 *Drug firms get warning over off-label marketing*, Bloomberg News (Oct. 15, 2010), *available at* http://www.nj.com/business/index.ssf/2010/10/drug_firms_get_warning_over_of.html (last visited May 15, 2012).

54 *Johnson & Johnson's Recall of Children's Tylenol and Other Children's Medicines: Hearing Before the H. Comm. On Oversight and Gov't Reform*, 11th Cong. (2010) (statement of Deborah Autor, Director of the Office of Compliance, Center for Drug Evaluation and Research, FDA) *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg63140/pdf/CHRG-111hhrg63140.pdf.

55 Julianne Pepitone, *Tylenol Recalls Referred to FDA Crime Division*, CNN Money (May 27, 2010), *available at* http://money.cnn.com/2010/05/27/news/companies/tylenol_hearing/ (last visited Feb. 14, 2012).

56 FDA, Inspections, Compliance, Enforcement, and Criminal Investigations: Special Procedures and Considerations for Park Doctrine Prosecutions § 6-5-3, *available at* http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProcedures Manual/ucm176738.htm.

57 *Id.*

58 Anne K. Walsh, *FDA Finally Releases "Non-Binding" Park Doctrine Criteria*, FDA Law Blog (Feb. 6, 2011), http://www.fdalawblog.net/fda_law_blog_hyman_ phelps/2011/02/fda-finally-releases-non-binding-park-Doctrine-criteria.html.

59 Tony West, Assistant Attorney General, Address at the 12th Annual Pharmaceutical Regulatory and Compliance Congress (November 2, 2011), *available at* www.justice.gov/iso/opa/civil/speeches/2011/civ-speech-111102.html (last visited Feb. 22, 2012).

60 United States v. New Eng. Grocers Supply Co., 488 F. Supp. 230, 234 (D. Mass. 1980).

61 *See* United States v. Freed, 189 Fed. Appx. 888, 891–92 (11th Cir. 2006).

62 *See supra* note 15.

63 *See* United States v. Park, 421 U.S. 658, 666 (1975) (affirming a $250 fine); United States v. Dotterweich, 320 U.S. 277, 277 (1943) (affirming a $500 fine and 60 days probation).

Civil Rights

Misconceptions about *Ledbetter v. Goodyear Tire & Rubber Co.*

*By Hans Bader**

Note from the Editor:

This article discusses the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, as well as two subsequent pieces of legislation, the Lilly Ledbetter Fair Pay Act of 2009 and the Paycheck Fairness Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about this issue. To this end, we offer links below to various materials discussing this topic, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007): http://www.supremecourt.gov/opinions/07pdf/07-290.pdf.
- Testimony of Lilly Ledbetter before the Senate Judiciary Committee on Sept. 23, 2008: http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da1411260&wit_id=e655f9e2809e5476862f735da1411260-1-1
- Allison Cimpl-Wiemer, *Ledbetter v. Goodyear: Letting the Air out of the Continuing Violations Doctrine?*, 92 Marqu. L. Rev. 355 (2008): http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1310&context=mulr
- National Women's Law Center, Fact Sheet: What the Paycheck Fairness Act Would Really Do (2012): http://www.nwlc.org/sites/default/files/pdfs/pfa_myths_and_facts_factsheet_5.30.12_final.pdf

I. *Ledbetter v. Goodyear Tire & Rubber Co.*

Lilly Ledbetter became famous when she lost her pay-discrimination case in the Supreme Court. Her lawsuit was rejected as untimely in the Supreme Court's 5-4 ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), because she filed her complaint with the Equal Employment Opportunity Commission (EEOC) too late. The Supreme Court said that, in most cases, employees should file an EEOC complaint within 180 days of their first discriminatory paycheck, if they want to sue under the federal anti-discrimination law with the shortest deadline, Title VII of the Civil Rights Act.[1] But, it left open the possibility that the deadline could be extended for employees who do not discover the discrimination until later.[2] And it pointed out that she might have fared better had she simply pressed her claim under a different law that has a longer deadline.[3]

Ms. Ledbetter has since repeatedly claimed that she only learned she was paid less than her male co-workers at the end of her career,[4] and then belatedly filed an EEOC complaint. In her testimony before the United States Senate, Ledbetter stated that she "only learned about the discrepancy in [her] pay after nineteen years, and that was with someone leaving me an anonymous note."[5] She later made similar claims in speeches at the Democratic National Conventions in 2008[6] and 2012 (claiming that she did not learn of it until "two decades" after she began working at the company).[7] Her story was widely publicized by the media.[8] However, the factual record of the *Ledbetter* case is much different than what has been reported.

Ms. Ledbetter worked for the company for nineteen years, from 1979 to 1998.[9] She learned of the pay disparity by 1992, as excerpts from her deposition, filed in the Supreme Court as part of the Joint Appendix, make clear. In response to the question: "So you knew in 1992 that you were being paid less than your peers?" she answered simply "yes, sir."[10] But she only filed a legal complaint over it in July 1998, shortly before her retirement in November 1998.[11] As Stuart Taylor of the *National Journal* pointed out:

> Ledbetter admitted in her sworn deposition that "different people that I worked for along the way had always told me that my pay was extremely low" compared to her peers. She testified specifically that a superior had told her in 1992 that her pay was lower than that of other area managers, and that she had learned the amount of the difference by 1994 or 1995. She added that she had told her supervisor in 1995 that "I needed to earn an increase in pay" because "I wanted to get in line with where my peers were, because… at that time I knew definitely that they were all making a thousand [dollars] at least more per month than I was."[12]

Thus, the record shows she was aware of the pay disparity for over five years before filing a legal complaint over it.

By claiming that she learned of the pay disparity just before filing a legal complaint over it, Ledbetter was able to make it sound like the Supreme Court had acted unreasonably in barring her lawsuit as untimely, and created the impression that it had applied the deadline rigidly, without regard to whether she could have learned of the discrimination in time to sue.

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This notion, widely promoted in the press,[13] was later cited by Democratic leaders in Congress,[14] and the Obama Administration,[15] to justify enacting a new law that overturned the Supreme Court's decision, the Lilly Ledbetter Fair Pay Act.[16]

For example, the White House claimed that:

> The [Supreme] Court ruled that employees subject to pay discrimination like Lilly Ledbetter must file a claim within 180 days of the employer's original decision to pay them less . . . even if the employee did not discover the discriminatory reduction in pay until much later [].[17]

However, the Supreme Court never said the 180-day deadline should be applied rigidly. Instead, it specifically left open the possibility that employees could sue later simply because they didn't know of the discrimination at the time—a factual situation it said did not apply to Ledbetter's case since she testified in her deposition that she knew of the pay disparity in 1992, but only filed her complaint with the EEOC in 1998.[18] The Court pointedly noted that the plaintiff could have pressed her claim instead under the Equal Pay Act, which has a longer deadline for suing.[19] Moreover, as lawyer Paul Mirengoff observed,[20] the Supreme Court has long allowed hoodwinked employees to rely on equitable tolling or estoppel to sue beyond the deadline when employer deception keeps them from suing within 180 days, as it made clear in its *Zipes* decision.[21] The Court's decision did not surprise employment lawyers, who expected it based on the Court's precedents, and generally viewed it as the correct decision.[22]

The Supreme Court did not say that the deadline should apply inflexibly, without regard to whether a worker could have discovered the discrimination. Rather, it explicitly left open the possibility that plaintiffs can wait to sue until *after* learning of discrimination, under the so-called "discovery rule." It noted in footnote 10 of its opinion:

> [W]e have previously declined to address whether Title VII suits are amenable to a discovery rule . . . .Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.[23]

Thus, since Ledbetter did not claim that a lack of knowledge had prevented her from suing in time, relaxing the deadline for her would have done her no good. And, even if she had lacked knowledge *as a result* of being hoodwinked by her employer, she could have had the deadline extended under the longstanding doctrines of equitable tolling and estoppel, which apply somewhat more narrowly than the discovery rule.[24]

Moreover, although the Supreme Court did dismiss Ledbetter's lawsuit under Title VII, the discrimination law with the shortest deadline, it emphasized that the plaintiff could have pressed her discrimination claim instead under the Equal Pay Act, [25] which has a longer deadline for suing.[26] As it noted, "Petitioner, having abandoned her claim under the Equal Pay Act, asks us to deviate from our prior decisions in order to permit her to assert her claim under Title VII."[27] She might have won her case had she simply appealed based on the Equal Pay Act, which has a longer deadline for bringing discrimination claims (3 years in most cases)[28] than Title VII does—and may even have more generous rules for when the clock starts ticking on its deadline.[29] Under the EPA, the deadline for suing arguably restarts with each paycheck,[30] quite possibly allowing employees to sue even if they, like Ledbetter, waited for years after learning about it before suing.

Under another provision of Title VII—its ban on unintentional or "disparate-impact" discrimination[31]—the deadline starts running all over again with each paycheck, as the Supreme Court indicated in *Lewis v. City of Chicago* (2010).[32] That decision held that under Title VII's disparate-impact provision—unlike its intentional-discrimination provision (the provision applied in *Ledbetter*)—the deadline does not run from the date a decision or policy is *adopted*, but rather starts running all over again each time the policy is *applied,* giving the plaintiff much more time to sue. In *Ledbetter*, the Supreme Court suggested that a similarly generous accrual rule might apply under "the EPA," because it likewise "does not require . . . proof of intentional discrimination."[33]

II. Subsequent Legislation

A. Lilly Ledbetter Fair Pay Act

These misconceptions about the *Ledbetter* decision and its reach played a key role in the push for two pieces of federal pay legislation, the Lilly Ledbetter Fair Pay Act, enacted in 2009,[34] and the Paycheck Fairness Act, which has not passed the Senate yet, but was passed by the House under Democratic control in the 110th and 111th Congresses.[35]

The Ledbetter Act changes federal law to restart the clock on the deadline for suing each time an employee is paid a paycheck affected by an allegedly discriminatory pay decision. As House Speaker Nancy Pelosi noted, under it, "each paycheck resulting from a discriminatory pay decision would constitute a new violation of employment nondiscrimination law. As long as a worker files a charge within 180 days of a discriminatory paycheck, the charge would be considered timely." Pelosi's argument was based on the premise that:

> The *Ledbetter* decision allows employers to escape responsibility by keeping their discrimination hidden and running out the clock. Under the Supreme Court decision, employers have an incentive to keep discriminatory pay decisions hidden for 180 days then never correct them. Once 180 days has elapsed, the employer can continue paying discriminatory wages to the employee for the rest of her career."[36]

This premise was widely publicized by the media.[37]

As documented earlier in this article, it was incorrect that the Supreme Court's decision allows employers to "never correct" discriminatory pay decisions as long as they succeed in keeping them "hidden for 180 days." Nothing in the Supreme Court's decision questioned, much less overruled, its earlier *Zipes* decision, an 8-to-0 ruling that allowed employees to rely on equitable tolling or estoppel to sue even after the deadline when an employer's deception actually prevented them from learning of the discrimination earlier.[38] Further, most employees who failed to comply with the 180-day deadline for Title VII claims enforced in the *Ledbetter* decision could simply sue instead under other laws with longer deadlines, like the Equal Pay

Act, which also prohibits pay discrimination based on sex.[39]

Perhaps anticipating the argument that the Equal Pay Act provided an alternative remedy for female employees, Speaker Pelosi claimed that the *Ledbetter* "decision severely restricted workers' ability to pursue claims of pay discrimination on the basis of not only sex, but race" and other characteristics as well.[40] But this also led to another major misconception. While it is true that the Equal Pay Act itself only covers sex discrimination, lawsuits alleging intentional racial discrimination or racially unequal treatment can be brought by any employee, public or private, under 42 U.S.C. § 1981, which has a long four-year deadline for suing.[41] Public employees can sue for pay discrimination,[42] including racial, sexual,[43] or religious[44] discrimination, under 42 U.S.C. § 1983, which has a statute of limitations as long as six years in some states.[45]

Moreover, the *Ledbetter* decision itself indicated that the deadline for suing might start running all over again with each new paycheck in cases alleging *unintentional* or "disparate impact" discrimination (rather than the intentional discrimination alleged by Ms. Ledbetter).[46] Indeed, the Supreme Court later ruled unanimously that in such cases, a worker can sue within 180 days of each *application* of a discriminatory policy (like a recently-issued paycheck), rather than having to sue within 180 days after the policy was first *set*, since the focus in unintentional discrimination cases is not the employer's intent at the time it adopted the policy (which is irrelevant in such cases), but rather any *application* of the policy.[47] Thus, the *Ledbetter* decision did not restrict workers' ability to pursue those claims of pay discrimination at all, regardless of whether the alleged discrimination was based on race, sex, or religion.

By allowing employers to be sued many years after a worker's pay is set, simply because the worker is still drawing a paycheck, the Lilly Ledbetter Fair Pay Act may leave some employers unable to defend themselves against meritless charges. The Supreme Court noted that due to Ledbetter's own delay in suing Goodyear, the supervisor involved in setting her pay had died by the time her case was tried: "Ledbetter's claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor . . . by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously."[48] The passage of time thus left the company less able to show that Ledbetter's lower pay was not the result of sexism or discriminatory intent.[49]

B. The Paycheck Fairness Act

The notion that the *Ledbetter* decision barred women from suing over pay discrimination even when they could not have discovered it any sooner was also used to press for passage of the Paycheck Fairness Act, a bill that would make changes to the Equal Pay Act.[50]

Backers of the Paycheck Fairness Act relied on other misconceptions as well. House Speaker Pelosi argued that existing law treated victims of sex discrimination worse than other kinds of discrimination, and that the Paycheck Fairness Act was thus needed to put "gender-based discrimination sanctions on equal footing with other forms of wage discrimination by allowing women to sue for compensatory and punitive damages."[51]

First, although the Equal Pay Act does not authorize compensatory and punitive damages (it does give employees back pay and liquidated damages), Title VII, which also prohibits pay discrimination based on sex, makes available compensatory and punitive damages up to $300,000 to employees who prevail in discrimination lawsuits[52] (in addition to providing them with back pay[53] and attorney's fees).[54]

Under current law, victims of sex discrimination are better off than employees alleging discrimination based on other factors, such as religion. Those employees can sue only under Title VII, not the Equal Pay Act, and thus cannot recover liquidated damages the way that plaintiffs alleging gender discrimination under the Equal Pay Act can.[55]

The Paycheck Fairness Act would give plaintiffs suing over pay discrimination damages unavailable to other kinds of discrimination victims. For example, although compensatory and punitive damages (unlike back pay) are usually unavailable to workers suing over unintentional or "disparate-impact" discrimination,[56] the Paycheck Fairness Act would create an exception for gender-based equal-pay cases, giving such plaintiffs compensatory damages even in cases of unintentional pay discrimination.[57]

Moreover, the Paycheck Fairness Act would completely eliminate the cap on compensatory and punitive damages for one special category of discrimination plaintiff—those alleging gender-based pay discrimination.[58] For most other categories of discrimination, the cap would remain at $300,000.[59]

Other provisions in the bill would undermine rather than promote equality. As Speaker Pelosi noted, under the Equal Pay Act, "Courts have allowed employers to use any factor other than sex to justify a pay disparity between men and women." By contrast, "Under the Paycheck Fairness Act, an employer would have to show that the disparity . . . is job-related, and is consistent with business necessity."[60] So the fact that an employer relied on a "factor other than sex" to set pay would not necessarily be a defense under the Paycheck Fairness Act, which could hold an employer liable even if it was perfectly fair in how it paid its workers.[61]

To this last point, it is worth noting that not all pay disparities between men and women are the product of sexism or discrimination. For example:

Men are far more likely to choose careers that are more dangerous, so they naturally pay more. Top 10 most dangerous jobs (from the U.S. Bureau of Labor Statistics): Fishers, loggers, aircraft pilots, farmers and ranchers, roofers, iron and steel workers, refuse and recyclable material collectors, industrial machinery installation and repair, truck drivers, construction laborers. They're all male-dominated jobs.[62]

Ninety-two percent of all workers who die on the job are men, even though only a bare majority of all workers are men.[63] Moreover, "Men are far more likely to take work in uncomfortable, isolated, and undesirable locations that pay more. Men work longer hours than women do. The average fulltime working man works six hours per week or fifteen percent longer than the average fulltime working woman."[64] These examples are at odds with the assumption of many supporters of the Paycheck

Fairness Act and the Ledbetter Act that pay disparities are simply the result of gender bias or sexism.

Endnotes

1 *See* 42 U.S.C § 2000e–5(e)(1) (180-day deadline applies in states that do not have "a State or local agency with authority to grant or seek relief" from the alleged discrimination, and 300-day deadline applies in other states).

2 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642 n.10 (2007).

3 *See id*. at 621.

4 *Pay Equity Pioneer Lilly Ledbetter Addresses the DNC*, PBS Newshour, August 26, 2008, *available at* www.pbs.org/newshour/bb/politics/july-dec08/ledbetter_08-26.html.

5 *See* Senate Judiciary Hearing on Elena Kagan's Nomination to the Supreme Court, July 1, 2008 beginning at the 74 minute mark, *available at* www.senate.gov/fplayers/CommPlayer/commFlashPlayer.cfm?fn=judiciary070110&st=xxx.

6 *Pay Equity Pioneer Lilly Ledbetter Addresses the DNC*, PBS Newshour, Aug. 26, 2008 (Ledbetter said she learned of the pay disparity from an "anonymous note in my mailbox," after beginning to suspect it "toward the end of my 19 years at Goodyear"; "our highest court sided with big business. They said I should have filed my complaint within six months of Goodyear's first decision to pay me less, even though I didn't know that's what they were doing.").

7 *Speech by Lilly Ledbetter at Democratic National Convention (Text / Video)*, *available at* http://electronicvillage.blogspot.com/2012/09/speech-by-lilly-ledbetter-at-democratic.html.

8 *See, e.g.,* Jim Abrams, Associated Press, *Democrats in House Push Through 2 Pay-Equity Bills*, South Florida Sun-Sentinel, January 10, 2009, at 9A ("Lilly Ledbetter. . . sued the company over pay discrimination when she learned, shortly before retiring after a 19-year career there, that she was paid less than any male supervisor"); Fanny Carrier, *Retired US worker Becomes Champion of Women's Fair Pay*, Agence France Presse English Wire, January 30, 2008 ("Ten years ago, someone slipped an anonymous note into Lilly Ledbetter's locker and the tire factory worker learned that she was being paid less than her male counterparts who were doing the same work. . . She immediately" complained to the EEOC, but her case was dismissed as untimely); Ann Friedman, *TAP Talks with Lilly Ledbetter*, The American Prospect, April 23, 2008 (In *Ledbetter*, "The justices ruled that employees can only file a wage-discrimination complaint within 180 days of when the payroll decision was made," "which leaves women and minorities in Ledbetter's situation with no recourse"; "TAP talked with Ledbetter . . . *How did you finally find out how much your male co-workers were making?* The only way that I really knew was that someone left an anonymous note in my mailbox showing my pay and the pay for the three males who were doing the same job"), http://prospect.org/article/tap-talks-lilly-ledbetter-0.

9 *Ledbetter*, 550 U.S. at 621.

10 Ledbetter v. Goodyear Tire & Rubber Co., Case No. 05-1074, *Joint Appendix* at pg. 233 (Page 123 of Ledbetter's deposition), *available at* www.scotusblog.com/movabletype/archives/LedbetterJoinAppendix.pdf (this is from a web site co-sponsored by Ledbetter's own lawyers in the Supreme Court, the Howe & Russell law firm); *see also* Copus, *Pay Discrimination Claims After Ledbetter*, 75 Defense Counsel Journal 300, 305 (2008) (Copus, a leading employment lawyer who once worked for the EEOC, noting that Ms. Ledbetter admitted in her deposition that she was aware of the disparity in pay by 1992).

11 *Ledbetter*, 550 U.S. at 621.

12 Stuart Taylor, *The Right Should Stop Demagoguing -- And Obama Should Stop Distorting Facts*, National Journal, May 28, 2009, *available at* http://ninthjustice.nationaljournal.com/2009/05/the-right-should.php.

13 *See, e.g.,* Jim Abrams, *Democrats in House Push Through 2 Pay-Equity Bills*, Associated Press, *supra* ("The Lilly Ledbetter Act would reverse a 2007 Supreme Court ruling that a worker must file claims of wage discrimination within 180 days of the first decision to pay that worker less, even if the person was unaware of the pay disparity"); *Shut loophole on inequality*, Editorial, Ventura County Star, Aug. 27, 2008 ("When Ms. Ledbetter retired from her job of 19 years, she got an anonymous note that her salary of $45,000 a year was $6,600 less than the lowest-paid male supervisor"; the courts ruled against her because "Ms. Ledbetter had not filed her discrimination lawsuit within the proscribed 180 days after the alleged discrimination occurred, which was several years earlier. The catch? Ms. Ledbetter did not know that, for years, she had been paid less than her male colleagues."), *available at* https://www.vcstar.com/news/2008/aug/27/shut-loophole-on-inequality/; Gail Collins, *McCain's Compassion Tour*, N.Y. Times, April 26, 2008, at A21 ("When she was near retirement, she got an anonymous letter listing the salaries of the men who held the same job," who were paid more; the Supreme Court "ruled 5-to-4 against Ledbetter, saying that she should have filed her suit within 180 days of receiving her first paycheck in which Goodyear discriminated against her. The fact that workers generally have no idea what other people are making when they start a job did not concern the court . . . In other words, pay discrimination is illegal unless it goes on for more than six months.").

14 House Speaker Nancy Pelosi, *Fair Pay* ("the Supreme Court said that Ledbetter had waited too long to sue for pay discrimination, despite the fact that she filed a charge with the U.S. Equal Employment Opportunity Commission as soon as she received an anonymous note alerting her to pay discrimination.") (www.democraticleader.gov/floor?id=0269).

15 *See, e.g.,* Kenneth R. Bazinet & Davis Saltonstall, *Michelle Charms at Bam's 1st Bill Signing. Lauds Granny Behind Equal-Pay Law*, N.Y. Daily News, Jan. 30, 2009, at 2 (Obama claimed Ledbetter worked for Goodyear "for nearly two decades before discovering that for years, she was paid less than her male colleagues.").

16 Pub. L. 111-2, 123 Stat. 5 (Jan. 29, 2009), 42 U.S.C. § 2000e-5(e)(3).

17 Macon Phillips, *Now Comes Lilly Ledbetter*, The White House Blog, January 25, 2009, 1:48 p.m. EDT, *available at* http://www.whitehouse.gov/now-comes-lilly-ledbetter/.

18 *Ledbetter*, 550 U.S. at 642 n.10.

19 *Id.* at 621. *See* 29 U.S.C. § 255(a) (deadline of 2 or 3 years under the Equal Pay Act depending on the type of claim); *Ledbetter*, 550 U.S. at 658 n.8 (Ginsburg, J., dissenting) (saying that "under the Equal Pay Act," Ledbetter "would not have encountered a time bar").

20 Paul Mirengoff, *Demonizing the "Roberts Court," Dishonestly, Part One*, Powerline Blog, July 5, 2010, http://www.powerlineblog.com/archives/2010/07/026687.php.

21 Zipes v. Trans World Airlines, 451 U.S. 385, 393 (1982).

22 For example, Ross Runkel wrote that "This is the correct decision, following the reasoning that I predicted back in November." Runkel, *Ledbetter Loses Pay Discrimination Case*, Law Memo, May 29, 2007, http://www.lawmemo.com/blog/2007/05/ledbetter_loses.html.

23 *Ledbetter*, 550 U.S. at 642 n.10.

24 *See Zipes*, 451 U.S. at 393; Cooper v. Bell, 628 F.2d 1208, 1214 (9th Cir.1980) (extending deadline due to deceptive statements); NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 382-83 (9th Cir. 1979) (deadline extended due to employer's fraudulent concealment of violation).

25 *Ledbetter*, 550 U.S. at 621.

26 *See id.* at 658 n.8 (Ginsburg, J., dissenting) (discussing limitations period of two or three years for Equal Pay Act claims, and saying that "under the Equal Pay Act," Ledbetter's claim "would not have encountered a time bar").

27 *Ledbetter*, 550 U.S. at 621.

28 29 U.S.C. § 255(a) (prescribing a three-year deadline for willful violations, and a two-year deadline for all other violations, such as unintentional violations, in minimum wage cases); 29 U.S.C. § 206(d)(3) (treating Equal Pay Act violations as if they were minimum wage violations, and thus subjecting them to the deadline in § 255(a)).

29 *Ledbetter*, 550 U.S. at 640 (responding to Ledbetter's observation that "lower courts routinely hear [EPA] claims challenging pay disparities that first arose outside the limitations period" by noting that "the EPA and Title VII are not the same"; "If Ledbetter had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts").

30 *Ledbetter*, 550 U.S. at 658 n.8 (Ginsburg, J., dissenting) ("Under the

EPA," "a claim charging denial of equal pay accrues anew with each paycheck," citing legal treatise).

31 42 U.S.C. § 2000e-2(k)(1) (employer policies that have an unintentional "disparate impact" on a race or gender are illegal unless they are shown to be "job related" and "consistent with business necessity").

32 130 S.Ct. 2191 (2010).

33 *Ledbetter,* 550 U.S. at 640 (citing 29 U.S.C. § 206(d)(1)).

34 42 U.S.C. § 2000e-5(e)(3).

35 It passed the House on July 31, 2008. *See* H.R. 1338 (110th): Paycheck Fairness Act, http://www.govtrack.us/congress/bills/110/hr1338; *see also* 154 Cong. Rec. H7681. It passed the House again on January 9, 2009. *See* 155 Cong. Rec. H127; *see also H.R. 12 (111th):* Paycheck Fairness Act, http://www.govtrack.us/congress/bills/111/hr12. It "was never passed by the Senate." *Id.*

36 House Speaker Nancy Pelosi, *Fair Pay*, www.democraticleader.gov/floor?id=0269.

37 *See, e.g.,* Abrams, *supra* note 8 ("The Lilly Ledbetter Act would reverse a 2007 Supreme Court ruling that a worker must file claims of wage discrimination within 180 days of the first decision to pay that worker less, even if the person was unaware of the pay disparity").

38 *Zipes*, 455 U.S. at 393 ("filing a timely charge of discrimination with the EEOC is . . . a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling").

39 *See* 29 U.S.C. § 206(d).

40 Pelosi, *supra* note 36.

41 Jones v. R.R. Donnelley & Sons, 541 U.S. 369 (2004) (four-year deadline).

42 Maitland v. Univ. of Minnesota, 155 F.3d 1013 (8th Cir. 1998).

43 *See* Davis v. Passman, 442 U.S. 228 (1979) (Constitution forbids employment discrimination based on sex).

44 *See* Torcaso v. Watkins, 367 U.S. 488 (1961).

45 *See, e.g.,* Egerdahl v. Hibbing Comm. College, 72 F.3d 615 (8th Cir. 1995).

46 *Ledbetter,* 550 U.S. at 640 (noting that the deadline might run anew with each paycheck under a statute that does "not require . . . proof of intentional discrimination").

47 *Lewis,* 130 S.Ct. at 2199 ("a Title VII plaintiff must show a "present violation" within the limitations period. . . What that requires depends on the claim asserted. For disparate-treatment claims—and others for which discriminatory intent is required—that means the plaintiff must demonstrate deliberate discrimination within the limitations period. See *Ledbetter, supra,* at 624–629 . . But for claims that do not require discriminatory intent, no such demonstration is needed. Cf. *Ledbetter, supra,* at 640. . . [*Ledbetter*'s] reasoning has no application when, as here, the charge is disparate impact, which does not require discriminatory intent.").

48 *Ledbetter*, 550 U.S. at 632 n.4.

49 Even if she was paid less, that was not illegal, unless her lower pay was based on her sex. If her job performance was worse, or her male co-workers were better at negotiating raises, those could be defenses to liability. *See De*y v. Colt Construction, 28 F.3d 1446, 1462 (7th Cir.1994).

50 Rep. Louise Slaughter, *Close Wage Gap That Hurts Women and Undercuts Principle of Equality*, Rochester Democrat & Chron., July 20, 2008, at A17 ("Paycheck Fairness Act" is "critical legislation will rectify the Supreme Court's decision in *Ledbetter v. Goodyear*," which supposedly prevented women from suing because "pay practices typically take place in secret," making it "almost impossible for a woman to discover discrimination within 180 days."); Anne Ladky, executive director, Women Employed, *Pay Discrimination*, Chicago Tribune, June 15, 2012, at 35 (PFA needed because "women often have no way of knowing that they are being paid less," and PFA "would make it illegal to retaliate against an individual for talking about pay with other employees").

51 Pelosi, *supra* note 36.

52 42 U.S.C. § 1981a(a)(1)&(b)(3).

53 42 U.S.C. § 2000e–5 (g).

54 42 U.S.C. § 2000e–5 (k); *see* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

55 *See* Russell v. City of Overland, 838 F.Supp. 1350, 1354 (E.D. Mo.1993).

56 *See* 42 U.S.C. § 1981a(a)(1).

57 Paycheck Fairness Act, S. 182, § 3(c)(1) (amending 29 U.S.C. § 216(b)).

58 *Id.*

59 *See* 42 U.S.C. § 1981a(b)(3).

60 Nancy Pelosi, *supra* note 36; *see* Paycheck Fairness Act S. 182, § 3(a)(3) (adding 29 U.S.C. § 206(d)(1)(B) ("The bona fide factor defense . . . shall apply only if the employer demonstrates that such factor . . .(ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice."), http://www.opencongress.org/bill/111-s182/text.

61 The Society for Human Resource Management contends that "the PFA would effectively prohibit employers from using many legitimate factors to compensate their employees, including professional experience, education, training, employer need, local labor market rates, hazard pay, shift differentials and the profitability of the organization." *See* Tim Gould, *HR Morning,* May 25, 2012, www.hrmorning.com/hr-pros-rally-against-paycheck-fairness-act-passage/ (quoting the SHRM).

62 Steve Tobak, *The Gender Gap Is A Complete Myth*, *CBS News*, March 8, 2011, http://www.cbsnews.com/8301-505125_162-28246928/the-gender-pay-gap-is-a-complete-myth/.

63 Bureau of Labor Statistics, Fatal Work Injuries and Hours Worked, By Gender of Worker 10 (2010), *available at* http://www.bls.gov/iif/oshwc/cfoi/cfch0009.pdf.

64 Tobak, *supra* note 62.

Sleeping Giant?: Section Two of the Thirteenth Amendment, Hate Crimes Legislation, and Academia's Favorite New Vehicle for the Expansion of Federal Power

By Gail Heriot & Alison Schmauch Somin***

Note from the Editor:

This article examines the original meaning, purpose, and history of the Thirteenth Amendment and recent hate crimes legislation enacted by Congress using its Thirteenth Amendment power. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to foster further discussion and debate about the constitutional and policy issues involved with hate crimes and the Thirteenth Amendment. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. Penn. J. Con. L. 1337 (2009): http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1039&context=law_facpubs.
- The Matthew Shepard Hate Crimes Precention Act of 2009: Before the S. Comm. on the Judiciary, 111th Cong. 1 (2009) (statement of Eric W. Holder, Jr. Att'y Gen. of the United States): http://www.judiciary.senate.gov/pdf/06-25-09HolderTestimony.pdf
- The Matthew Shepard and James Byrd, Jr. Hate Crimes Precention Act of 2009: http://dpc.senate.gov/dpcdoc.cfm?doc_name=lb-111-1-97
- Prof. Dawinder S. Sidhu, *The Meaning and Viability of the Thirteenth Amendment*, The Hill's Congress Blog, Jan. 7, 2013: http://thehill.com/blogs/congress-blog/civil-rights/275887-the-meaning-and-viability-of-the-thirteenth-amendment

A brief look at the Thirteenth Amendment might suggest that it has rather limited application in today's world. The full text provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.[1]

Indeed, when one of the authors of this essay told a friend that she was going to an all-day academic conference on contemporary applications of the Thirteenth Amendment, he expressed shock that there could be any need to discuss this subject and inquired if he had missed a campaign proposal by Newt Gingrich to revive chattel slavery.

He was joking—obviously. Hardly anyone is foolish enough to believe that chattel slavery is in danger of making an imminent or not-so-imminent comeback in America. Mr. Gingrich was being unfairly (though playfully) maligned. Nevertheless, there has been a growing movement in both academia and the halls of Congress to use the Thirteenth Amendment's Section 2 to address a variety of social ills thought to be in some way traceable back to slavery. This movement has had its greatest recent success with the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA). In passing that law, Congress relied solely on its Section 2 constitutional authority for its ban on crimes motivated by race and color.[2] (Congress relied on its Commerce Clause power for its ban on crimes motivated by gender, sexual orientation, gender identity and disability and therefore the statute requires proof of some interstate commerce nexus for a conviction on those bases. For crimes motivated by religion and national origin, Congress relied on both powers.)

In this essay, we discuss some issues presented by a broad conception of Section 2. We also survey the literature calling for legislation based on a broad conception of Section 2 and briefly note that conception's potential to be a double-edged sword.

I. Legislative History and Case Law Interpreting the Thirteenth Amendment

Section 1's straightforward text mostly speaks for itself. Modern scholars have sometimes quoted lofty rhetoric about its purpose and likely consequences,[3] but in the end its legal significance is unusually clear for a constitutional amendment: It bans slavery and involuntary servitude.[4] In the Supreme Court's words, it is "undoubtedly self-executing."[5] That self-executing character limits the extent to which it can or should be broadly or metaphorically construed.[6]

As for Section 2, there was relatively little discussion regarding its proper interpretation in the congressional

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debates about the Thirteenth Amendment. Amendment co-author Senator Lyman Trumbull and supporter Representative Chilton White both said that Congress's enforcement powers resembled those that it had under the Necessary and Proper Clause.[7] Following *McCulloch v. Maryland*, Trumbull and White's comments suggest that they agreed with Chief Justice Marshall's well-known explication of that clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[8] Put differently, Trumbull and White's comments suggest that courts should review deferentially the means that Congress chooses to achieve a particular end, but that courts should not show such deference regarding the legitimacy of the ends of such legislation.[9] Under that view, Section 2 legislation may be somewhat prophylactic in nature, but it must have as its end the effectuation of Section 1 and not some other goal.[10]

The first Supreme Court cases interpreting Section 2 declined to read the section expansively. *United States v. Harris*, the first such case, concerned the Ku Klux Klan Act of 1871, which stated in part: "If two or more person in any state or territory conspire or go in disguise upon the highway . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws … each of said persons shall be punished by a fine . . . or by imprisonment . . . ." The Court held that this was not a permissible exercise of Congress's Section 2 power because it covered conspiracies by white persons against a white person or by black persons against a black person who had never been enslaved.[11]

Ten months later, in the *Civil Rights Cases*, the Court again held a federal statute to be an improper exercise of Congress's Section 2 power—this time the Civil Rights Act of 1875, which had guaranteed "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement." The *Civil Rights Cases* first established that unlike the Fourteenth Amendment, which governs only state action, the Thirteenth Amendment governs private conduct and thus permits Congress to regulate such conduct directly.[12] The Court nevertheless held that Section 2 did not permit Congress to prohibit race discrimination in public accommodations. While Congress had the power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery," being refused service at a hotel or restaurant on account of one's race was not such a badge or incident.[13]

The phrase "badges and incidents" of slavery has endured in Thirteenth Amendment case law into modern times and thus demands our attention. It was in widespread use before the Civil War. The "incidents" half of the phrase had a more determinate legal meaning. The 1857 edition of Bouvier's Law Dictionary defined an "incident" as a "thing depending upon, appertaining to, or following another, called the principal."[14] According to Professor Jennifer Mason McAward, a leading scholar of the Thirteenth Amendment, an "incident" of slavery was "an aspect of the law that was inherently tied to or that flowed directly from the institution of slavery—a legal restriction that applied to slaves qua slaves or a legal right that inhered in slave owners qua slave owners."[15] The clearest incident of slavery is, of course, compulsory service—since it is both necessary and arguably sufficient to create the slave-owner relationship. But the inability to marry, the inability to acquire property, and the deprivation of any status in a court of law, either as a litigant or a witness, could also be described as incidents of slavery as it was practiced in the American South. The term was indeed used in the congressional debates regarding the Thirteenth Amendment and the Civil Rights Act of 1866 in precisely this sense.[16]

"Badges," by contrast, was a more open-ended term that did not have a precise legal meaning but that was nonetheless used widely in antebellum abolitionist popular writing. Mid-nineteenth-century dictionary definitions are not terribly different from modern ones: one dictionary defines "badge" as "a mark or sign worn by some persons, or placed upon certain things for the purpose of designation."[17] Some "badges of slavery" were quite literal. In 18th and 19th-century Charleston, South Carolina, the city issued copper slave badges to all slaves-for-hire identifying the particular slave's trade (e.g. porter, mechanic, or fisher) and official number.[18] In addition, across the South, slaves were forbidden by law to travel without the permission of their owners. Consequently, travel passes had to be issued to those who had permission.[19] Sometimes these took the form of a letter from the owner, and sometimes they were tickets issued in the name of the particular plantation from which the slave came. A slave found to be travelling without such a pass by a slave patrol could be punished. The requirement that slaves have permission to travel was certainly an "incident of slavery"; the copper badges issued by Charleston were the clearest case of a "badge of slavery." But travel passes may also be one of the stronger cases of a "badge of slavery."

But the terms "badge" and "badge of slavery" were also being used metaphorically at the time.[20] "Badge of slavery" was commonly used to refer to dark skin, but it also had other meanings. Some abolitionists referred, for example, to physically grueling labor as a "badge of slavery."[21] It is fair to say, however, that "badge" was ordinarily used to describe a characteristic that was distinctively associated with slave status and not one that could be commonly associated with both slave and non-slave status.

After the Civil War, however, the distinction between incidents and badges appears to have been lost. The phrase "badge of slavery" was used only twice during the debates over the Civil Rights Act of 1866. There, Senator Lyman Trumbull appears to use it essentially as a synonym for "incidents," as did the Supreme Court in the *Civil Rights Cases*.[22]

Congress's Section 2 power fell out of use following the *Civil Rights Cases*. It is not clear whether this was because the Court's decision limited that power or (more likely, in our opinion) because Congress felt that it had already erected the statutory framework needed to fulfill Section 1's promise. For about a century, most of the Thirteenth Amendment action involved the enforcement of the Peonage Abolition Act of 1867, which had outlawed peonage:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited . . . and all acts, laws, resolutions, orders, regulations or usages . . . of any territory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any person . . . in liquidation of any debt . . . are declared null and void.

Between the turn of the twentieth century and about 1945, the federal government prosecuted more than 100 peonage cases. In the years since emancipation, sharecroppers and agricultural laborers had come to be ensnared in a cycle of debt that sometimes obliged them to remain on the plantations. A complex web of laws—criminal laws for breach of contract and for vagrancy, etc.—supported a system that roughly approximated many of the attributes of antebellum slavery.[23] In order to abolish peonage, these laws had to be dismantled one by one—a task that involved multiple trips to the Supreme Court by both the United States and private litigants.[24] It is fair to call such laws "incidents of peonage."

The most notable thing about the struggle to abolish peonage is that it is near the core of what one would expect the Thirteenth Amendment to cover. These cases were not about an extension of Section 1's prohibition to some direct or indirect consequence of a system of slavery that had been abolished a century before. As far as Congress was concerned in 1867 and most Americans today, peonage *was* a form of slavery.

Things became a lot more creative in the 1960s. It was then that the Supreme Court issued an extraordinarily expansive "badges and incidents" decision—*Jones v. Alfred H. Mayer & Co*. *Jones* concerned a suburban St. Louis real-estate developer's policy of not selling homes to African-Americans.[25] Joseph Lee Jones and his wife Barbara Jo, an interracial couple, brought suit. Their problem, however, was that the Fair Housing Act was not passed until the week *after* their case had been argued in the U.S. Supreme Court. Instead, they had brought suit under a then-obscure section of the Civil Rights Act of 1866. It read: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase lease, sell, hold, and convey real and personal property." Much of *Jones*'s analysis deals with a question of statutory interpretation—whether these words amounted to a ban on race discrimination by private sellers in real estate transactions. The Court held that they did. This was a decision that we believe was not just a mistake, but an egregious misreading of history—for reasons discussed by Professor Gerhard Casper in his classic article, Jones v. Mayer*: Clio, Bemused and Confused Muse*.[26] Briefly stated, prior to emancipation, slaves did not have the legal capacity to own, purchase, or sell property. No transaction they might enter into could be enforced in court either by them or against them (and therefore few would be willing to transact with them). The legal capacity to purchase property is not, however, the same thing as the right to insist that others agree to sell. To view the question otherwise would be akin to saying that a "right to marriage" encompasses the right to marry someone who doesn't wish to marry you.

The *Jones* decision went on to address whether Congress was authorized by Section 2 of the Thirteenth Amendment to pass such a law in 1866. In analyzing this question, the Court once again used the "badges and incidents" terminology to describe the appropriate objects of Congress's power under Section 2.[27] But the Court was more explicitly deferential to Congress than it had been before by holding that Congress's determination that particular conduct is a "badge" or "incident" of slavery is subject only to rational-basis review.[28] The willingness of sellers to discriminate on the basis of race was held to be a badge or incident of slavery.

Note the Court's peculiar reasoning. First, the Court misinterpreted the statute by finding that the statute prohibits race discrimination by private parties engaged in the sale or lease of property—when it is overwhelmingly likely that Congress intended no such thing. Then it deferred to Congress's judgment on the question of whether Section 2 accords Congress the authority to prohibit such race discrimination—when Congress made no such judgment.

Jones was clearly inconsistent with the *Civil Rights Cases*. If Congress did not have the authority under Section 2 to prohibit race discrimination in public accommodations in the *Civil Rights Cases*, it is difficult to see how it could have the authority under Section 2 to prohibit race discrimination in the purchase and sale of real estate. It seems unlikely that race discrimination in the sale or lease of homes is either a badge or incident of slavery or a way of getting at a badge or incident of slavery but that race discrimination in public accommodations is not.[29]

Jones was decided in the midst of a tumultuous few months in American history. Among other things, the Rev. Martin Luther King, Jr. was assassinated just two days after oral argument wrapped up.[30] The Court had reason at the time for desiring to construe both the law and the Constitution broadly. But the constitutional issue in the *Jones* decision itself can be construed narrowly. Note that the Court was construing a statute that was passed in 1866, a time when the nation was still in the process of dismantling the actual institution of slavery, not in sorting out its long-term effects on the course of history. Under the circumstances, giving Congress considerable discretion in identifying the badges and incidents of slavery is best viewed as deferring to Congress on the means of ridding the nation of slavery, not as deferring to Congress on what constitutes slavery or involuntary servitude. A 21st-century statute outlawing private discrimination in housing (or the HCPA) would not be due the same deference, since dismantling slavery itself is no longer the problem. What is left is simply deciding what to do with its historical vestiges.

The only problem with this narrow interpretation of *Jones* is that the opinion itself contains casual language that suggests the Court was thinking more broadly. In a footnote, the Court suggests that Congress could take aim not just at slavery, but at the last "vestiges of slavery."[31] In another part of the opinion, it appears to suggest that wiping out "the relic[s] of slavery" is authorized.[32] Equating the "badges and incidents of slavery"

with the "relic[s]" and "vestiges of slavery" is dictum, of course, since it was unnecessary to the opinion. But dictum extending the power of the federal government has a funny way of being taken seriously.[33]

In future Thirteenth Amendment cases, however, it seems quite likely that the Supreme Court will reject the "vestiges" and "relics" language or perhaps even explicitly overrule *Jones*' Thirteenth Amendment holding.[34] *Jones* was part of a trio of cases from that period that have been interpreted to require considerable deference to Congress when it exercises its powers under the Reconstruction Amendments.[35] Later decisions have reasserted *McCulloch v. Maryland*'s notion that deference is to the means by which Congress carries out the goals of the Fourteenth Amendment, not the goals themselves. In *City of Boerne v. Flores*, the Court held that it is the job of the Court to determine what constitutes a substantive violation of the Fourteenth Amendment. While Congress has the power under the Fourteenth Amendment's Section 5 to promulgate prophylactic rules aimed at dealing with those substantive violations, there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[36]

Subsequent cases have added that the reviewing court must confirm that a subject is an appropriate target for prophylactic legislation by "identifying the constitutional right that Congress sought to enforce" and ensuring, through legislative history and findings, an identified "history and pattern of constitutional violations by the states" with respect to that right. If there is such a legislative record, the Court must then "determine whether the challenged legislation is an appropriate response to the history and pattern by asking whether the rights and remedies created by the statute are congruent and proportional to the constitutional right being enforced."[37] In other words, Fourteenth Amendment legislation receives much more detailed scrutiny than the bare-bones rational-basis review required by *Jones*.

Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment are textually nearly identical, containing all the same words but with the key clauses arranged in a slightly different order. Section 2 reads, "Congress shall have power to enforce this article by appropriate legislation," and Section 5 of the Fourteenth Amendment reads "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[38] Given these similarities, there is no apparent reason why "appropriate" should have a different meaning in each section. Instead, it seems overwhelmingly likely that the Court would apply *City of Boerne* and its progeny to the Thirteenth Amendment's Section 2.

If *City of Boerne* applies to Section 2 cases, it underlines that Section 1 prohibits actual slavery and involuntary servitude—as those terms are defined by the Court. It does not prohibit things that bear some causal relationship with slavery. While Congress may enact prophylactic rules to effectuate that end (and hence may ban certain "incidents" and "badges" of slavery), those rules must be congruent and proportional to the problem. Since almost no one is expecting slavery to be making a comeback, that limitation on Congress's Section 2 power is a very serious one.

The alternative is to take *Jones*' reference to "relic[s]" and "vestiges" as authority for Congress to obliterate anything with any kind of connection to slavery. But that construction would provide Congress with something very close to a general police power—something that was not intended by the Thirteenth Amendment's ratifiers and is certainly not to be wished for by anyone who values limited government.[39] The problem with equating the "badges and incidents" of slavery with the "relic[s]" and "vestiges" of slavery is that nearly everything has some historic connection with slavery. For example, if not for slavery, few African-Americans would have come to this country in the 17th, 18th and 19th centuries. It is likely that few would live here now. And African-Americans are not the only ones who would not be here. Nobody living today would be here, since it is unlikely that anyone's ancestors would have immigrated and/or paired off quite the way they did and produced quite the same descendants if slavery, the abolition movement, the Civil War, the Reconstruction Era, the period of Jim Crow, and the Civil Rights Movement had not happened. Everything, large and small, good and bad, would be different in ways we can barely imagine. There are relics and vestiges of slavery everywhere, just as there are relics and vestiges of the struggle to end it and of every other significant chapter in history.

II. The Thirteenth Amendment and Hate Crimes

Thirteenth Amendment bulls have already had one major legislative victory with the passage of the Mathew Shepard Hate Crimes Prevention Act (HCPA) of 2009. It provides in relevant part:

> (1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—
>
> (A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
> (B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—
> (i) death results from the offense; or
> (ii) the offense includes kidnapping . . . aggravated sexual abuse . . . or an attempt to kill.[40]

Congress asserted that the Thirteenth Amendment gave it power to pass this legislation with the following finding:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because

> of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.[41]

A very similar provision follows setting forth prohibitions on hate crimes on the basis of actual or perceived religion, national origin, gender, sexual orientation, gender identity, and disability. But the government may only prosecute such crimes if an adequate link between the circumstances of the criminal conduct and interstate commerce exists.[42] Potentially, the Thirteenth Amendment would thus permit Congress to prohibit some hate crimes that the Commerce Clause does not, although commentators have alleged that nearly all hate crimes can be shown to have some connection to interstate commerce.

Such a use of the Thirteenth Amendment seems to us to be more than a stretch. Congress may surely ban slavery and involuntary servitude. But it does not need to, since Section 1's ban is self-executing. Under Section 2, Congress may also punish those who engage in slavery and involuntary servitude. Less obviously, but grounded in the legislative history and established in the case law, it may ban the badges and incidents of slavery as a means of banning slavery itself. Indeed, it may do so even when this will cause it to "overshoot" its target of banning slavery and involuntary servitude, since doing so is often an appropriate way to ensure that slavery and involuntary servitude are indeed banned. In some sense, of course, slavery is simply the sum of its legal incidents; the only way to abolish it is to abolish the legal incidents that make it possible. Section 2 is flexible in allowing Congress the means by which to abolish and forever ban slavery and involuntary servitude.

But hardly anyone would claim that Congress's goal in passing the HCPA was to prohibit slavery or to prevent its return. Section 7(a)(1) is a ban on violent crime that occurs "because of" somebody's race, color, religion, or national origin. It appears to be intended to, well, ban violent crime that occurs "because of" somebody's race, color, religion, or national origin—although less charitable interpretations of congressional motivations are surely possible, too.[43]

The HCPA does not target an incident of slavery. It does not remove a legal disability imposed on slaves or a legal right accorded to slave owners. Indeed, it is not even one step removed from an incident of slavery in the sense that it does not attempt to remove a legal disability imposed on former slaves or slave descendants or a legal right accorded to the descendant of former slave owners or their descendants. It does not alter anyone's legal status. It simply adds federal penalties for conduct that was already illegal.

Nor does it target a badge of slavery. As Professor George Rutherglen has explained, the term "badge" is meant to refer to a "characteristic indicative of slave status." That is, a badge of slavery should be something that is distinctively associated with slavery. It should not refer to characteristics that can be commonly associated either with being a slave or not being a slave. It is not just that being the victim of bias crime is not such a badge.[44] It is not even a badge of former enslavement or of having been descended from slaves. No one is immune from bias crimes. Just like the statute held unconstitutional in *United States v. Harris*, the HCPA applies to everyone, regardless of race.[45] One need only read the newspapers to know members of all races are the victims of crimes motivated by race. [46] While one could argue that crimes against whites may have reflected anger or resentment influenced by slavery's history, other bias crimes, like those aimed at Asian-Americans, cannot be connected to slavery so easily.

If bias crimes had anything other than the mildest association with the nation's history of slavery, one might expect to see evidence in the HCPA's congressional record that there were more such crimes in the former slave states of the Deep South than in New England. Yet the statistics cited in the record show just the opposite.[47] Moreover, these statistics further show—and the HCPA reflects—that bias crimes are often based on things that are completely unrelated to race—like religion, sex, sexual orientation, disability, etc. Domestically, slightly less than half of the bias crimes reported to the FBI in 2010 (the most recent year for which data was available as of this writing) were based on racial bias and instead were based on other biases.[48] Moreover, in countries that have never had legal institutions resembling American antebellum slavery, such as France and Germany, bias crimes have been reported in the media to be a problem.[49] American antebellum slavery may have exacerbated or prolonged certain forms of racial bias, but the general problem of bias and crimes based on it is unfortunately hardly a distinctive characteristic of slave societies.

Under the circumstances, it seems unlikely that Congress's assertion of jurisdiction over hate crimes will be seen as congruent and proportional to the problem of slavery and involuntary servitude.

III. Potential Future Directions in Section Two Legislation

The HCPA is not the only effort to make use of Section 2 in light of the breadth of the *Jones* decision. Scholarly articles argue that Section 2 authorizes hate-speech regulation;[50] bans on housing discrimination based on sexual orientation;[51] federal civil remedies for victims of domestic violence;[52] federal child labor bans;[53] bans on racial profiling;[54] minimum-wage laws like the Fair Labor Standards Act;[55] federal regulation of the mail-order bride industry;[56] bans on race-based jury peremptory challenges;[57] regulation of racial disparities in capital punishment;[58] regulation of environmental problems in African-American communities;[59] state laws like Colorado's Amendment 2 that prohibit states and localities from passing bans on sexual orientation discrimination;[60] regulation of the use of the Confederate battle flag;[61] laws that aim to protect employees' privacy and autonomy;[62] federally funded job-training programs for the urban underclass;[63] federal guarantees of public education;[64] a federal ban on rape;[65] anti-sexual harassment laws;[66] legislation protecting "reproductive freedom"; [67] bans on payday lending;[68] and even changes to our nation's "malapportioned, undemocratic presidential election system" because of its adoption on the alleged basis of

"appeasement to southern slaveholding interests."[69]

Predicating these proposals on the Thirteenth Amendment may seem fanciful now. But, for good or ill, today's fanciful academic ideas sometimes become tomorrow's legislation. Few would have predicted a generation before it happened the growth of the Commerce Clause power that occurred in the 20th century.[70] Who, for example, would have predicted *Wickard v. Filburn*?[71] The HPCA proves that academic proposals to employ Section 2 have not been wholly ignored.

Most of the academic calls for expansive readings of Section 2 have come in support of policy proposals that are typically more popular with the political left than the right. Three Supreme Court Commerce Clause decisions of the last twenty years—*United States v. Lopez*,[72] *United States v. Morrison*,[73] and *National Federation of Independent Business v. Sebelius*[74]—have clarified the scope of the Commerce Clause power. They have suggested that this power is more limited than many lawyers and academics previously understood it to be (although vastly more expansive than the framers may have expected it to be). The holding of *City of Boerne v. Flores* similarly suggested that this grant of power under Section 5 of the Fourteenth Amendment was also more limited than some had previously thought. Political liberals and progressives have since been searching for alternative constitutional groundings for general economic or civil rights legislation that they favor, and the breadth of *Jones* has made Section 2 seem like one such attractive constitutional foundation for such legislation. Some liberal and progressive academics more or less explicitly acknowledge that they find broad readings of Section 2 attractive for this reason.[75] Despite the low likelihood that the arguments of these Thirteenth Amendment optimists will prove successful in court, one legal scholar notes that the broader movement may still have value in mobilizing political progressives to work on behalf of favored causes: "The most productive use of Thirteenth Amendment optimism lies not in encouraging appellate lawyers and judges to incorporate Thirteenth Amendment arguments into briefing and judicial decisions but rather in stimulating a political movement to broaden its imagination and understand its ends in Thirteenth Amendment terms."[76]

Perhaps, but at this point we note only that the lone bill proposed during this session of the 112th Congress that explicitly cites Section 2 as Congress's constitutional authority for passing it—the Pregnancy Nondiscrimination Act (PRENDA)—was proposed by Republicans, on behalf of a cause ordinarily classified as politically conservative. PRENDA would ban the performance of a sex-selection or race-selection abortion, coercion to undergo either, the acceptance or solicitation of funds for either, and the transportation of a woman into the United States or across state lines to obtain either.[77] The Committee Report cites the *Jones* decision for the proposition that "the Thirteenth Amendment prohibits slavery, and the opposite of slavery is liberty. Therefore any unwarranted restrictions on liberty that are race based, may be considered 'incidents' of slavery, and section 2 of the Thirteenth Amendment empowers Congress to protect citizens from unjust restrictions on liberty."[78]

As far as we are aware, there is no historical evidence showing that race-selective abortion was a distinctive feature or badge of chattel slavery. (Indeed, there is some evidence that female slaves were often coerced into bearing more children than they might have wished because of the economic benefits that additional slave children provided to their masters.[79]) Therefore, we are inclined to conclude that the Thirteenth Amendment does not give Congress the power to enact PRENDA, although other constitutional provisions might.[80]

It is unclear to us whether PRENDA is a sign that the academic commentators are wrong about the likely political valence of broad readings of Section 2.[81] What is clearer to us is that politicians of all stripes like broad grants of power, and that they are therefore likely to use broadly granted powers in ways that those advocating for the grant of power often could not have at first readily imagined. That is why broad grants of power to politicians are undesirable. Perhaps the best way to prevent legislators from so going beyond the limits of their constitutionally granted powers is for courts to pay close attention to the text and original meaning of the relevant constitutional provisions and vigorously enforce appropriate limits on such powers.

Endnotes

1 U.S. Const. amend. XIII.

2 18 U.S.C. § 249 (2011).

3 Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 Md. L. Rev. 60, 64–65 (2011) (responding to Alexander Tsesis's citations to the Congressional Globe in the service of supporting broad readings of Section 2); Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 Md. L. Rev. 40 (2011). For a more complete exposition of the congressional debates and subsequent case law relating to the Thirteenth Amendment than we can provide in this short essay, see Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment After* City of Boerne v. Flores, 88 Wash. U. L. Rev. 77 (2010) [hereinafter McAward, *Scope*]; Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561 (2012) [hereinafter McAward, *Defining the Badges*].

4 Just about everyone agrees that the primary evil at which Section 1 was targeted was chattel slavery of African-Americans as it existed before the Civil War in the American South. There is less agreement over whether Section 1's ban on slavery and involuntary servitude extends to modern and historic forms of forced labor that in some ways resemble antebellum slavery but in other ways are quite different—*e.g.*, traditional apprenticeship; indentured servitudes of short duration; the military draft; mandatory community service requirements for high-school students; proposals for six months or a year of mandatory national service for teenagers that are sometimes likened to a universal civilian draft; and even the confinement of zoo or circus animals that perform for crowds without compensation. In this article, we need not take a position on whether any of these practices, all of which in some sense involve "involuntary servitude," fall within the scope of the Section 2 (other than the last one, which we are happy to label as just plain silly). Instead, our primary concern is that the courts and many in Congress have embraced too broad a conception of Congress's enforcement power to ban activities that are not in any sense "slavery" or "involuntary servitude" under Section 2. Likewise, our occasional comments about Thirteenth Amendment bulls, bears, optimists, pessimists, etc. refer to different views on Section 2 and should not be taken as a commentary on how broadly the self-executing Section 1 ought to be read.

5 *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883). Section 1's text was modeled after the Northwest Ordinance, and there was already a history of case law interpreting that language at the time of its adoption. *See* Butler v. Perry, 240 U.S. 328 (1916).

6 Self-executing constitutional prohibitions are poor candidates for broad interpretation, since such an interpretation would create the potential for overreach by the judiciary. For example, as noted in *supra* note 4, some advocates have argued in federal court that Section 1 prohibits the confinement of zoo or circus animals that perform for crowds. *See* Michael Winter, *Judge Dismisses PETA "Slavery" Suit Over SeaWorld Orcas*, USA Today, Feb. 8, 2012; *supra* note 4. If the federal courts were to adopt this or any other extremely aggressive view, Congress would have no power to reject that result. Only a constitutional amendment could do that. The comments of one of the Thirteenth Amendment's co-authors, Senator Lyman Trumbull, that the effect of the Amendment was only to "rid the country of slavery" suggested that his conception of the Amendment's reach was quite narrow. Cong. Globe, 38th Cong., 1st Sess. 1314 (1864). Indeed, in this respect his reading was arguably narrower than the text, which banned both slavery and involuntary servitude. His comment suggests that "involuntary servitude" was included simply to reduce the chance that "slavery" would be given an unduly narrow construction and not to augment the prohibition.

An interesting debate developed almost immediately about the Thirteenth Amendment's reach. Senator John Brooks Henderson, one of the Amendment's co-authors, argued that it conferred or could confer only freedom upon the freed slave. *See* Cong. Globe, 38th Cong., 1st Sess. 1465 (1864). According the Senator James Harlan, it conferred rights such as "the right to acquir[e] and hol[d] property," the deprivation of which was a "necessary incident" to slavery. Cong. Globe, 38th Cong., 1st Sess. 1439–40 (1864). This issue became highly significant in the debates over the Civil Rights Act of 1866, which purported to confer those rights on all citizens regardless of race. *See* McAward, *Scope*, *supra* note 3, at 109–114.

President Andrew Johnson vetoed that legislation in part on the ground that the Thirteenth Amendment did not authorize Congress to require states to confer upon freedmen the legal capacity to buy, sell, or own property and that this was therefore a matter for the States. Congress overrode his veto. Just to be sure of its authority, however, Congress re-enacted these provisions as the Civil Rights Act of 1870 after the ratification of the Fourteenth Amendment, which among other things requires states to accord all persons the equal protection of the laws.

This shows where the battle lines were then drawn in the debate over the Thirteenth Amendment's interpretation. There is no doubt that the legal incapacity to purchase, own, and convey property was a hugely important incident of a slave's status and that slavery was still in the process of being dismantled at the time. Yet it was controversial whether Congress had the power under Section 2 to confer that legal capacity. Note that the re-enactment in 1870 has significant bearing on the later controversy over *Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409 (1968). *See infra* notes 26–35 and accompanying text. If, as the *Jones* decision concluded, a statute conferring the right to own, purchase, and convey property should be interpreted as a prohibition on race discrimination in the purchase and sale of property by private parties, then re-enactment under the Fourteenth Amendment, which clearly applies only to state action, did not address President Johnson's constitutional objections. The overwhelmingly likely explanation is that *Jones* misinterpreted the Act and it was never intended to cover anything but the legal capacity to own, purchase, and convey.

7 Cong. Globe, 38th Cong., 1st Sess. 553 (1864) (statement of Sen. Trumbull); *id.* at 1313; Cong. Globe, 38th Cong., 2d Sess. 214 (1865) (statement of Rep. White).

8 McCulloch v. Maryland, 17 U.S. 216 (1819).

9 *See* McAward, *Scope*, *supra* note 3.

10 More expansive views of the potential of Section 2 could be found in speeches made by the Amendment's opponents in both Congress and in the state-level ratification debates. But the speakers on those occasions were not arguing that an expansive view was desirable. They were arguing that the Amendment should be rejected. *See, e.g.*, *id.* at 106–08 (summarizing comments made during ratification debates); *see also* George Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, *in* Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 163 (Alexander Tsesis ed., 2010).

11 United States v. Harris, 106 U.S. 629 (1883).

12 The Civil Rights Cases, 109 U.S. 3, 11 (1883).

13 *Id.* at 20.

14 McAward, *Defining the Badges*, *supra* note 3, at 570 (citing Bouvier's Law Dictionary 617 (7th ed. 1857)).

15 McAward, *Defining the Badges*, *supra* note 3, at 572. McAward's article also gives additional examples of the ways in which antebellum courts used "incident" in precisely this legal sense. *See also* Rutherglen, *supra* note 10.

16 McAward, *Scope*, *supra* note 3, at 126.

17 McAward, *Defining the Badges*, *supra* note 3, at 575 (citing Bouvier's Law Dictionary 151 (7th ed. 1857)); Webster's Encyclopedic Dictionary of the English Language 93 (Fallows ed., 1900) (reprinting definitions from 1864 ed.) (defining "badge" as "[a] mark, sign, token, or thing, by which a person is distinguished, in a particular place or employment, and designating his relation to a person or to a particular occupation; as, the badge of authority")).

18 *See* Harlan Greene, Harry S. Hutchins, Jr. & Brian E. Hutchins, Slave Badges and The Slave-Hire System in Charleston, South Carolina 1783–1865 (2008). These slave badges are considered collectible today. Several are available on Ebay and apparently sell for well over a thousand dollars each.

19 Charles Joyner, Down By The Riverside: A South Carolina Slave Community 132 (1985); Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South (Vintage Books ed. 1989).

20 For example, the phrase "badge of fraud" occasionally appears in antebellum cases to refer to sham transactions made to shield a debtors' assets from creditors. Rutherglen, *supra* note 10, at 166.

21 McAward, *Defining The Badges*, *supra* note 3, at 576–78.

22 109 U.S. 3 (1883).

23 Benno Schmidt, Jr., *Peonage*, *in* The Oxford Companion to The Supreme Court of The United States 729 (Kermit Hall, James W. Ely & Joel B. Grossman eds., 2005).

24 Pollock v. Williams, 322 U.S. 4 (1944); United States v. Gaskins, 320 U.S. 527 (1944); Taylor v. Georgia, 315 U.S. 25 (1942); United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905).

25 392 U.S. 409 (1968).

26 *See* Gerhard Casper, Jones v. Mayer*: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89 (1968) (explaining the error of *Jones*' interpretation of the Civil Rights Act of 1866); *see also* George Rutherglen, *The Improbable Story of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303 (2003) (a retrospective look at *Jones* and its progeny); Louis Henkin, *Foreword: On Drawing Lines*, *in The Supreme Court 1967 Term*, 82 Harv. L. Rev. 63, 82–87 (1968) (placing the error of *Jones* in the context of the Court's 1968 Term). A similar issue was addressed a generation earlier in connection with the capacity of married women to own property. The New York Married Women's Property Act ensured that married women would have the same right to own and control property as single women. 1848 N.Y. Laws 307, ch. 200. No one has interpreted this law to prohibit a seller from choosing not to do business with a woman because she is married.

Interestingly, the statute in the *Jones* decision applies to both the purchase and sale of property. Presumably, then, not only can Mr. and Mrs. Jones bring a lawsuit for the refusal of Alfred H. Mayer & Co. to sell them a house on account of Mr. Jones' race, but Alfred H. Mayer & Co. could have sued the Joneses for refusing to buy from a seller whose race did not suit them. It also applies to inheritance: A minority member who could convince a court that the deceased would have left him all her estate if only the deceased had not been inclined toward racism would presumably be entitled to damages.

27 *Jones*, 392 U.S. at 439. It did not define those terms, nor did the Court indicate why it had so chosen to include them. Unlike "badge" and "incident," these terms were not in widespread use in the Reconstruction era. See McAward, *Defining the Badges*, *supra* note 3, at 196, for historical analysis on this point.

28 *Jones*, 392 U.S. at 440.

29 If anything, the case for congressional power over public accommodations should be stronger, given the common-law tradition of treating common carriers and innkeepers as quasi-public institutions. Joseph Henry Beale, Jr., The Law of Innkeepers And Hotels 42–50 (1906). The statute at issue in the *Civil Rights Cases* was enacted in 1875. The Civil Rights Act of 1835, 18 Stat. 335 (1875). It seems strange that Congress would pass a statute with the far-more modest goal of ensuring non-discrimination in public accommodations if the Civil Rights Act of 1866 had already outlawed private discrimination in inheritance as well as in the purchase, lease, or conveyance of real and personal property (according to the *Jones* decision's interpretation of Section 1982) and in contracting of any kind (according to *Runyon v. McCrary*, 427 U.S. 160 (1976), which followed *Jones* in interpreting the parallel Section 1981). Yet that is what *Jones* and *Runyon* require readers to believe.

30 Contemporary news events are not always a useful explanation for the actions of courts. In the case of *Jones*, however, we would be remiss if we did not at least mention the dramatic events that unfolded while it was pending before the Supreme Court. Five weeks before oral argument the Report of the National Advisory Commission on Civil Disorders (known as the "Kerner Commission Report") was published. The Commission had been formed to investigate the extensive civil unrest of the summer of 1967. In its controversial report, the Commission concluded that white racism was largely to blame and warned that without reform things would get worse.

Whether on account of the lack of reform or something else, things did get worse. *Jones* was argued on April 1–2, 1968. Two days later, the Reverend Martin Luther King, Jr. was assassinated in Memphis, Tennessee. The tragedy of that loss was quickly multiplied as dozens of cities became engulfed in riots. In Washington, D.C. alone, over the course of the next several days, twelve people were killed (mostly in burning homes), over 1000 were injured, and over 6000 arrests were made. Government offices—including those on Capitol Hill, where the Supreme Court is located—were evacuated. It took more than 13,000 federal troops and five days to quell the riots, which at one point came within a few blocks of the White House. When the smoke cleared, about 1200 buildings had been burned, many of them in middle-class black neighborhoods that did not begin to recover economically until the 1990s. *See* Ben W. Gilbert et al., Ten Blocks from the White House: Anatomy of the Washington Riots of 1968 (1968). But as Washington calmed, riots continued in Baltimore and erupted for the first time in Kansas City.

On the first full day of violence, President Lyndon Baines Johnson wrote a letter to the Speaker of the House of Representatives urgently requesting that the Fair Housing Act, which had been stalled for some time, be given immediate priority. *See* Letter from Lyndon Baines Johnson to Speaker John W. McCormick (Apr. 5, 1968) ("When the Nation so urgently needs the healing balm of unity, a brutal wound on our conscience forces upon us all this question: What more can I do to achieve brotherhood and equality among all Americans?"). McCormick delivered, and Johnson signed the bill into law on April 11, 1968. While this did not moot the *Jones* case, it greatly reduced the legal consequences of the decision. Race discrimination in the sale and lease of housing would be illegal no matter how the case came out.

Sporadic riots continued through the month of May. The opinion in *Jones* was announced on June 17, 1968—just eleven days after the assassination of Senator Robert F. Kennedy, an event that no doubt added to the sense of turmoil that pervaded those months.

It is entirely possible, of course, that none of this had any effect upon the thinking of any of the Court's members. It is possible they would have rendered an opinion that misunderstood the historical context as well as the text of the Civil Rights Act of 1866 even in the absence of these events. It is also possible that their expansive reading of Section 2 of the Thirteenth Amendment giving Congress broad powers to tackle the civil-rights issues was unrelated in any way to the tragedies they had witnessed. But it would be unwise to deny the possibility.

31 *Jones,* 392 U.S. at 441 n.78.

32 *Id.* at 443. The Court did not define those terms, nor did it indicate why it had so chosen to include them. Unlike "badge" and "incident," these terms were not in widespread use in the Reconstruction era. For more historical analysis on this point, see McAward, *Defining the Badges*, *supra* note 3, at 196.

33 Such a power would, of course, be quite sweeping. In Afghanistan, the Taliban saw it as its mission to remove the relics of Buddhism from that country—even though Buddhism had been eliminated as a religion in that country almost a thousand years ago. *See* Ahmed Rashid, *After 1,700 Years, Buddhas Fall to Taliban Dynamite*, The Telegraph, Mar. 12, 2001. Presumably the authority to outlaw the relics and vestiges of slavery—rather than just slavery itself or slavery along with the supports that make it possible—would empower Congress not just to ensure that slavery does not return, but to wipe out any sign it ever existed. That could include everything from Southern plantation houses to the use of gumbo in Southern recipes. This hardly seems like a plausible reading of either the Thirteenth Amendment or the intent of those who adopted it. That amendment is about prohibiting slavery, not wiping away history.

34 As of this writing, one federal court of appeals has upheld the HCPA in a Thirteenth Amendment constitutional challenge. United States v. Maybee, No. 11-3254 (8th Cir. 2012). The court of appeals appears not to have considered some of the arguments raised in this article.

35 Katzenbach v. Morgan, 384 U.S. 641 (1966) (interpreting the Fourteenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301(1966) (interpreting the Fifteenth Amendment).

36 521 U.S. 507, 519 (1997).

37 Tennessee v. Lane, 541 U.S. 509 (2004).

38 Section 2 of the Fifteenth Amendment is identical to Section 2 of the Thirteenth Amendment. *See* U.S. Const. amend. XV, § 2. *City of Boerne* has been cited as authority in Fifteenth Amendment cases. *See* Shelby County v. Holder, No. 1:10-cv-00651 15-20 (D.C. Cir. May 18, 2012).

39 Deeply rooted federalist doctrines regarding the importance of protecting individuals from the long reach of a powerful central government also counsel for reading Section 2 at least as narrowly as Section 5. Section 5 gives Congress remedial power to act only when the states have violated the Fourteenth Amendment's substantive provisions, and the doctrine elucidating limits on the scope of this power has grown up with the goal of preventing legislation that intrudes on legislative spheres of autonomy generally reserved to the states. *See* Fitzpatrick v. Bitzer, 427 U. S. 445, 455 (1976). But preserving the legislative spheres of autonomy of the states is not traditionally viewed as an end in and of itself. Rather, as Supreme Court Justice Anthony Kennedy once put it: "States are not the sole intended beneficiaries of federalism . . . ." An individual has a direct interest in objecting to laws that upset the constitutional balance between the national government and the states." Bond v. United States, 564 U.S. __ (2011). *City of Boerne* thus protects individual rights indirectly by protecting the states' traditional spheres of autonomy from federal intrusion. But the potential threat to individual liberty in the Thirteenth Amendment context is perhaps much greater than in the Fourteenth Amendment context because Section 2 permits Congress to reach individual conduct directly. *Cf.* McAward, *Scope*, *supra* note 3, at 141("However, legislation that controls private conduct raises a separate federalism concern, namely, that Congress could attempt to exercise such a high degree of control over private citizens that it will transform the Thirteenth Amendment enforcement power into a general police power . . . ."). In other words, current doctrine requires the Supreme Court to aggressively protect the legislative autonomy of the states so as to protect individual autonomy indirectly, but requires the Court to be hands-off in reviewing Section 2 legislation that may directly infringe on individual autonomy. This seems to us to be an odd result and perhaps even precisely backwards.

40 18 U.S.C. § 249 (2011).

41 National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 4707 (2009). Congress also found that certain unspecified religions and national origins were considered to be races at the time and that in order to eliminate the badges and incidents of slavery, the HCPA should include those categories as well (at least to a limited degree).

42 18 U.S.C. § 249(a)(2)(A). Specifically, the criminal conduct must occur:

> during the course of, or as the result of, the travel of the defendant or the victim (I) across a State line or national border; or (II) using a channel, facility, or instrumentality of interstate or foreign commerce; (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A); (iii) in connection with the conduct described in

subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce. *Id.* § 249(a)(2)(B).

Alternatively, the alleged criminal conduct must either interfere "with commercial or other economic activity in which the victim is engaged at the time of the conduct" or otherwise affect interstate or foreign commerce." 18 U.S.C. § 249(a)(2)(B).

It is not known to us why Congress did not write this section of the statute to permit prosecution of race- or color-motivated hate crimes if there is a sufficient connection between such hate crimes and the Thirteenth Amendment. Because the HPCA has a severability clause, if the section passed pursuant to Section 2 of the Thirteenth

Amendment is struck down, the rest of the HPCA will still stand. It may be that the drafters thought that, in the aftermath of *Lopez* and *Morrison*, the section passed pursuant to Section 2 was less vulnerable to court challenge than the section passed under the Thirteenth Amendment. The decision to include race and color only under the Thirteenth Amendment may have been an invitation to litigate the issue.

43 The dissenting view in the House Committee Report argued that there was a general lack of evidence in the record that state and local governments were falling down on the job at prosecuting the kind of crime covered by the Act. H.R. Rep. No. 111-86, pt 1. at 42 (2009). At the hearing, the question was asked, "Precisely how many cases is the Justice Department aware of that have gone unprosecuted at the state and local level?" Some hedging rhetoric was followed by a single account of a sexual orientation case that was prosecuted under South Carolina state law, but under which the defendant received a lenient sentence. Given this lack of evidence, it may be that members of Congress simply wished to please interest groups who in turn wished to ensure their members and donors that they were doing everything possible to eradicate that kind of crime. An army of organizations submitted testimony in support of the HCPA, from the American Music Therapy Association to the Gay, Lesbian, and Straight Education Network to the National Abortion Federation. Some of the organizations and governmental entities that weighed in in favor of the legislation may have been motivated in part by the subsidies that the legislation distributes in the fight against such crimes. To our knowledge, none of these organizations argued that the reason that conduct of this nature should be federally banned is that otherwise slavery could make a comeback. Nor was such an argument made by the thousands of individuals who marched around the Department of Justice headquarters demanding more federal hate crimes prosecutions. *See Thousands Protest Hate Crimes*, CNN Newsroom Transcript, Nov. 16, 2007, *available on* Lexis-Nexis. As far as we are aware, slavery made it into the discussion only in the perfunctory reference to it in Congress's findings in order to invoke Section 2 powers under the Thirteenth Amendment. *See supra* note 41 and accompanying text.

44 We hesitate to call the crimes covered by the HCPA "hate crimes," since hatred is not an element of the crime. It is sufficient if the crime occurs "because of" somebody's race, color, religion, sex, disability, etc. We are not keen even on the less dramatic term "bias crime," though we are willing to use it. The way the statute is written, however, it is sufficient if the perpetrator would not have committed the crime if the victim were of a different race. With rape, of course, it will be uncommon for the perpetrator to be indifferent to the sex of his victim. *See* Gail Heriot, *Lights! Camera! Legislation!: Grandstanding Congress Set to Adopt Hate Crimes Bill that May Put Double Jeopardy Protections in Jeopardy*, Engage, Feb. 2009, at 4.

45 If it did not, then it would be vulnerable to Fifth Amendment due-process objections. Similar state statutes would be vulnerable to Fourteenth Amendment equal-protection objections.

46 *See* Charisse Jones, *Death on the LIRR: The Suspect: In Notes and Past of the Accused, Portrait of Boiling Resentment*, N.Y. Times, Dec. 9, 1993 (providing biographical information on Colin Ferguson, an African-American who murdered six people and wounded nineteen others on the Long Island Rail Road in New York; papers were found on his person indicating that his killing spree was motivated by "'racism by Caucasians and Uncle Tom Negroes'"); *see also* James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law and Identity Politics 143 (describing series of crimes committed by African-Americans against white, Hispanic, and South Asian victims in Brooklyn, New York in 1993 as retaliation for an alleged hate crime directed against African-American children).

47 Brian Levin, Director for the Center of Hate Crimes and Extremism, noted that there were more hate crimes reported to the FBI from the city of Boston in 2007 than from the Deep South states of Georgia, Alabama, Arkansas, Louisiana, and Mississippi combined. S. Rep. No. J-111-33, at 287 (2009). More recently, following the much-publicized Trayvon Martin case, there were several media reports of white crime victims who were targeted on the basis of their race in retaliation for Martin's death. *See, e.g.*, *Gainesville Man Beaten After Men Shout Trayvon*, Jacksonville News 4 Online, Apr. 10, 2012, *available at* http://www.news4jax.com/news/Gainesville-man-beaten-after-men-shout-Trayvon/-/475880/10396944/-/wk1c9z/-/v; *Police, Trayvon Protesters Ransack Store*, Local News 10 Online, Mar. 27, 2012, *available at* http://www.local10.com/news/Police-Trayvon-protesters-ransack-store/-/1717324/9719674/-/xctonpz/-/index.html; Michael Lansu, *Officials: Trayvon Case Cited in Racial Beating*, Chicago Sun-Times, May 22, 2012, *available at* http://www.suntimes.com/news/metro/12032142-460/prosecutors-trayvon-martin-case-led-to-racial-beating-in-oak-park.html.

48 *See* Fed. Bureau of Investigation, Hate Crimes Statistics: Incidents and Offenses (2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses (last accessed Sept. 18, 2012). In other words, a clear majority of bias crimes committed in the United States do not target the descendants of African-American slaves. African-Americans also have also committed widely publicized hate crimes. Data for the years preceding 2010 showed similar patterns.

49 *See, e.g.*, *Spate of Hate Crimes in Eastern German City*, Der Spiegel Online (International Edition), Dec. 13, 2007; *ADL Applauds New Italian Initiative to Combat Hate Crimes, Sarkozy Announces Crackdown on Internet Hate Sites*, Reuters, Paris, Mar. 22, 2012, *available at* http://www.reuters.com/article/2012/03/22/us-france-shooting-sarkozy-idUSBRE82L0MH20120322.

50 Alexander Tsesis, *Hate Speech and Hate Crime, Symposium Essay: Regulating Intimidating Speech*, 41 Harv. J. on Legis. 389 (2004.); *see also* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. St. Paul, 106 Yale L. J. 124 (1992).

51 Alexander Tsesis, *The Second Founding: Interpreting the Thirteenth Amendment*, 11 U. Pa. J. Const. L. 1337 (2009).

52 Marcellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. Pa. L. Rev. 1097 (1998).

53 Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 Rutgers L. Rev. 59 (Fall 2010).

54 William Carter, *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 Harv. C.R.-C.L. L. Rev. 17, 57 (2004); William Carter, *Toward a Thirteenth Amendment Exclusionary Rule as a Remedy for Racial Profiling*, Temple University Legal Studies Research Paper No. 2008-57 (Mar. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1108247.

55 James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law*, 102 Colum. L. Rev. 1 (2002).

56 Suzanne S. Jackson, *Marriages of Convenience: International Marriage Brokers, "Mail-Order Brides," and Domestic Servitude*, 38 U. Tol. L. Rev. 895 (2007).

57 Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1 (1990).

58 Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1 (1995).

59 Marco Masoni, *The Green Badge of Slavery*, 2 Geo. J. on Fighting Poverty 97 (1994) (arguing that environmental degradation of black communities is remnant of slavery).

60 David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's*

Amendment 2, 4 Temp. Pol. & Civ. Rts. L. Rev. 133, 142 (1994) (explaining that the Colorado referendum prohibiting state from offering protection

from discrimination on basis of sexual orientation was a badge or incident of slavery because any legislation depriving "an individual, or class, of their civil rights . . . devalue[s] the subject class by relegating it to a subordinate status, [and therefore] violate[s] the mandate of equality implicit in the Thirteenth Amendment").

61 Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 Temp. L. Rev. 539 (2002) (arguing that confederate symbols are badges of slavery violating Thirteenth Amendment).

62 Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. Pa. L. Rev. 437 (1989).

63 Dawinder S. Sidhu, *A Constitutional Remedy for Urban Poverty*, DePaul L. Rev. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1872184.

64 Rodic B. Schoen, *Nationalization of Public Education: The Constitutional Question*, 4 Tex. Tech L. Rev. 63, 115 (1972).

65 Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 Harv. J.L. & Gender 264 (2011).

66 Jennifer L. Conn, *Sexual Harassment: A Thirteenth Amendment Response*, 28 Colum. J.L. & Soc. Probs. 519 (1995).

67 Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. Gender Race & Just. 401 (2000).

68 Zoe Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, St. Mary's L. Rev. on Minority Issues (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009022.

69 Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 Marq. L. Rev. 201, 230 (1994) (observing that current constitutional structures governing presidential elections were adopted as "constitutional appeasements to southern slaveholding interests" and, as such, "must be philosophically and politically scrutinized as structural badges and incidents of slavery") (internal quotation marks omitted).

70 As one of our colleagues once colorfully put it: "American law schools are the origin of some very bad ideas, in something like the same way bats are said to be the reservoir of certain nasty viruses in Africa; the germs of pernicious concepts incubate there in relative obscurity between epidemics, erupting occasionally to spread destruction and misery." Thomas A. Smith, *The Liberal Paper Chase*, Yale Alumni Mag., May/June 2011, *available at* http://www.yalealumnimagazine.com/issues/2011_05/arts_law_schools.html; *see also* Walter Olson, Schools for Misrule (2011) (describing how once-seemingly exotic ideas nursed in the legal academy eventually become part of our law).

71 317 U.S. 111 (1942).

72 514 U.S. 549 (1995).

73 529 U.S. 598. (2000).

74 No. 11-393 (June 28, 2012).

75 *See, e.g.*, Rebecca Zietlow, *The Promise of Congressional Enforcement*, *in* The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment 182 (Alexander Tsesis ed., 2010) ("These cases [*Lopez* and *Morrison*]present a challenge for members of Congress wishing to expand rights of belonging, those rights that provide an inclusive vision of who belongs to the national community . . . and that facilitate equal membership in that community. However, Section Two of the Thirteenth Amendment has considerable potential to resolve this dilemma."); *see also* Mark Graber, *Plus or Minus One: The Thirteenth and Fourteenth Amendments*, 71 Md. L. Rev. 12 (2011) ("Many participants [at a Maryland Law symposium] saw the constitutional commitment for abolishing slavery as foundation for a new progressive constitutionalism."). In the same piece, Graber also notes that "[t]he lack of a state action requirement also makes the Thirteenth Amendment particularly attractive as a foundation for progressive constitutional visions."

See also Sidhu, *supra* note 63 ("Moreover, as a practical matter, the Supreme Court has never struck down a congressional act made pursuant to the Thirteenth Amendment's enforcement power, whereas the Commerce Clause does not have this track record.").

See generally Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, U Iowa Legal Studies Research Paper No. 07-20, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014417&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014417 ("sketch[ing] a much broader interpretation of the Thirteenth Amendment, an interpretation of our aspirations of freedom in a carefully delimited, but expansive, rather than a restrictive, fashion").

76 Jamal Greene, *Thirteenth Amendment Optimism*, Colum. L. Rev., (forthcoming 2012) (symposium issue).

77 *See* Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3541, 112th Congress (2012).

78 First, this sentence is not a direct quote from *Jones*; broad as that case's language is, it makes no such sweeping claim. *Jones* does not provide a comprehensive definition of badge or incident, but, quoting the Civil Rights Act of 1866, states only that the badges and incidents of slavery includes "restraints upon those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Jones v. Alfred H. Mayer & Co.*, 392 U.S. 409, 441. The relevant section of the Committee Report also notes: "The Supreme Court's abortion jurisprudence does not require a different result. The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* recognized the essential holding of the Court in *Roe v. Wade*—that women possess the right to obtain an abortion without undue interference from the state before viability. That holding, *Casey* clarified, was based on the Court's perception that the state's interests were not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure at that stage. The Supreme Court has made clear, however, that the government has a compelling interest in eliminating discrimination against women and minorities, and this compelling interest could prove sufficient to hold that such an abortion restriction is constitutional.

79 *See generally* Pamela D. Bridgewater, *Un/Re/Discovering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 Wash. & Lee J. Civ. Rts & Soc. Just. 11 (2001) (suggesting that "while forced labor is the commonly thought of and protected against aspect of slavery, the institution also consisted of reproductive exploitation via forced sex and forced reproduction and the doctrine designed to protect against slavery should be broadened to recognize such conditions").

80 We have not closely studied the alternative claims made by PRENDA's sponsors that the Commerce Clause or Section 5 of the Fourteenth Amendment give Congress the authority to pass it and therefore express no opinion on these claims here.

81 *See also* Graber, *supra* note 75, at 18 ("Several essays in this Symposium also provide paths by which the Thirteenth Amendment might drift for a vehicle for progressive constitutional ambitions to a vehicle to a source for more conservative constitutional law.").

Corporations, Securities, & Antitrust

Del Monte and *El Paso*: Going to *Revlon*-Land With a Conflicted Financial Advisor

*By Robert T. Miller**

Note from the Editor:

This article examines two recent cases in the Delaware Court of Chancery addressing the *Revlon* duties of directors when the company's financial advisor has a conflict of interest related to the proposed business combination transaction. As always, The Federalist Society takes no position on particular legal or public policy initiatives, and no position on the conduct of the parties involved or decisions by the respective judges in *Del Monte* or *El Paso*. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about conflicts of interest in business combination transactions. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- *In re* Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813 (Del. Ch. 2011): http://www.rlf.com/files/Del%20Monte.pdf
- Del Monte and Barclays Settle Investor Lawsuit for $89.4 million, N.Y. Times Dealbook, Oct. 6, 2011: http://dealbook.nytimes.com/2011/10/06/del-monte-and-barclays-settle-investor-lawsuit-for-89-4-million/
- John Coaes, et. al, Barclays Capital and the Sale of Del Monte Foods, Harvard Law School Case Study (from the perspective of the bankers and lawyers at Barclays) (July 27, 2012): http://casestudies.law.harvard.edu/barclays-capital-and-the-sale-of-del-monte-foods/
- Jeffrey McCracken, *Barclays Leads LBO Financing Retreat After Del Monte Slap*, Bloomberg, Sept.14, 2011: http://www.bloomberg.com/news/2011-09-14/barclays-leads-lbo-financing-retreat-after-del-monte-criticism.html

Two recent cases in the Delaware Court of Chancery address the *Revlon*[1] duties of directors when the company's financial advisor has a conflict of interest related to the proposed business combination transaction. The first, *In re Del Monte Foods Company Shareholders Litigation*,[2] was relatively straightforward. In a cash sale of Del Monte Foods Company (Del Monte) to a consortium of private equity buyers, Del Monte's financial advisor, Barclays Capital (Barclays), flagrantly violated its fiduciary duties to the company by concealing its role in putting the company in play, its desire to provide financing to the buyers (so-called "stapled financing"),[3] and its facilitating a pairing of two buyers to make a joint bid for the company. The doctrinally interesting aspect of the case concerns how breaches of fiduciary duties that an agent owed to the corporation can support a claim that the directors, who were entirely unaware of the agent's wrongdoing, breached their *Revlon* duties to the shareholders.

The second case, *In re El Paso Corporation Shareholders Litigation*,[4] is more complex. El Paso Corporation (El Paso) had agreed to be acquired by Kinder Morgan, Inc. (Kinder Morgan) for a mix of cash and stock, but its usual financial advisor, Goldman Sachs & Co. (Goldman), owned a substantial interest in Kinder Morgan. Fully aware of this conflict, El Paso reduced Goldman's role in the transaction and engaged Morgan Stanley & Co., LLC (Morgan Stanley) to advise it as well. Morgan Stanley's compensation was structured in such a way that it would receive a large fee only if El Paso completed a deal with Kinder Morgan, a fact about which the board was of course also fully aware. Although these conflicts were fully disclosed to the board, and although under well-known principles of agency law an agent does not breach its fiduciary duty merely by having a fully-disclosed conflict of interest, the court nevertheless held that the El Paso directors had breached their *Revlon* duties in part because they relied on advice from conflicted advisors. Thus, while *Del Monte* concerns primarily the effect of *undisclosed breaches* of a financial advisor's fiduciary duty, *El Paso* concerns primarily the effect of a financial advisor's *fully disclosed conflicts of interest*. Below I discuss both cases, arguing that the result in *Del Monte* was clearly right but that in *El Paso* is largely wrong.

I. *In re Del Monte Foods Company Shareholders Litigation*[5]

A. Factual Background

As usual in Delaware business combination cases, the facts in *Del Monte* are complex. In January of 2010, Apollo Global Management (Apollo) approached Del Monte about a possible leveraged-buyout.[6] Del Monte sought the advice of Peter J. Moses, an investment banker at Barclays, who had often advised Del Monte in the past.[7] Moses, whose responsi-

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bilities at Barclays included the consumer food sector, had in the ordinary course of his activities been pitching Barclays to various private equity firms, including Apollo.[8] In so doing, Moses hoped that, in any leveraged buyout of the company, Barclays would be able to offer stapled financing to the buyers and thus collect an additional fee. Disclosing none of this to Del Monte, Moses advised the company to conduct a limited process focusing on financial buyers,[9] which itself was reasonable given the paucity of potential strategic buyers for the company. As Vice Chancellor Laster points out, however, this decision also furthered Barclay's goal of providing buy-side financing,[10] for financial buyers are much more likely to use such financing than strategic buyers.

On Barclays's recommendation, Del Monte invited five financial buyers, including Apollo and Kohlberg, Kravis, Roberts & Co. (KKR),[11] to submit expressions of interest,[12] and when word leaked that Del Monte was soliciting proposals, Campbell Soup Company, a potential strategic buyer, and Vestar Capital Partners (Vestar), another financial buyer, asked to be, and were, included in the process as well.[13] All of the potential buyers entered into confidentiality agreements with Del Monte,[14] and, as is common in transactions involving financial buyers, these agreements contained "no-teaming" clauses, which provide that, without the prior written consent of the target company, the potential buyer shall not enter into any discussions or agreements with another other person, including other potential buyers, concerning a transaction involving the target.[15] The purpose of such provisions is obvious: because private-equity buyers routinely join forces to acquire portfolio companies,[16] the target naturally wants to control this process in order to maximize price competition among the buyers.

Eventually, most of the financial bidders submitted nonbinding indications of interest in acquiring the company, with the highest bids coming from KKR ($17 per share) and Vestar ($17.00 to $17.50 per share), although Vestar made it clear that it would have to partner with another firm in making an actual bid.[17] The Del Monte board decided not to proceed, however, and it instructed Barclays to terminate the sales process and inform the bidders that the company was not for sale.[18]

A few months later, in September of 2010, acting on his own initiative, Moses restarted the process. He approached Vestar and indicated that Del Monte might be receptive to proposals (the company had failed to meet its earnings targets for successive quarters and its stock price was down), and he further suggested that KKR would be the ideal partner for Vestar.[19] Moses then discussed the idea with KKR, and soon KKR and Vestar had agreed to work together on an approach to Del Monte.[20] As Vice Chancellor Laster later found, these discussions breached the no-teaming provision in the agreements that KKR and Vestar had with Del Monte.[21] Moreover, in pairing KKR and Vestar, Moses had joined together the two highest bidders in the earlier process. If Del Monte was to get the highest price possible, it would seem to make more sense to pair Vestar with some other large and capable firm, such as Apollo. But teaming Vestar with KKR served Barclays' interest: Barclays had an especially close relationship with KKR, had provided stapled financing to KKR in the past, and believed that its chances of providing such financing in a transaction involving Del Monte would be maximized if KKR was the buyer.[22]

On October 11, 2010, KKR presented to Del Monte a written indication of interest to acquire the company at $17.50 cash per share.[23] KKR said nothing about Vestar participating in the transaction.[24] Neither did Moses. Even worse, Moses worked with KKR to keep Del Monte in the dark about Vestar's role. On October 31, for example, Moses emailed a representative of KKR, noting that he agreed with KKR's judgment that Vestar's representatives should not yet be invited to meetings with representatives of Del Monte.[25] When the Del Monte board met to consider KKR's indication of interest, the directors decided that, since they had conducted a limited market check only eight months earlier and since KKR's bid was equal to the highest bid received during that process, they would negotiate with KKR and not seek bids from other potential buyers.[26] They also engaged Barclays to act as the company's financial advisor, and Barclays again failed to disclose to Del Monte that its representatives had for some time been discussing the transaction not only with KKR but also with Vestar.[27]

In the subsequent negotiations, Barclays was the principal point of contact with KKR.[28] Del Monte rejected KKR's $17.50 per share offer as inadequate but offered to make due diligence materials available to KKR. KKR began reviewing these materials, and eventually raised its offer to $18.50 per share, an offer which Del Monte again rejected as inadequate.[29] On November 8, with the parties believing they were close to reaching agreement, KKR finally requested that it be permitted to partner with Vestar.[30] Apparently without considering whether it would be more advantageous to the company if Vestar were paired with another major firm, and without attempting to extract some concession from KKR, the Del Monte board consented to the arrangement between KKR and Vestar.[31]

Barclays then asked KKR to give Barclays one-third of the debt financing KKR would need to complete the transaction, a request to which KKR assented.[32] The next day Barclays asked Del Monte's management for permission to provide buy-side financing to KKR. Apparently without any consideration of the ramifications, Del Monte agreed.[33] There was never any contention that KKR needed Barclays to finance the deal; indeed, KKR's relationships with other major banks were more than sufficient. Nor did the Del Monte board obtain any advantage for the company in exchange for its consent that Barclays arrange buy-side financing. The only apparent reason for the arrangement was that it benefited Barclays, which hoped to earn between $21 million and $24 million in fees from its buy-side work—an amount approximately equal to the $23.5 million it would earn from Del Monte for its sell-side work in the deal.[34]

Of course, when Barclays became a lender to the buyer, its interests became aligned with those of the buyer and contrary to those of Del Monte, a fact made explicit in a letter agreement between Del Monte and Barclays.[35] That agreement also provided that Barclays "believes that it is essential . . . for the company to receive independent financial advice, including an additional fairness opinion, from an independent third party firm who is not involved in the acquisition financing."[36] Del Monte thus engaged Perella Weinberg Partners, LP (Perella Weinberg) to provide such an opinion at an additional cost

to the company of $3 million.[37] Moreover, as Vice Chancellor Laster observes, at the time that Barclays interests became contrary to those of Del Monte, Del Monte and KKR had not yet agreed on price, and Barclays was still handling price negotiations with KKR.[38]

On November 24, KKR presented its best and final offer of $19 cash per share.[39] Barclays and Perella Weinberg delivered favorable fairness opinions, and the Del Monte board accepted the offer.[40]

The merger agreement between the parties provided for a 45-day go-shop period during which Del Monte was permitted to further shop the company, after which it would be bound by a customary non-solicitation provision.[41] The agreement also contained a standard fiduciary out, permitting Del Monte to terminate the agreement to accept a superior offer (subject to matching rights in favor of KKR), provided that Del Monte paid a termination fee to KKR. The fee would be $60 million (1.5 percent of the equity value of the transaction) if the superior offer were made during the go-shop period and $120 million (3.0 percent of the equity value of the transaction) if the superior offer were made after go-shop period.[42]

Del Monte asked Barclays to conduct the market check permitted by the go-shop.[43] Although Barclays approached fifty-three potential acquirers, including both strategic and financial buyers, none ultimately made a competing offer for Del Monte.[44] As Vice Chancellor Laster observes, however, at this point Barclays stood to make at least as much from its buy-side work for KKR as from its sell-side work for Del Monte, and Barclays would likely lose the former benefit if another buyer emerged.[45] Other banks were available to manage the go-shop, and Goldman approached Del Monte about fulfilling this role.[46] When this happened, a representative of Barclays emailed a representative of KKR, stating that "Goldman has been pushing the company to help run the go-shop and scare up competition against us."[47] KKR responded by offering Goldman five percent of the buy-side financing work, after which Goldman ceased its efforts to acquire the go-shop assignment from Del Monte.[48]

Several shareholders sued, alleging breaches of the Del Monte board's fiduciary duties in the sales process.[49]

B. The Court's Holdings: Breaches of Revlon *Duties by the Board and the Effect of Barclays' Misconduct*

The plaintiffs sought to preliminarily enjoin the merger, and so they had to demonstrate a reasonable probability of success on the merits.[50] Since the plaintiffs were suing the directors directly, not Barclays derivatively on behalf of the corporation, the key *legal* issues concerned breaches by the board of its fiduciary duties, even though some of the most important *facts* concerned breaches by Barclays of its fiduciary duties.[51] Because the Del Monte board had agreed to sell the company for cash, its *Revlon* duties had been triggered,[52] and so, in Vice Chancellor Laster's formulation, the burden was on the directors to prove that: (a) "they sought to secure the transaction offering the best value reasonably available for the stockholders,"[53]—meaning that they "tr[ied] in good faith" to secure the best available transaction, not that they necessarily had done so (this is the so-called subjective component of *Revlon*),[54] and (b) "they (i) followed a reasonable decision-making process and based their decisions on a reasonable body of information, and (ii) acted reasonably in light of the circumstances" (this is the so-called objective component of *Revlon*—the first part of which concerns the objective reasonability of the board's process and the second part of which concerns the substantive reasonability of its decisions).[55]

Vice Chancellor Laster concentrates on the objective aspect of *Revlon*, and although his discussion of the issues is lucid and insightful, he does not expressly distinguish two issues that I think are helpful to keep separate. Bearing in mind that Barclays kept from the Del Monte various material facts, we should acknowledge an analytically important distinction between (a) the reasonability of a decision by the board given the facts as the board understood them at the time it made its decision, and (b) the reasonability of a decision by the board in light of the facts as they would have appeared to the board had Barclays been completely candid with the board. These are obviously different issues. The wrongdoing of Barclays cannot be charged to the board as if the board had authorized or intended it,[56] and a decision by the board may have been fully reasonable if the facts had been as the board believed but not as Barclays knew them to be. Although he did not organize the issues in this way, Vice Chancellor Laster found both that (a) some decisions by the directors would have breached their *Revlon* duties even if the facts had been as the board had thought at the time, and (b) Barclay's actions in concealing material facts from the board deprived other decisions by the board—decisions that might have been reasonable under *Revlon* had the facts been as the directors thought—of protection.

As to issues of the first kind, the court held that the Del Monte board breached its *Revlon* duties both when deciding to allow KKR to team with Vestar and when deciding to allow Barclays to provide buy-side financing. In particular, the Vice Chancellor held that, when KKR and Barclays finally informed the board that KKR wanted to team with Vestar to make a bid, the board did not engage in any "meaningful . . . consideration or informed decision-making with respect to the Vestar pairing."[57] The implication seems to be that this violated the *procedural* aspects of the objective component of the board's *Revlon* duties: the board was not informed of all the material facts reasonably available before it decided. The Vice Chancellor does not expressly say which facts the board should have had before it, but surely information about how pairing with Vestar was creating value for KKR, about whether any of this value could be extracted by Del Monte in the form of a price increase from KKR, and whether Vestar would be likely to make a competing bid paired with another major private equity firm if the board declined KKR's request would all surely have been material. Furthermore, the court also held that it "was not reasonable for the Board to accede to KKR's request and give up its best prospect for price competition without making any effort to obtain a benefit for Del Monte and its stockholders."[58] The board thus also violated the *substantive* aspects of the objective component of its *Revlon* duties: its bargaining—or, more accurately, lack of bargaining—was not reasonably calculated to get the best available transaction for the shareholders. In other words, if Del Monte is conferring a significant benefit on KKR

by allowing it to team with Vestar, the board should at least have tried to get something in exchange.[59]

As to the board's decision to allow Barclays to provide buy-side financing, the court appears to have held that this decision also breached both the procedural and the substantive aspects of *Revlon*'s objective component. For, in considering Barclay's request, "the Board did not ask whether KKR could fund the deal without Barclays' involvement" and "did not learn until this litigation that Barclays was not needed on the buy-side,"[60] which implies a breach of the board's duty to be informed before making a decision. Furthermore, on the substance, "[t]here was no deal-related reason [from Del Monte's point of view] for the request, just Barclays' desires for more fees. Del Monte did not benefit."[61] In fact, Del Monte's interests were compromised, because Del Monte and KKR were still negotiating the price of the deal, and Barclays had the lead role in handling those negotiations. "Without some justification reasonably related to advancing stockholder interests, it was unreasonable for the Board to permit Barclays to take on a direct conflict when still negotiating price. It is impossible to know how the negotiations would have turned out if handled by a representative that did not have a direct conflict."[62]

The court's holdings that these two decisions by the directors—allowing KKR to team with Vestar and allowing Barclays to provide buy-side financing—breached the directors' fiduciary duties do not rely on the fact that Barclays had been deceiving the board in various ways. Put another way, even if the facts had been as the directors had thought, their decisions would still have breached their *Revlon* duties. What, then, was the effect of Barclays' wrongdoing? Perhaps not fully consistently, the Vice Chancellor believed that "the blame for what took place appears . . . to lie with Barclays,"[63] and so he discussed at-length how Barclays' misconduct tainted almost every aspect of the sales process, from the decision to pair KKR and Vestar, to the price negotiations with KKR, to the conduct of the go-shop. Clearly, Barclays' misconduct may have reduced the deal price. Less clear, however, is how wrongdoing by Barclays results in a breach of duty by the directors. This point is critical because, if the merger was to be enjoined, it had to be because of a breach of the *directors'* duties. Breaches of duty merely by Barclays could support an action by the corporation for damages, but probably not an injunction stopping or delaying the merger. So the question becomes how wrongdoing by Barclays implies a breach of duty by the directors.

Here Vice Chancellor Laster relies on *Mills Acquisition Co. v. McMillan, Inc.*[64] for the proposition that, although decisions by a board based upon information provided by expert advisors will not normally be disturbed when otherwise made in the proper exercise of business judgment, "when a board is deceived by those who will gain from such misconduct, the protections girding the decision itself vanish."[65] In other words, the court will not respect such decisions and will enjoin their effects, but the directors will not generally be liable in damages for such decisions. In particular, because the Del Monte board "sought in good faith to fulfill its fiduciary duties" (that is, did not violate the subjective component of *Revlon*) "but failed because it was misled by Barclays,"[66] "exculpation under Section 102(b)(7) and full protection under Section 141(e) make[] the chances of a judgment for money damages vanishingly small."[67] Both of these results seem correct, but none of this yet explains, in a doctrinally coherent way, how wrongdoing by an advisor amounts to a breach of duty by the directors.

The situation seems paradoxical. If the directors made poor decisions because a faithless advisor deceived them, this is the fault of the advisor, not the directors, who thus are victims, not villains. Hence, the directors ought not be liable in damages. But if the directors did nothing wrong, how can the court void their decisions? After all, only wrongful decisions may be voided.

At one point Vice Chancellor Laster states that "the directors breached their fiduciary duties" because they "fail[ed] to provide serious oversight that would have checked Barclays' misconduct."[68] In other words, the directors' decisions based on Barclays' deceptions were wrongful after all, not because the directors were involved in Barclays' wrongdoing but because, through a lack of oversight, they failed to detect that wrongdoing. But this reasoning does not pass muster. For one thing, making out a case that directors have breached their oversight duties under *Caremark*,[69] as confirmed and elaborated in *Stone v. Ritter*,[70] is extremely difficult,[71] and Vice Chancellor Laster did not even the attempt to do this. Moreover, it is difficult to see how the board could have discovered the Barclays' deceit no matter how actively it managed the sales process. For example, on the crucial issue of teaming KKR with Vestar, Barclays arranged this pairing before the sales process had even started. Without employing "a corporate system of espionage"[72] against its own advisors, which it surely is not required to do, the board would almost certainly never have discovered this. The problem in *Del Monte* was not that the board was unreasonably disengaged, but that its trusted financial advisor was actively deceiving it. Moreover, even if the *Del Monte* directors were lax in their oversight of Barclays, what would happen in a case when an advisor was so skilled in mendacity that even the most actively engaged directors would not discover the advisor's deception? Surely in such a case, too, the directors' decisions made on the basis of fraudulent advice should be voided. We need some other explanation of why wrongdoing by an advisor can result in breaches of duty by the directors.

The answer here is actually straightforward—namely, that we are here considering whether the directors' decisions were reasonable under the *objective* component of *Revlon*, which requires both that the board be informed of all the material facts reasonably available to it at the time it makes a decision (the procedural aspect of the objective component) and that board's decision be reasonably calculated to get best price for the shareholders reasonably available (the substantive aspect of the objective component). If a financial advisor—or any other agent, for that matter—deceives a board, or withholds from the board information it should have conveyed, then the board does not have all the material facts reasonably available. The directors may be entirely blameless, but this is irrelevant: their decision was nevertheless made without all the material facts reasonably available. Accordingly, the court ought not to respect it. The directors are not personally liable in damages, but the reason

for this is not they personally did nothing wrong but that they are fully protected under Section 141(e).[73]

This shows us that the procedural and substantive aspects of *Revlon*'s objective component are independent, and a breach of either is sufficient for a court to void the board's decision. In particular, a decision by the board breaching the procedural aspect—that is, a decision made when the board has less than all the material facts reasonably available—cannot be saved even if it is substantively reasonable in light of all those facts, including those the board did not have when it made the decision. This may seem odd, but the reason is that the substantive aspect is a mild standard: the question is "whether the directors made a reasonable decision, not a perfect decision,"[74] and "[i]f a board selected one of several reasonable alternatives, a court should not second-guess the choice even though it might have decided otherwise or subsequent events have cast doubt on the board's determination."[75] Hence, a decision may be substantively reasonable under *Revlon* even though it was made without the benefit of all the material facts reasonably available. But such a decision, though substantively reasonable under *Revlon,* may not have been the decision that a fully-informed board would have made to maximize value for shareholders, which is what the shareholders are entitled to once the board's *Revlon* duties are triggered. Hence, once a decision by the directors is shown to have been made without the benefit of all the material facts reasonably available, the proof of a breach of fiduciary duty by the directors is complete and the substantive reasonability of the decision is irrelevant.

To return to *Del Monte*, having found that the plaintiffs had a reasonable probability of success on the merits, the court then turned to the other requirements for obtaining a preliminary injunction—a showing of irreparable injury if the injunction is not granted[76] and a balancing of the equities.[77] Noting that "[t]he core injury inflicted on the stockholders was Barclays' steering the deal to KKR"[78] "without meaningful competition,"[79] the court concluded that it would issue a preliminary injunction along the lines requested by the plaintiffs. In particular, the court enjoined the consummation of the merger for twenty days, during which time all of the deal protection measures in the merger agreement would be suspended—an arrangement "which should provide ample time for a serious and motivated bidder to emerge."[80]

C. Aftermath: Approval by the Shareholders and Settlement

No other suitors emerged, and on March 7, 2011, the Del Monte shareholders voted overwhelming to prove the transaction with KKR,[81] and the merger was completed.[82] Subsequently, Del Monte and Barclays settled with the shareholders and paid them $89.4 million, with Del Monte paying $65.7 million and Barclays paying $23.7 million.[83] Del Monte withheld $21 million in fees it would otherwise have owed Barclays.[84] In effect, Barclays forfeited its entire fee from the transaction.

D. Significance of the Decision and Effects on Subsequent Transactions

Barclays' misconduct was egregious. It involved breaches of elementary rules of agency law concerning loyalty of agents to principals, and for precisely this reason the *Del Monte* case breaks little new legal ground. Investment bankers may on rare occasions behave as badly as the bankers at Barclays did, and they may often be tempted to behave that badly, but they have always known that such behavior is wrong and will be punished by courts (and, of course, by boards) if it is detected. It is hardly news to the financial community, for example, that a selling company's investment banker ought not to conspire with the buyer to conceal facts about the transaction from the company's board. *Del Monte* thus reminds bankers of obligations about which they are already well aware, but the case does not create any new obligations for investment bankers or even expand any existing ones.

At the margin, however, the case deters the use of stapled financing. Nowadays, in practically every public company acquisition and especially when *Revlon* duties have been triggered, some target shareholders sue their board, and if the board authorized its banker to provide stapled financing, there will now be one more issue to litigate, for plaintiffs will undoubtedly rely on *Del Monte* to argue that the board's decision to authorize such financing was a breach of its fiduciary duties. That said, early reports that stapled financing may effectively disappear[85] have proven untrue. In appropriate circumstances, stapled financing creates value for both sellers and buyers, and so parties have continued to use it. Where the value of such financing was positive but low, however, the increased litigation risk arising from such financing may deter its use. This, of course, reduces value for both buyers and sellers.

In this regard, the opinion in *Del Monte* was somewhat unfortunate. For, no holding in the case implies that stapled financing is always bad, and Vice Chancellor Laster could have emphasized that, if a sell-side banker makes full disclosure to the selling board and the board behaves reasonably to maximize shareholder value, then neither the banker nor the board violates its fiduciary duties if the board allows the banker to provide buy-side financing. But, instead of stating clearly this undoubted point of law, the Vice Chancellor repeats the opinions of then-Vice Chancellor, now Chancellor, Leo Strine, who, in the *Toys "R" Us* case in 2005, severely criticized stapled financing even though he had found that neither the selling board nor its banker had breached their fiduciary duties.[86] In passages Vice Chancellor Laster quotes in *Del Monte*, Vice Chancellor Strine writes that the selling board's decision to allow its financial advisor to provide buy-side financing "was unfortunate, in that it tends to raise eyebrows by creating the appearance of impropriety, playing into already heightened suspicions about the ethics of investment banking firms,"[87] and it would have been "far better . . . if [the financial advisor] had never asked for permission, and had taken the position that its credibility as a sell-side advisor was too important in this case, and in general, for it to simultaneously play on the buy-side in a deal when it was the seller's financial advisor." Thus, "it might have been better . . . for the board of the Company to have declined the request."[88] These statements may or may not describe best practices in corporate control transactions (probably, they do not), but they certainly do not describe the law in Delaware.

Indeed, in Delaware law as in American law generally,

there is no absolute rule against agents acting adversely to their principals. On the contrary, the general rule is that an agent may act adversely to its principal if the principal consents to the arrangement after disclosure of all the material facts and the agent deals fairly with the principal.[89] There is no reason why this traditional principle of the common law ought not to apply to stapled financing. In fact, few principals are better able to understand the issues involved in such a decision than the independent directors of a public company. Sometimes, but not always, stapled financing creates value for both the buyer and the seller. Hence, such arrangements are sometimes good and sometimes bad, and the party best placed to decide whether such an arrangement is advisable in an individual case is the selling board, not a judge in Delaware. At some point, the *Del Monte* case ought to have been clear about that.

II. *In re El Paso Corporation Shareholders Litigation*[90]

The *El Paso* case made headlines[91] because Chancellor Strine held that Goldman, the financial advisor to the selling company, had engaged in various forms of wrongdoing that so impaired El Paso's sales process that the plaintiff shareholders were likely to prevail on the merits on their claims for breaches of fiduciary duty by the board. A closer look shows, however, that this case is nothing like *Del Monte*. In *Del Monte*, Barclays egregiously breached its fiduciary duties; in *El Paso*, Goldman did little more than have a fully-disclosed conflict of interest, which is no breach of duty at all.

A. Factual Background

El Paso was a petroleum company with two main businesses, a pipeline business and an exploration and production (E & P) business, the latter of which the El Paso board had announced it intended to spin-off.[92] The market had reacted favorably to this announcement, and El Paso expected that, after the spin-off was completed, the pipeline business standing alone would be an attractive acquisition target for several potential buyers.[93] Soon after the announcement of the spin-off, Kinder Morgan approached El Paso about acquiring the entire company.[94] Kinder Morgan was really interested only in the pipeline business and made it clear it would sell the E & P business, either before or after a transaction with El Paso closed.[95] In fact, El Paso understood quite well that, in offering to buy El Paso before the spin-off was completed, Kinder Morgan was attempting to preempt competition for the pipeline business.[96]

On August 30, 2011, Kinder Morgan offered to acquire El Paso for $25.50 per share in cash and stock,[97] but El Paso quickly rejected this offer as inadequate. Kinder Morgan then threatened to go public,[98] and the El Paso board decided to open negotiations.[99] Goldman was El Paso's long-time financial advisor and had been advising El Paso in connection with the spin-off of the E & P business, but Goldman would have a substantial conflict of interest in any transaction with Kinder Morgan because Goldman owned 19% of Kinder Morgan, had the right to name directors to two of its board seats, and participated in a group that controlled 78.4% of the company's voting power.[100] All of this was fully disclosed to El Paso's board, however, and the board and Goldman agreed that El Paso would also engage Morgan Stanley for financial and tactical advice regarding a potential sale of the company.[101]

The El Paso board made Doug Foshee, the company's chief executive officer, its primary negotiator, and Foshee soon reached a tentative agreement with Rich Kinder, Kinder Morgan's chief executive officer, pursuant to which Kinder Morgan would acquire El Paso for $27.55 per share in cash and stock, subject to further due diligence by Kinder Morgan.[102] Soon thereafter, however, Kinder Morgan backed away from the $27.55 price, claiming that it had relied upon a too bullish set of analyst projections.[103] In Chancellor Strine's words, Foshee "backed down," and "[i]n a downward spiral, El Paso ended up taking a package that was valued at $26.87" as of the signing date, comprising $25.91 in cash and stock, as well as a warrant to purchase Kinder Morgan stock valued at $0.95.[104] Nevertheless, the price still included a substantial premium above El Paso's undisturbed stock price, and after both Goldman and Morgan Stanley opined that the offer was more attractive than completing the spin-off, the board approved the transaction and entered into a merger agreement with Kinder Morgan.[105]

The agreement provided that El Paso would assist Kinder Morgan in selling the E & P business, preferably before the closing of the Kinder Morgan-El Paso transaction.[106] It also contained a standard no-shop provision prohibiting El Paso from soliciting competing bids for the company, qualified by a fiduciary out, which permitted El Paso to terminate the merger agreement to accept a superior proposal from a third party provided it paid Kinder Morgan a $650 million terminate fee.[107] This fiduciary out was not unusual in itself, for it defined a "superior proposal" as one to acquire more than 50% of El Paso's equity securities or consolidated assets. It thus permitted El Paso to terminate the agreement to sell the pipeline business (subject to a match right in favor of Kinder Morgan), because the pipeline business represented more than 50% of the company's assets, but it did not permit El Paso to terminate the agreement to sell the E & P business, because that business represented less than 50% of the company's assets.[108] Thus, if another buyer wanted to purchase just the pipeline business and Kinder Morgan did not want to match the new buyer's price, El Paso would have to pay Kinder Morgan the full $650 million termination fee, which would have aggregated about 5.1% of the equity value and 2.5% of the enterprise value of that business.[109]

B. The Court's Holdings: Four Conflicts of Interest and a Breach of Revlon

Chancellor Strine begins his analysis by stating, "Although a reasonable mind might debate the tactical choices made by the El Paso Board, these choices would provide little basis for enjoining a third-party merger approved by a board overwhelming comprised of independent directors, many of whom have substantial industry experience."[110] But, "when there is a reason to conclude that debatable tactical decisions were motivated not by a principled evaluation of the risks and benefits to the company's stockholders, but by a fiduciary's consideration of his own financial or other personal self-interests," then the result under *Revlon* may well be quite different.[111] In other words, the Chancellor's ultimate holding in favor of the plaintiffs depends on his finding that some of the fiduciaries involved

had conflicts of interests. As he puts it, "the record . . . belies [the defendants'] argument that there is no reason to question the motives behind the decisions made by El Paso in negotiating the Merger Agreement."[112] In particular, Chancellor Strine identified four conflicts of interest, including ones affecting (a) Goldman generally, (b) an individual Goldman banker, (c) Morgan Stanley generally, and (d) El Paso's CEO.

1. Goldman's Conflict of Interest

Chancellor Strine recounts at great length the undisputed facts concerning Goldman's substantial interest in Kinder Morgan, which of course aligned Goldman's financial interests with Kinder Morgan and against El Paso. The Chancellor then notes that, although "Goldman formally set up an internal 'Chinese wall' between Goldman advisors to El Paso and the Goldman representatives responsible for the firm's Kinder Morgan investment,"[113] nevertheless "Goldman still played an important role in advising the [El Paso] Board," by, for example, suggesting that the board avoid causing Kinder Morgan to go hostile and by presenting information about the value of pursuing the spin-off instead of the Kinder Morgan deal.[114] As Chancellor Strine suggests, Goldman's advice on these matters may well have been suspect, and in fact the El Paso board regarded it as such, but it is a mistake, in my view, to conclude as Chancellor Strine does that this somehow makes the El Paso board's decision after receiving this advice in any way questionable under *Revlon*.

Here, Chancellor Strine is running together the El Paso board's decision to retain Goldman as its financial advisor after learning of its conflict of interest with various decisions the board subsequently made perhaps based in part on Goldman's advice. That is, at the outset the board received full disclosure about its financial advisor's conflict of interest. At that point, the board had to decide whether to allow the agent to continue to act on its behalf, bearing in mind its divided loyalties, or to terminate the relationship with the agent and hire another. Obviously, there were costs to retaining Goldman as a financial advisor (its advice might be tainted by self-interest), but there were benefits as well because Goldman, as the long-time advisor to the company, was very familiar with its business and had already done a great deal of work on the potential spin-off, none of which was tainted by its relationship with Kinder Morgan. In the event, the board chose a middle path: keep Goldman to advise on the spin-off issues, make it set up a Chinese wall between the relevant individuals, and scrutinize Goldman's advice with a critical eye. Thus, the first issue that Chancellor Strine should have decided was whether this decision by the El Paso board to retain Goldman in a limited role was reasonable under *Revlon*. He never does so. If he had, he would have noted that, in making this decision, the board had no conflict of interest. Presumably, "[a]lthough a reasonable mind might debate" this choice, the choice "would provide little basis for enjoining a third-party merger approved by a board overwhelming comprised of independent directors, many of whom have substantial industry experience."[115] And, indeed, this seems to be what Chancellor Strine himself believed at least implicitly, because at no point in the opinion does he say that the El Paso board's decision to retain Goldman breached its *Revlon* duties.

But, once that point is settled, Goldman's conflict of interest cannot, without more, be used to attack other decisions the board made based in part on Goldman's advice. First, it cannot be that Goldman's conflict, without more, makes subsequent board decisions based on Goldman's advice unreasonable under *Revlon*. That would imply that the board may retain a conflicted advisor only if it never hears the advisor's advice, which is absurd. Nor can it be that hearing a conflicted advisor's advice is even a negative factor in determining whether a board's subsequent business decisions are unreasonable. For, the conflict obviously cannot count against the substantive reasonability of the decision, and the board's prior fully informed decision to retain a conflicted advisor settles the question of the procedural reasonability of hearing the advisor's advice, provided, of course, the board keeps in mind that the advisor has a conflict of interest (which the El Paso board seems clearly to have done). Raising the issue of the advisor's conflict in evaluating subsequent decisions by the board is thus double-counting.

But that is just what Chancellor Strine does. He argues that Goldman's fully disclosed conflict somehow tainted the process, much as Barclay's undisclosed breaches did in *Del Monte*. Hence, he says that the board's decisions "would provide little basis for enjoining . . . [the] merger," but then finds that these decisions were nevertheless unreasonable under *Revlon* because "there is a reason to conclude that debatable tactical decisions were motivated . . . by a fiduciary's consideration of his own financial or other personal self-interests."[116] What it really comes down to this is: the board made a fully informed decision to retain a conflicted financial advisor, a decision that Chancellor Strine obviously thinks was dead wrong but which he cannot seriously maintain was a breach of *Revlon*, and so when the board makes subsequent decisions which he finds debatable but also not likely on the merits to be breaches of *Revlon*, he re-raises the issue of the advisor's conflict to add to the case against these decisions and so hold that they were in fact breaches. This is not a tenable way to apply *Revlon*.

2. An Individual Goldman Banker's Conflict of Interest

Goldman's lead banker on the transaction, Steven Daniel, owned, directly and indirectly, approximately $340,000 in Kinder Morgan stock and never disclosed this fact to the El Paso board. In Chancellor Strine's view, this was "a very troubling failure that tends to undercut the credibility of his testimony and the strategic advice he gave."[117] It also led to sensational press coverage and heated denunciations of the ethics of Goldman's bankers,[118] prompting Goldman to revise its procedures for individual bankers to disclose such conflicts in the future.[119]

Now, like other agents, individual bankers should disclose material conflicts of interest to their principals, but in this case it is very unlikely that Daniel's financial interest in Kinder Morgan was material. Hence, disclosure was very likely not required under general principles of agency law, and, in any event, it is difficult to see how a rational board of directors would have regarded Daniel's interest in Kinder Morgan as important. This may seem shocking, but a moment's attention to the numbers involved shows that it is correct. For, on October 16, 2011, the date of the merger, El Paso had outstanding 771,852,913 shares of common stock.[120] Hence, every additional $0.25 that

Kinder Morgan paid per El Paso share cost Kinder Morgan in the aggregate about $193 million, or, since Kinder Morgan had outstanding on a fully diluted basis 707,001,570 shares of its common stock,[121] about $0.27 per Kinder Morgan share. Now, since Kinder Morgan shares closed at $26.89 on October 14, 2011, the last trading day before the merger was announced, Daniel's $340,000 in Kinder Morgan stock represented about 12,644 shares.[122] Therefore, each additional $0.25 that Kinder Morgan paid per El Paso share cost Daniel about $3,414, or, conversely, for each $0.25 per El Paso share that Daniel might, by nefarious means, depress the deal price, he would personally profit by about $3,414. Was this amount material to Daniel given his actual financial circumstances? Daniel heads Goldman's Houston office, and he is co-head of Goldman's global energy practice.[123] His annual compensation is not, to my knowledge, publicly disclosed, but it must be several thousand times $3,414 and probably many times the total value of his investment in Kinder Morgan. In other words, assuming Daniel has the income and wealth typical of senior bankers at Goldman, the idea that his judgment would be affected by his financial interest in Kinder Morgan is implausible. It may be politically incorrect to suggest that a $340,000 investment could be immaterial, but when this is in fact the case, it is the duty of courts to say so. Very wealthy people should not be treated worse by the legal system just because they are very wealthy.

3. Morgan Stanley's Conflict of Interest

Chancellor Strine also found that Morgan Stanley, the financial advisor El Paso engaged because of Goldman's conflict of interest, was itself subject to a conflict. Goldman, which had been engaged as the company's exclusive financial advisor in connection with the potential spin-off of the E & P business, had not agreed to give up its contractual right to its exclusive role related to that transaction (as distinct from a sale of the whole company); hence, El Paso could not pay Morgan Stanley a fee in connection with the spin-off if it ultimately chose to pursue such a transaction.[124] Accordingly, this produced an incentive structure for Morgan Stanley, in which, if it recommended a deal with Kinder Morgan, it would get its full fee of $35 million, but if recommended that El Paso pursue the spin-off, it would get nothing.[125] According to Chancellor Strine, "[t]his makes more questionable some of the tactical advice given by Morgan Stanley and some of its valuation advice, which can be viewed as stretching to make Kinder Morgan's offers more favorable than other available options."[126]

There is a surface plausibility to this argument, but given the usual way fees for investment banking advisory services are structured, the argument is plainly wrong. In the typical situation, a target company's investment banker receives a large fee (usually called a "success fee") only if the target agrees to be acquired, the fee being calculated as a percentage of the deal value. If there is no transaction, the financial advisor gets at most a modest fee plus reimbursement of its out-of-pocket expenses. The obvious virtue of this arrangement is that it incentivizes the financial advisor to get the highest price possible for the target; the obvious vice is that it incentivizes the financial advisor to approve a transaction at any price if the alternative is that no transaction at all will be completed. Everyone involved in this business fully understands this. Independent directors are appropriately wary, and bankers realize that there will reputational costs if their clients perceive them to be pushing for a suboptimal deal just to collect their success fee. El Paso's relationship with Morgan Stanley fits exactly into this pattern: Morgan Stanley got a big fee if El Paso completed a transaction with the buyer, and it got nothing otherwise. The only difference is that, in the typical case, the status quo is the buyer remaining an independent company, whereas here the status quo was that El Paso would continue with its previously announced spin-off. It is very difficult to see why this makes any difference. All of Chancellor Strine's concerns about Morgan Stanley's conflict of interest would apply *mutatis mutandis* to virtually every instance of a target company engaging a financial advisor in connection with a potential sale of the company. Accordingly, it is unclear how Morgan Stanley's compensation structure in any way supports an argument that the El Paso board breached its *Revlon* duties in relying on Morgan Stanley's advice.[127]

Moreover, Chancellor Strine's argument about Morgan Stanley falls into the same error as his argument about Goldman. That is, even if Morgan Stanley did have a serious conflict of interest, the El Paso board was fully aware of all the material facts and decided that the benefits of engaging Morgan Stanley on the agreed-upon terms outweighed the costs, and this decision by the board was in no way questionable under *Revlon*. Therefore, Morgan Stanley's conflict of interest, standing alone, cannot be used as an argument that the board's subsequent decisions based on Morgan Stanley's advice somehow breached the board's *Revlon* duties. Once a board makes a decision reasonable under *Revlon* to engage a conflicted advisor, its subsequent decisions based on advice from that advisor cannot become unreasonable under *Revlon* merely because the advisor was conflicted. But this is exactly what Chancellor Strine's argument about Morgan Stanley implies.

4. El Paso CEO's Conflict of Interest

Chancellor Strine also found that Foshee, El Paso's CEO, to whom the board entrusted the lead role in negotiating with Kinder Morgan, also had a conflict of interest. "Worst of all was that the supposedly well-motivated and expert CEO entrusted with all the key price negotiations kept from the Board his interest in pursuing a management buy-out of the Company's E & P business."[128] In particular, while negotiating the deal price with Kinder Morgan, Foshee had already started discussing a potential management buy-out of the E & P business with other senior officers of El Paso.[129] Hence, "Foshee was interested in being a buyer of a key part of El Paso at the same time he was charged with getting the highest possible price as a seller of that same asset."[130] This is important, as Chancellor Strine sees it, because "for an MBO to be attractive to management and to Kinder Morgan, not forcing Kinder Morgan to pay the highest possible price for El Paso was more optimal than exhausting its wallet, because that would tend to cause Kinder Morgan to demand a higher price for the E & P assets."[131]

For Chancellor Strine, this is uncharacteristically naïve. He seems to think that if Foshee went easy on Kinder Morgan in the negotiations to buy El Paso, Kinder Morgan would return the favor and go easy on him in negotiations to sell the E & P

business. Far more likely is that Kinder Morgan would seek the highest price available for the E & P, regardless of how Foshee negotiated. Besides, Foshee had a substantial equity interest in El Paso, and so had a large financial interest in getting the best price in a sale of the company.[132] That he would give up certain and immediate value in the sale of El Paso for the mere hope that Kinder Morgan would go easy on him to some unknowable extent in a later transaction that might or might not occur passes credibility. If Foshee was determined to lead an MBO for the E & P business after a sale of the company, he should have disclosed this to the board, but even with this fact undisclosed, his interest was so speculative that I have grave doubts that Foshee's conflict warrants voiding the board's decision to rely on him to negotiate the deal price. In any event, since Foshee was not a financial advisor, the question is beyond the scope of this article.

C. No Injunction Issued

Despite finding that plaintiffs were likely to prevail on the merits,[133] and despite going on to find that they were likely to suffer irreparable harm if the merger was not enjoined (because it was unlikely that they could collect sufficient monetary damages),[134] Chancellor Strine nevertheless declined to enjoin the merger because he held that the balance of equities did not favor issuing an injunction.[135] In so doing, he noted that there was no other transaction in the offing,[136] that the transaction with Kinder Morgan was at a substantial premium to market,[137] and that the stockholders of El Paso were free to vote down the merger if they wanted to do so.[138] Moreover, the relief that the plaintiffs requested—an injunction that would allow El Paso to shop itself either in whole or in part (in contravention of the no-shop provision in the merger agreement), allow El Paso to terminate the merger agreement without paying the termination fee if a superior proposal emerged, but also force Kinder Morgan to consummate the merger in accordance with the merger agreement if no superior offer appeared[139]—would "pose serious inequity to Kinder Morgan, which did not agree to be bound by such a bargain."[140]

D. Aftermath: Approval by the El Paso Shareholders

After Chancellor Strine declined to enjoin the merger, the El Paso shareholders overwhelmingly approved the transaction: approximately 79 percent of the company's common shares entitled to vote were voted, and of these more than 95 percent voted in favor.[141] Apparently, the company's shareholders were less concerned about the conflicts of interest identified by Chancellor Strine than Chancellor Strine was. Subsequently, without admitting any wrongdoing, Kinder Morgan paid $110 million to settle the suit, with Goldman agreeing to forgo its $20 million fee in connection with the settlement.[142]

III. Concluding Observations

Although they both involve financial advisors and were decided close in time, *Del Monte* and *El Paso* are very different cases. In *Del Monte*, an agent flagrantly breached well-understood duties of loyalty; the case is important from a legal point of view primarily because it raises the question of how breaches by the corporation's agent support setting aside decisions by the corporation's board. *El Paso*, on the other hand, did not involve any significant breaches by financial advisors of their fiduciary duties as traditionally understood. The primary question in that the case was what should be the legal effect under *Revlon* of an independent board's fully-informed decision to use a conflicted financial advisor—a question that, once asked, answers itself: none, provided that in the circumstances the board's decision was made on an informed basis and was reasonably calculated to get the best price reasonably available for the shareholders. But Chancellor Strine never formulated this question; instead, he held that various negotiating decisions made by the El Paso board breached the board's *Revlon* duties in part because they were made on the basis of advice from conflicted advisors, thus suggesting, but not holding, that a board breaches its *Revlon* duties if relies on a conflicted advisor. As I argued above, this is a mistake, for it amounts to saying that a board may engage a conflicted advisor provided that it refuses to hear that advisor's advice, which cannot possibly be right.

As to their likely effects on future deal making, *Del Monte* will reduce, but not eliminate, the use of stapled financing, which will continue to create value for both buyers and sellers in appropriate cases. *El Paso* may make selling boards and their bankers more concerned about the bankers' actual or apparent conflicts of interest, but this will be more because of the perceived hostility of courts and the risk of strike suits than on the merits. The fact that it is a significant departure from traditional principles of agency law will, in all likelihood, limit the real effects of the *El Paso* decision.

Endnotes

1 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

2 *In re* Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813 (Del. Ch. 2011).

3 A financial buyer virtually always needs debt financing to acquire a target, and sometimes a strategic buyer does as well. When this financing is arranged by the selling company's investment bank, it is called "stapled financing" because the financing is made available to potential buyers together with the opportunity to purchase the company (i.e., is "stapled" to the larger transaction). The benefits of this arrangement to the seller include a speedier negotiation and increased certainty that the transaction will be consummated. Paul Povel and Rajdeep Singh have also argued that stapled financing makes the bidding process more competitive, thus producing higher prices for sellers. Paul Povel & Rajdeep Singh, Stapled Finance, (Aug. 2007), *available at* http://finance.wharton.upenn.edu/department/Seminar/2007FALL/micro/paul-povel-micro092007.pdf.

4 In re El Paso Corporation Shareholder Litigation, 41 A.3d 432 (Del. Ch. 2012).

5 The court's opinion deciding the plaintiffs' application for a preliminary injunction is based on a limited record, and the further discovery that would have occurred had the matter come to trial could have developed facts that contradict or supplement the account described in the text, which is based on the court's factual findings made in the opinion. The reader should bear in this mind in forming judgments about the conduct of the individuals involved. *See Del Monte*, 25 A.3d at 819.

6 *Id.* at 820.

7 *Id.* at 820.

8 *Id.* at 819–820

9 *Id.* at 820.

10 *Id.* at 820–821.

11 From the outset, KKR partnered with Centerview Partners. *Id.* at 820. For simplicity I refer only to KKR throughout.

12 *Id.* at 821.

13 *Id.* at 821.

14 *Id.* at 821.

15 *Id.* at 821.

16 There are many pro-competitive justifications for private-equity firms teaming up in this way. One is that, for some large transactions, a single firm acting alone may not have enough equity capital to fund the deal. Another is that teaming allows private equity firms to invest in a larger number of portfolio companies, diversifying their investments and reducing the risk they bear.

17 *Id.* at 822.

18 *Id.* at 822.

19 *Id.* at 823.

20 *Id.* at 823.

21 *Id.* at 823. Of course, since the Del Monte board had instructed Barclays to terminate the sales process that it had begun earlier in the year, Barclays had no authority to act for Del Monte in any way and certainly no authority to consent on its behalf to the actions of KKR and Vestar that would otherwise violate the no-teaming provision. *Id.*

22 *Id.* at 823.

23 *Id.* at 823.

24 *Id.* at 823.

25 *Id.* at 824.

26 *Id.* at 824.

27 *Id.* at 824.

28 *Id.* at 825.

29 *Id.* at 825.

30 *Id.* at 825.

31 *Id.* at 825.

32 *Id.* at 826.

33 *Id.* at 825–826.

34 *Id.* at 826.

35 *Id.* at 826.

36 *Id.* at 826.

37 *Id.* at 826.

38 *Id.* at 826.

39 *Id.* at 826.

40 *Id.* at 827.

41 *Id.* at 827.

42 *Id.* at 828.

43 *Id.* at 828.

44 *Id.* at 828.

45 *Id.* at 828.

46 *Id.* at 828.

47 *Id.* at 828.

48 *Id.* at 828.

49 *Id.* at 817.

50 *Id.* at 829–830. The reader should keep in mind that this standard "falls well short of that which would be required to secure final relief following trial," *Id.* at 830 (quoting, Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 579 (Del. Ch. 1998)), and the facts as Vice Chancellor Laster found them and as described above (especially the rather unsavory actions of Barclays, KKR and some of their respective representatives) were found only to this standard and on a limited record. *See supra* note 5.

51 Although Vice Chancellor Laster's opinion does not discuss the issue, presumably Barclays' fiduciary duties, which arise from the common law of agency, run to its principal, which would be the Del Monte corporate entity, not that entity's shareholders. Hence, except in a derivative action on behalf of the corporation, the shareholders would have no standing to sue Barclays, which owned them no duties.

52 *See* Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 42-43 (Del. 1994).

53 *Id.* at 830 (quoting *QVC*, 637 A.2d at 44 (internal quotations omitted)).

54 *Id.* at 830.

55 *Id.* at 830. This formulation of the board's *Revlon* duties makes it perfectly clear that, under *Revlon*, the court reviews for reasonability not only the process of the board's decision-making (i.e., whether the board reasonably considered all the material facts reasonably available to it before deciding, as required by Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)) but also the substance of the board's decisions (which is not evaluated by the court under the ordinary business judgment rule, *see In re* Caremark International Inc. Derivative Litigation, 698 A.2d 959, 967 (Del. Ch. 1996) (Allen, C.), except for the minimal rational business purpose requirement, *see* Brehm v. Eisner, 746 A.2d 244, 246 (Del. 1998), which seems to be functionally equivalent to the corporate waste test, *Id.*).

56 Assuming, that is, that the board's decision to engage Barclays was not itself wrongful. This presents a very subtle question because some of Barclays' very questionable conduct occurred before it was engaged as the board's financial advisor, and, as Vice Chancellor Laster points out, "If the directors had known at the outset Barclays' intentions and activities, the Board likely would have hired a different banker." *Del Monte*, 25 A.3d at 833. In other words, the same distinction made the in the text—reasonability given the facts as the board understood them versus reasonability given the facts as they would have appeared to the board had Barclays been completely candid—applies even to the very decision to engage Barclays as the board's financial advisor.

57 *Del Monte*, 25 A.3d at 834.

58 *Id.* at 834.

59 The only obvious exception to this would be, presumably, if the board had concluded that it would lose the KKR bid completely if the board did not permit KKR to team with Vestar, but, at least as appears from the facts found in the court's opinion, there is little basis for thinking that this would have been the case. Moreover, because the board apparently did not consider the issue in any serious way, it apparently had no information to this effect when it made the decision to allow the pairing.

60 *Id.* at 835. Of course, one need not be a very sophisticated deal-maker to conclude that KKR does not need Barclays to fund a $5.3 billion acquisition of a public company. But, if the Del Monte directors *did* know this without having to ask, then their decision to allow Barclays to participate in providing such financing without obtaining some benefit for Del Monte in exchange becomes even more unreasonable.

61 *Id.* at 834.

62 *Id.* at 835. In addition, the court notes that, when the board allowed Barclays to provide buy-side financing, it also created the necessity of hiring another banker, at a cost to the company of $3 million, to provide an unconflicted fairness opinion. *Id.* at 834–835. The court seems to imply that the board breached its duties by making the corporation worse off solely to benefit Barclays. To the extent that the court is referring to the $3 million fee, however, this is not quite correct. For, unless Del Monte's incurring this additional $3 million liability caused KKR to reduce the price it was willing to pay (recall that, at this point, the parties had still not reached agreement on price, so this is a real possibility), the additional liability in no way harmed Del Monte's shareholders. The reason is that, although the *corporation* incurred this cost, assuming the transaction closed, the Del Monte shareholders would still receive the same cash price for their shares. Hence, unless Del Monte's incur-

ring this obligation affected the deal price, it was KKR, not the Del Monte shareholders, who would be paying for the second fairness opinion: when the deal closed, KKR would own the company, including whatever cash it had, and so the result of the company's spending $3 million for the second fairness opinion would be that KKR bought for the same price a company holding $3 million less in cash than it otherwise would have held.

63 *Id.* at 835.

64 559 A.2d 1261 (Del. 1989).

65 *Id.* at 836 (quoting Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1284 (Del. 1989)).

66 *Id.* at 818. Of course, it is not quite correct that the Del Monte board breached (the objective component) of its *Revlon* duties *only* "because it was misled by Barclays." As discussed above, the court held that the board's decision (a) to allow KKR to team with Vestar, and (b) to allow Barclays to provide buy-side financing both breached its *Revlon* duties, and these breaches were independent of Barclays' wrongdoing.

67 *Id.* at 818.

68 *Id.* at 818.

69 *In re* Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

70 Stone v. Ritter, 911 A.2d 362 (Del. 2006).

71 *See In re* Caremark International Inc. Derivative Litigation, 698 A.2d 959, 967 (Del. Ch. 1996) (referring to oversight claims as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment").

72 Graham v. Allis-Chalmers Manufacturing Co., 188 A.2d 125, 130 (Del. 1963); *see also* Caremark, 698 A.2d at 969 (discussing the ongoing validity of this holding).

73 If the corporation's certificate of incorporation incudes a 102(b)(7) provision, the directors would be protected under that provision as well.

74 QVC 637 A.2d at 45 (emphasis deleted).

75 QVC 637 A.2d at 45.

76 *In re* Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813, 837–838 (Del. Ch. 2011).

77 *Id.* at 839.

78 *Id.* at 839.

79 *Id.* at 839.

80 *Id.* at 840.

81 Form 8-K of Del Monte Foods Company (filed March 7, 2011) (stating that Del Monte's stockholders approved the merger with KKR and indicating that 149,829,208 shares voted in favor, 1,603,244 against, and 2,348,232 abstained).

82 Form 8-K of Del Monte Foods Company (filed March 8, 2011) (stating that acquisition was completed).

83 Gina Chon & Anupretta Das, *Settlement Chills Use of M&A Tactic*, Wall St. J., October 7, 2011.

84 *Id.*

85 *Id.*

86 *In re* Toys "R" Us Shareholders Litig., 877 A.2d 975, 1005-1006 (Del. Ch. 2005).

87 *Id.* at 1006 (quoted in *In re* Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813, 832 (Del. Ch. 2011).

88 *Id.* at 1006 (quoted in *Del Monte*, 25 A.3d at 832).

89 Under Section 8.03 of the Restatement (Third) of Agency (2006), an agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship, but, under Section 8.06, conduct by an agent that would otherwise violate Section 8.03 does not constitute a breach of duty if the principal consents to the conduct, provided that (a) in obtaining the principal's consent, the agent (i) acts in good faith, (ii) discloses all material facts that the agent knows, has reason to know, or should know, would reasonably affect the principal's judgment, and (iii) otherwise deals fairly with the principal. Apart from questions of emphasis, this seems little different from the traditional rule embodied in Sections 389-390 of the Restatement (Second) of Agency (1958), which provided that an agent has a duty not to deal with his principal as an adverse party in a transaction connected with this agency without the principal's knowledge (Section 389), but an agent may act as an adverse party to his principal if the agent discloses to the principal all facts the agent knows or should know would reasonably affect the principal's judgment and the agent deals fairly with the principal (Section 390).

90 *In re* El Paso Corporation Shareholders Litigation, 41 A.3d 432 (Del. Ch. 2012). As in *Del Monte*, the case came before the court on a motion for a preliminary injunction, and thus the court's decision was based on a limited record. If the matter had come to trial, further discovery could have developed facts that contradict or supplement the account described in the text, which is based on the court's factual findings made in the opinion. *Id.* at 433.

91 Steven M. Davidoff, *Goldman, on Both Sides of a Deal, Is Now in Court*, N.Y. Times Dealbook, February 7, 2012 (stating, "Goldman Sachs appears to be everywhere in a $21.1 billion buyout of a giant pipeline and energy company—or at least on every side where money can be made"); Andrew Ross Sorkin, *As an Adviser, Goldman Guaranteed Its Payday*, N.Y. Times Dealbook, March 5, 2012 (stating, "Goldman was on every conceivable side of the deal" and "[a]s a result, El Paso may have unwittingly sold itself far too cheaply"); William D. Cohan, *Wise Up on Goldman*, Bloomberg Businessweek, March 15, 2012 (stating, "Goldman's supposedly pristine reputation has always been more invented than earned").

92 *In re* El Paso Corporation Shareholders Litigation, 41 A.3d 432, 435 (Del. Ch. 2012).

93 *See id.* at 435 (discussing how Kinder Morgan was attempting to preempt competition to purchase the pipeline business).

94 *Id.* at 435.

95 *Id.* at 436.

96 *Id.* at 435.

97 *Id.* at 435.

98 *Id.* at 435.

99 *Id.* at 435. Chancellor Strine seems to think this might have been a mistake, noting that the El Paso board could have "force[d] Kinder Morgan into an expensive public struggle." *Id.* In reality, such struggles have costs for targets as well as acquirers, and reasonable businesspeople could easily differ in particular cases as to which is the value-maximizing course of action for the target. This is merely the first instance in which Chancellor Strine takes—and then pointedly expresses—a dim view of a decision by the El Paso board that, to my mind, falls clearly within the range of reasonability.

100 *Id.* at 435–436.

101 *Id.* at 436.

102 *Id.* at 436.

103 *Id.* at 436.

104 *Id.* at 436–437. Chancellor Strine thinks Foshee should have told Kinder "where to put his drilling equipment," *Id.* at 436, and demand that Kinder stand by the price they had previously negotiated. He does not say how Foshee should have responded if Kinder merely stated that he would not do so. In reality, of course, Foshee's actual choices were likely to continue negotiations at a lower price level or else to terminate negotiations.

105 *Id.* at 436.

106 *Id.* at 436.

107 *Id.* at 437.

108 *Id.* at 437.

109 *Id.* at 437.

110 *Id.* at 439.

111 *Id.* at 439.

112 *Id.* at 440.

113 *Id.* at 440.

114 *Id.* at 440.

115 *Id.* at 439.

116 *Id.* at 439.

117 *Id.* at 442.

118 *E.g.*, Matthew Philips, *Goldman's Dubious Deals: Is This 'God's Work'?*, Bloomberg Businessweek, March 7, 2012; Alison Frankel, *Tortured Opinion is Strine's Surrender in El Paso Case*, Thomson Reuter's News & Insight, March 1, 2012.

119 Gina Chon and Anupreeta Das, *Goldman Reviewing Policies on Its Deal Makers' Conflicts*, Wall St. J., March 16, 2012.

120 Section 3.2(a) of the Agreement and Plan of Merger, Dated as of October 16, 2011, among Kinder Morgan, Inc., Sherpa Merger Sub, Inc., Sherpa Acquisition, LLC, Sirius Holdings Merger Corporation, Sirius Merger Corporation, and El Paso Corporation, include as Exhibit 2.1 in Form 8-K of El Paso Corporation (filed October 18, 2011).

121 Section 4.2(a) of the Agreement and Plan of Merger, Dated as of October 16, 2011, among Kinder Morgan, Inc., Sherpa Merger Sub, Inc., Sherpa Acquisition, LLC, Sirius Holdings Merger Corporation, Sirius Merger Corporation, and El Paso Corporation, include as Exhibit 2.1 in Form 8-K of El Paso Corporation (filed October 18, 2011). References to Kinder Morgan's common stock in the text refer to Kinder Morgan's Class P common stock.

122 According to Yahoo! Finance, Kinder Morgan common shares closed at $26.89 on October 14, 2011, the last full day of trading prior to the execution of the merger agreement. Hence, $340,000 worth of Kinder Morgan stock represents approximately 12,644 shares.

123 Zachary R. Miter, *Goldman Oil Bank Montgomery Said to Leave for Buyout Job*, Bloomberg News, April 6, 2011, *available at* http://www.bloomberg.com/news/2011-04-06/goldman-oil-banker-montgomery-to-leave-said-to-plan-buyout-job.html.

124 *In re* El Paso Corporation Shareholders Litigation, 41 A.3d 432, 442 (Del. Ch. 2012).

125 *Id.* at 442. Chancellor Strine's opinion says that, in this situation, Morgan Stanley would get nothing, but in reality it was probably entitled to a very modest fee plus reimbursement of its expenses. At least that is what financial advisor engagement letters usually provide in such circumstances.

126 *Id.* at 442.

127 Given that Morgan Stanley's incentives were substantially the same as those of the typical financial advisor on the target-side of a deal, it seems especially strange that Chancellor Strine would conclude that Goldman was somehow responsible for creating Morgan Stanley's allegedly perverse incentives. See id. at 434 (asserting that Goldman "was able to achieve a remarkable feat: giving the new investment bank an incentive to favor the Merger by making sure [Morgan Stanley] only got paid if El Paso adopted the strategic option of selling to Kinder Morgan," thus "distorting the economic incentives" of Morgan Stanley). But, regrettably, Chancellor Strine's hostility to Goldman is apparent throughout the opinion. For example, in a footnote in the slip opinion, the Chancellor reproduces the script for a telephone call that Goldman's chief executive officer, Lloyd Blankfein, placed to El Paso's chief executive officer, and recounts how his clerks found it reminiscent of the lyrics of a certain popular song, from which he then quotes. *In re* El Paso Corporation Shareholder Litigation, CA No. 6949-CS (February 29, 2012), at 22 n. 43–44. This footnote was widely discussed in the press, *e.g.*, David Benoit, *Lloyd Blankfein Makes Scripted Phone Calls*, Wall St. J. Deal J., Mar. 1, 2012, but it was entirely irrelevant to the issues in the case and served no apparent purpose except to hold up to public ridicule a politically unpopular defendant. Wisely, Chancellor Strine chose to delete this footnote from the final, reported version of the opinion.

128 *El Paso*, 41 A.3d at 443.

129 *Id.* at 443.

130 *Id.* at 443.

131 *Id.* at 444.

132 According to El Paso's Definitive Proxy Statement on Schedule 14A, 170–171 (filed January 31, 2012), Foshee had restricted stock, stock options, and performance-based restricted stock units that would be worth about $25,830,411 if the merger had been consummated on October 31, 2011.

133 *Id.* at 447.

134 *Id.* at 449.

135 *Id.* at 451.

136 *Id.* at 449.

137 *Id.* at 450; *see also id.* at 435 (noting that the deal price represented a 47.8% premium over the price of El Paso stock thirty days before Kinder Morgan made its first bid).

138 *Id.* at 451.

139 *Id.* at 449.

140 *Id.* at 450.

141 Press Release of El Paso Corporation, Mar. 9, 2012, *available at* http://www.marketwire.com/press-release/el-paso-corporation-stockholders-overwhelmingly-approve-merger-with-kinder-morgan-nyse-ep-1630176.htm.

142 Jef Feeley, *Kinder Morgan to Pay $110 Million to Settle El Paso Suits*, Bloomberg, Sept. 8, 2012.

Criminal Law & Procedure

The Sex Offender Registration and Notification Act (SORNA)

An Exchange Between John Malcolm and Professors Jill Levenson and Andrew Harris***

The Sex Offender Registration and Notification Act: A Sensible and Workable Law that Helps Keep Us Safe

*By John G. Malcolm**

I. Why We Need the Sex Offender Registration and Notification Act

On December 23, 2009, 11-year-old Sarah Haley Foxwell was snatched by a nighttime intruder from her home in Wicomico County, Maryland. That intruder was Thomas Leggs, Jr., a convicted sex offender. After brutally raping her, Leggs murdered Foxwell and deposited her burned and lifeless body in a field near the Maryland–Delaware border, where it was found on Christmas Day.[1] Leggs, who was ultimately convicted of this heinous offense, was able to avoid scrutiny in Maryland because, although listed in Delaware's registry as a "high-risk" sex offender, Leggs was deemed to be "compliant" in Maryland. While it is impossible to say with any certainty, this tragic result might have been avoided had Maryland been in compliance with the Sex Offender Registration and Notification Act, which, despite strong public support, remains controversial.

II. Background of the Sex Offender Registration and Notification Act

In 1994, Congress passed the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act ("Wetterling"), which required states, the District of Columbia, and the principle territories to create sex offender registries containing information about convicted sex offenders for use by law enforcement. This act was created because of public outcry in response to a series of kidnappings and sexual assaults of minors, including 11-year-old Jacob Wetterling, a crime with remains unsolved.[2] The act required convicted sex offenders to register their addresses with local law enforcement agencies upon the completion of their custodial sentence in order to assist the authorities in monitoring offenders and apprehending known recidivists. Although Wetterling required states to establish sex offender websites, it left discretion to the states regarding which offenders to register, what information would be posted, and who could access the websites. This lack of guidance resulted in an inconsistent patchwork of state run sex offender databases that was not capable of tracking sex offenders across state lines.

In 1996, following the brutal rape and murder of 7-year-old Megan Kanka by a neighbor with two prior convictions for sex offenses (a fact which was known to law enforcement but not by the community), Congress passed Megan's Law, which required that states make their sex offender databases available to the public so that citizens could be aware of dangerous sexual predators near them and take appropriate measures to protect themselves.[3] This law, however, did not solve the problem of inconsistency among state databases that limited their utility in tracking the movements of sex offenders.

In 2006, Congress passed The Adam Walsh Child Protection and Safety Act (AWA), named after 6-year-old Adam Walsh who was kidnapped in 1981 outside a department store in Hollywood, Florida. Weeks later, Adam's severed head was found by some fishermen, and in 2008, 27 years after the crime was committed, an individual named Ottis Toole confessed to killing young Adam and at least five other victims.[4] The boy's father, John Walsh, the host of the then-popular television show "America's Most Wanted," was a strong proponent of the law and lobbied hard for its passage.

Title I of the AWA, the Sex Offender Registration and Notification Act (SORNA),[5] created the first comprehensive national system of registration for sex offenders with certain uniform, minimum standards of data (twenty data requirements in total) that must be included (i.e., name, address, social security number, date of birth, photograph, place of employment, license plate number, etc.). It establishes a baseline of information that must be included, thereby giving jurisdictions some flexibility, within limits set forth in SORNA, to supplement that information with additional information to suit the needs of the citizens living in those jurisdictions.

This change was designed to create uniformity and to prevent "jurisdiction shopping," a practice whereby sex offenders commit offenses in jurisdictions with more lenient requirements and take advantage of inconsistencies between registries to avoid detection and scrutiny.[6] There are many reported examples of "jurisdiction shopping,"[7] and tribal lands, which were not covered under Wetterling, had become safe havens for sexual predators.[8] The system allows the public, through an Internet registry, "to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user."[9]

Among other things,[10] the law separates sex offenders into three tiers based mainly on their crime of conviction and sometimes elevated by past criminal sexual convictions,[11] and establishes the frequency and length of time for which sex offenders in each tier must remain in the registration system.[12] SORNA also created a separate prosecutable offense for failure to comply with these registration requirements.[13] Tier III offenders, deemed the most dangerous and most likely to recidivate, applies to those convicted of aggravated sexual assault, contact offenses against children younger than 13 years,[14] kidnapping of minors (unless committed by a parent or guardian), and

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attempts or conspiracies associated with any of these offenses. Tier III offenders must provide quarterly, in-person reports to confirm or update their registration information for the rest of their lives.[15] Tier II offenders are those convicted of sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual conduct, use of a minor in a sexual performance, solicitation of a minor to practice prostitution, and production or distribution of child pornography. Tier II offenders must provide semi-annual, in-person reports for 25 years. Tier I is a catch-all, covering any other "sex offense" (as defined in 18 U.S.C. § 16911(5)) not covered by the higher tiers, such as possession of child pornography, most misdemeanors sex crimes, and minor sexual assaults against adults. Tier I offenders are those deemed the least dangerous and least likely to recidivate. They must provide annual, in-person updates of their whereabouts for 15 years. Both tier III juvenile sex offenders[16] and tier I sex offenders can get their registration terms reduced by several years by fulfilling the "clean record" requirement of § 115(b) of SORNA. As a general matter, jurisdictions are only required to analyze the elements of a conviction and are not required to look behind the conviction to the underlying facts of the offense (unless there is an issue pertaining to the age of the victim) to determine which tier the sex offender's conviction falls into.

The AWA also expanded the definition of "jurisdiction" beyond the states, the District of Columbia, and the five principal U.S. territories to include federally-recognized Indian Tribes. In order to comply with SORNA, virtually all of the covered jurisdictions needed to make some revisions to their existing registries and to their SORNA-related laws, and many had to make substantial revisions in order to meet these new federal requirements. States that don't comply risk losing 10% of the funding that they receive under a program called the Byrne Justice Assistance Grant, although states that lose that funding can petition to get it back if they agree to apply it towards implementing the Act. Additionally, the federal government has provided many states, tribes, and territories with substantial grants to help cover the costs of implementation. Despite these "carrots and sticks," to date, only forty-eight jurisdictions (fifteen states, two territories, and thirty-three tribes) have substantially implemented the requirements set forth in SORNA.[17]

III. SORNA Is Not a Solution in Search of a Problem, as Some Contend

Providing members of the public with information about the identities and residential locations of convicted sex offenders enables the public to avoid putting themselves in situations where they might be victimized. Heightened community awareness also increases the likelihood that the police will be notified promptly when something suspicious occurs, and notification lets the offender know that the community is watching. Notification may also reduce sex crimes that would otherwise have been committed by first-time or nonregistered sex offenders, because they are aware that their crimes and personal information about them will be made public if they are caught and convicted. Knowledge is power and parents who become aware of the presence of sex offenders in their neighborhood can take steps to avoid these neighbors altogether (or make a special effort to get to know them better before having extensive contact with them) as well as the locations where they live and work. Parents can also assist their children by providing them with a list of sensible do's-and-don'ts to stay safe, including information about people or places to avoid, and by accessing reliable websites or other resources with educational material on prevention or on what indicators to look for as a sign that a child may have been a victim of abuse.

Despite these clear benefits, there are those who contend that SORNA is a bad idea because it needlessly and unjustifiably causes panic. These critics point to a number of studies (but there is by no means a consensus) that suggest that, contrary to conventional wisdom, the recidivism rates for sex offenders are significantly lower than the recidivism rates for those who commit non-sex offenses, at least in the short term (1-5 years).[18] However, even it this were true, people who commit property offenses and drug offenders cannot be compared with sex offenders in terms of the devastating and permanent psychological and physical damage that they cause to their victims (not to mention the great psychological harm that such offenses cause to the community), the fear that they engender in the public, and, at least with respect to child molesters, the vulnerability of their victims. Therefore, the fact that recidivism rates might be higher for these categories of offenders is of little import.

SORNA's critics also argue that the negative collateral consequences caused by SORNA outweigh any advantages.[19] To be sure, there are potential negative collateral consequences that might flow from the notification requirements in SORNA. Sex offenders whose presence becomes known because of SORNA can be subjected to general harassment or even vigilantism.[20] Public knowledge of an offender's past can also make it extremely difficult for that individual to get a job and find a place to live, thereby making it more difficult for that person to reintegrate into society, which can lead to isolation and instability that some have hypothesized might increase the likelihood that such an individual might reoffend rather than become a productive member of the community.[21] People who have served their debt to society deserve the chance to live in peace, so long as they remain law abiding.

While there are costs to be sure, the benefits of SORNA outweigh these costs, particularly since the argument that sex offenders have a low level of recidivism is subject to considerable doubt. Studies do not typically differentiate among classes of sex offenders,[22] not all of whom are equally culpable or likely to re-offend, when analyzing recidivism rates. Further, while recidivism rates for sex offenders may be relatively low in the short-term, over the longer term (15 years or longer), most studies show that, while still below the rates for drug and property-related offenses, recidivism rates for sex offenders increase to levels (25% to 30% or more, according to some studies) that would and should certainly concern most people.[23]

More alarmingly, there is strong reason to believe that recidivism rates among sex offenders are likely far higher than even these statistics would suggest. Recidivism rates focus exclusively upon sex offenders who are re-arrested or, in some cases, convicted; however, such statistics do not consider the well-established fact that sexual assaults are extremely underreported

compared to other offenses.[24] This grim reality was spotlighted recently in the Jerry Sandusky case, where his molestations went unreported by his many victims for years. Many sex offenders may, in fact, be committing new crimes without being detected and which go unreported. Indeed, several studies, drawing on data from self-reports provided by sex offenders themselves, suggest that many sex offenders commit multiple offenses for which they are never charged.[25] In one such study, 120 men admitted to committing acts that met the legal definition of rape or attempted rape for which they were never charged; in total, these 120 men admitted to committing 1,225 separate acts of interpersonal violence including rape (averaging 5.8 rapes each), battery, and child physical and sexual abuse.[26] Shocking as these results may appear, other studies report results that are staggeringly higher than these figures.[27]

IV. SORNA's Objective, Offense-Based Classification System Is Helpful to Law Enforcement and to the Public and Facilitates Uniformity

One of the biggest changes and challenges brought about by SORNA was the requirement that territories adopt a system of classifying sex offenders in three categories or "tiers" based solely on their offense of conviction. Critics of the law contend that these broad categories based on past offenses, rather than individualized risk assessments, leads to registries that are over-inclusive and provide the public with little information that is useful about which offenders pose a real risk to their community. The fact that so many convicted sex offenders must now register and for such a long period of time means that sex offender registries are likely to become voluminous over time. Some members of the public may lump all sex offenders together, failing to appreciate the nuances between tier I offenders who are not likely to recidivate and tier III offenders who are highly likely to do so, which may further limit the utility of the registry.

Some reputable clinicians argue that dynamic, "empirically-derived" risk assessments, based on personal interaction with the offender and the interviewing clinician's experience, are a more accurate predictor of likelihood of recidivism for purpose of community notification than SORNA's offense-based classifications.[28] In the clinical approach, personal interviews are conducted with offenders in which they are asked a series of questions seeking, among other things, detailed information about their victimizations, their childhood behavior, their relationship with family members, and their sexual preferences. The clinician might then employ one of the many risk assessment instruments that have been developed, and which are constantly being assessed (which is a good thing), such as the Static-99R, the Static-2002R, the Sex Offender Needs and Progress Scale, the Sex Offender Treatment Intervention and Progress Scale, the Structured Risk Assessment model, and the Violence Risk Scale-Sex Offender Version, to name just a few.

Such individualized clinical assessments may be appropriate and very useful for determining appropriate forms of post-release treatment or supervision or for civil commitment determinations. However, the wisdom of using such assessments for purposes of providing a uniform, workable, and useful notification system for sex offenders is far less clear.

While the clinicians who advocate for empirically-driven risk assessments may themselves be quite experienced and skilled at conducting such interviews and may be extremely familiar with the pros and cons of the various risk assessment models, it is important to remember that, given limited resources by the states and territories that must maintain sex offender registries, it is quite likely (if not overwhelmingly likely) that the person conducting the interview with the sex offender will not possess such skills, training, experience or knowledge. In all likelihood, the interviewer will ask the offender some questions about his past conduct and future desires, which may or may not be verified, and will then have to decide whether that offender poses a continuing risk (in which case he'll be required to register) or not (in which case he won't).[29] Dynamic risk assessments are, therefore, very subjective and very dependent on the answers given by the offender himself, who may have an incentive to dissemble and who may have a distorted view of how he sees the world and how others see him.

Additionally, some studies suggest that even trained and skilled clinicians utilizing their subjective judgment can be wrong in making sexual recidivism predictions 72% to 93% of the time,[30] while others have concluded that that dynamic assessments are "unnecessary for anticipating who will recidivate in a given time period," and that "very accurate statements about the likelihood of another . . . offense can be based upon knowledge of an individual's lifetime conduct."[31] Indeed, when it comes to predicting recidivism rates for sex offenders, William Shakespeare may have been correct when he wrote "what's past is prologue . . . ."[32]

It is also important to remember that Congress passed the AWA, thereby creating a seamless national system of interconnected state registries, after it came to light that many convicted sex offenders were taking advantage of lax registration requirements in some states and inconsistencies among the states to "fall off the grid." Critics of the law who favor more flexibility in registration requirements have no answer for how such a hodge-podge system among the states would not perpetuate the "loophole" problem that existed when the law was passed and, regrettably, still exists today. Relying on objective measures of an offender's personal characteristics and prior behavior is not subject to inconsistency and may, in fact, be a more accurate predictor of future behavior. And while some studies have suggested that registration and notification requirements for sex offenders has only had a limited effect in terms of recidivism, others have concluded that such requirements do contribute to an overall reduction in recidivism rates by providing information to law enforcement officials which makes it easier for them to monitor sex offenders and apprehend them quickly if they do recidivate, and because the existence of such requirements also may deter some nonregistered would-be offenders from engaging in such conduct in the first place.[33]

Additionally, it is worth recalling that SORNA establishes a "national baseline." It creates a set of minimum standards, "a floor, not a ceiling, for jurisdictions' programs."[34] This allows jurisdictions some flexibility to develop sex-offense registries that are tailored to meet the needs of that jurisdiction's unique needs. Each jurisdiction "may extend website posting to broader classes of registrants than SORNA requires and may

post *more information* concerning registrants than SORNA and these Guidelines require."[35] If a territory prefers empirical risk assessment analyses, believing them to be more useful to the public, that jurisdiction is free to supplement its public registry with findings from those studies, so long as it provides the baseline information mandated by SORNA and so long as the risk assessment is used only to increase a sex offender's tier status and not to reduce his or her status.

V. SORNA Is a Workable and Effective Way of Addressing a Real Problem

Will SORNA stop all sexual predators from re-offending? Of course not. Many, if not most, sexual predators are immune to increased scrutiny and societal opprobrium as constraints on their behavior. To be sure, there are difficulties with SORNA that merit further study; SORNA's offense-based classifications are not perfect and may, as its critics charge, obscure some important distinctions among offenders that are germane to the continuing risks they pose. However, despite its imperfections, SORNA is a practical, workable, and effective piece of legislation that assists law enforcement and the general public alike who desire to keep themselves and their children safe from dangerous sexual predators such as Ottis Toole and Thomas Leggs.

Sir Winston Churchill once stated that "it has been said that democracy is the worst form of government except all the others that have been tried." Perhaps the same might be said of the objective, tier-based classification system set forth in SORNA. There may come a time when additional research will warrant further refinements to SORNA's registration and notification process which will make sex offender registries more useful to the public and to law enforcement while still being workable, consistent, and uniform. That day has not yet arrived, and SORNA in its present form still serves a useful purpose when it comes to aiding law enforcement and providing the public with useful information that it can use to protect itself.

Endnotes

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3 Glaberson, W., *Stranger on the Block —A Special Report; At Center of Megan's Law Case, a Man No One Could Reach*, N.Y. Times, May 28, 1996, *available at* http://www.nytimes.com/1996/05/28/nyregion/stranger-block-special-report-center-megan-s-law-case-man-no-one-could-reach.html.

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8 *See, e.g.*, Suzaianne D. Painter-Thorne, *Tangled Up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 N.M. L. Rev. 239 (2011).

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10 The AWA also enlarged the kidnapping statute, increases the number of federal capital offenses; enhanced the mandatory minimum terms of imprisonment and other penalties that attend various federal sex offenses; expanded the number of sex offenses that must be captured by registration jurisdictions to include all state, territory, tribal, federal, and Uniform Code of Military Justice sex offense convictions, as well as certain foreign convictions; established a civil commitment procedure for sex offenders deemed to be dangerous; authorized random searches as a condition for sex offender probation and supervised release; outlawed Internet trafficking of so-called date drugs; permitted the victims of state crimes to participate in related federal habeas corpus proceedings; and, eliminated the statute of limitations for certain sex offenses and crimes committed against children.

11 The definitions of tier I, tier II, and tier III sex offenders are set forth in 42 U.S.C. §§ 16911(2), (3) & (4), respectively.

12 42 U.S.C. § 16915 (2011).

13 18 U.S.C. § 2250 (2011).

14 Situations in which "the victim was at least 13 years old and the offender was not more than 4 years older than the victim" are specifically excluded from the definition of a sex offense under SORNA so as not to require registration. 42 U.S.C. § 16911(5)(C) (2011).

15 The time frames for in person verifications for offenders are set forth in

42 U.S.C. § 16916 (2011).

16 Great controversy surrounded the requirement of juveniles being required to publically register under SORNA. Initially, juveniles 14 years of age or older at the time of offense were required to register under SORNA only if they were adjudicated delinquent, tried as an adult, and if the offense they committed (or attempted or conspired to commit) would be classified as a tier III offense. However, in 2011, the Department of Justice stated that "the Attorney General has exercised his authority in these supplemental guidelines to provide that jurisdictions need not publicly disclose information concerning persons required to register on the basis of juvenile delinquency adjudications." Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1632 (Jan. 11, 2011).

17 U.S. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Jurisdictions that that substantially implemented SORNA, http://www.ojp.usdoj.gov/smart/newsroom_jurisdictions_sorna.htm (last visited on September 5, 2012).

18 *See, e.g.*, Richard Tewksbury et al, Final Report on Sex Offenders: Recidivism and Collateral Consequences (2011) (and studies cited therein), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf; Ivan Kuzyk, Recidivism among sex offenders in Connecticut, Office of Policy and Management, Criminal Justice Policy & Planning Division (2012), *available at* http://www.ct.gov/bopp/lib/bopp/sex_offender_recidivism_2012_final.pdf. *But see* Stephen Brake, Recidivism and Reoffense Rates of Adult Sex Offenders (revised in 2011), *available at* http://www.stephenbrakeassociates.com/Recid.pdf (and studies cited therein); 2011 Adult Institutions Outcome Evaluation Report, California Department of Corrections and Rehabilitation, Tables 8.2 & 9 (2011) (showing three-year recidivism rates for the following categories of sex offenders: 46.5% for "lewd act with child"; 50.5% for "sexual penetration with object"; 51.5% for "rape"; 58.7% for "oral copulation"; 71.5% for "other sex offenses" which would include unlawful sex with a minor).

19 *See, e.g.*, Brittany Enniss, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 Utah L. Rev. 697, 717 (2008).

20 *See, e.g.*, Jon Nordheimer, *'Vigilante' Attack in New Jersey Is Linked to Sex-Offenders Law*, N.Y. Times, Jan. 11, 1995, http://www.nytimes.com/1995/01/11/nyregion/vigilante-attack-in-new-jersey-is-linked-to-sex-offenders-law.html; http://www.foxnews.com/us/2012/06/05/washington-man-accused-killing-sex-offenders-allegedly-leaves-note-it-had-to-be/. SORNA attempts to ameliorate this risk, however, by providing that sex offender registry websites must include a warning that the information contained on the site "should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry" and that "such action could result in civil or criminal penalties." 42 U.S.C. § 16917(f) (2011).

21 *See, e.g.*, R.E. Freeman-Longo, Feel good legislation: Prevention or calamity, 20 Child Abuse & Neglect 95–101 (1996); R. Prentky, *Community Notification & Constructive Risk Reduction*, Association for the Treatment of Sexual Abusers Newsletter, at 9-10 (1996); Edwards, W. & Hensley, C., Contextualizing sex offender management legislation and policy: Evaluating the problem of latent consequences in community notification laws, 45 Int'l J. of Offender Therapy & Comp. Criminology 83–101 (2001); Presser, L. & Gunnison E., *Strange bedfellows: Is Sex Offender Notification a Form of Community Justice?*, 45 Crime & Delinquency 299–316 (1999). Further, many states impose additional restrictions on where convicted sex offenders can live, often prohibiting residency within a designated distance from schools, playgrounds, daycare centers, and other similar facilities where children are likely to congregate. *See, e.g.*, *Fine-Tuning Megan's Law*, N.Y. Times, July 30, 2008, http://www.nytimes.com/2008/07/30/opinion/30wed3.html?_r=1&ref=megankanka. It is worth noting, however, that, even in the absence of SORNA, sex offenders would likely be called upon to disclose their convictions when completing rental agreements, job or mortgage applications, or any of an assortment of documents that require disclosure of such information.

22 Sex offenders constitute a large group of people that include, of course, rapists and child molesters, but also include exhibitionists, voyeurs, pimps, prostitutes, those who patronize prostitutes, and those who distribute obscene material, and those who possess or distribute child pornography.

23 *See* Brake, *supra* note 18 (and studies cited therein).

24 *See, e.g.*, Shannan M. Catalano, Criminal Victimization, Bureau of Justice Statistics (2006) (suggesting that less than 39% of all rapes and sexual assaults are reported to law enforcement); U.S. Department of Justice 2005 National Crime Victimization Study (estimating that 60% of rapes go unreported); Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. of Consulting & Clinical Psychol. 162–170 (1987); Brake, *supra* note 18 (and studies cited therein).

25 *See, e.g.*, Gene Abel et al, *Self-reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. of Interpersonal Violence 3–25 (1987); Judith Becker et al, *Multiple Paraphilic Diagnoses Among Sex Offenders*, 15 Bulletin of the Am. Acad. of Psychiatry & L. 153–168 (1988); Ahlmeyer et al, *The Impact of Polygraphy on Admissions of Victims and Offenses in Adult Sexual Offenders*, 12 Sexual Abuse 123–138 (2000); English et al, *Sexual Offender Containment: Use of the Postconviction Polygraph, in* Prentky, Sexually Coercive Behavior: Understanding and Management (Janus & Seto eds., 2003); Emerick & Dutton, *The Effect of Polography on the Self-report of Adolescent Sex Offenders: Implications for risk assessment*, 6 Annals of Sex Research 84–103 (1993); Heil et al, *Crossover Sexual Offenses*, 15 Sexual Abuse 221–236 (2003); Weinrott & Saylor, *Self-report of Crimes Committed by Sex Offenders*, 6 J. of Interpersonal Violence 286–300 (1991); Cunningham-Rathner et al., *Self-reported Sex Crimes of Non-incarcerated Paraphiliacs*, 2 J. of Interpersonal Violence 3–25 (1987); Baker et al., *Calculating Number of Offenses and Victims of Juvenile Sexual Offending: The Role of Post-Treatment Disclosures*, 13 Sexual Abuse 79–90 (2001); Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 23 Crime and Delinquency 450–458 (1982); Weinrott & Saylor, *Self-report of Crimes Committed by Sex Offenders*, 6 J. of Interpersonal Violence 286–300 (1991); Zolondek et al., *The Self-reported Behaviors of Juvenile Sexual Offenders*, 16 J. of Interpersonal Violence 73–85 (2001).

26 Lisak & Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 Violence and Victims 73–84 (2002).

27 *See, e.g.*, Sher, J. & Carey, B., *Debate on Child Pornography's Link to Molesting*, N.Y. Times, July 19, 2007 (reporting on a study of 155 male inmates from the Federal Correctional Institute in Butner, N.C. who were convicted of molesting 75 identified victims but who admitted to molesting a total of 1,777 victims), *available at* http://www.nytimes.com/2007/07/19/us/19sex.html?pagewanted=all; Brake, *supra* note 18.

28 *See* R.W. Wollert, *Low Base Rates Limit Expert Certainty When Current Actuarial Tests are Used to Identify Sexually Violent Predators: An Application of Bayes's Theorem*, 12 Psychol. Pub. Pol'y, & L. 56 (2006); State of Connecticut Office of Policy and Management Criminal Justice Policy & Planning Division, Recidivism among sex offenders in

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34 U.S. Dep't of Just., The National Guidelines for Sex Offender Registration and Notification, at 6, *available at* http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

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SORNA:
Good Intentions, Flawed Policy, and Proposed Reform

*by Jill Levenson & Andrew J. Harris***

I. SORNA: Good Intentions

Sexual victimization is a profound societal issue that often goes unreported to authorities and can leave a legacy of far-reaching effects for victims, families, and communities. Though rarely publicly discussed until the 1980s, sexual abuse has emerged over recent decades as an important social problem requiring inter-disciplinary attention. Law enforcement and child protection initiatives to investigate allegations and bring perpetrators to justice have improved our response to sexual abuse, giving voices to victims and reinforcing that such crimes will not be tolerated.

One prominent feature of our society's response to sexual violence has been the creation of sex offender registries. Although systems of sex offender registration and notification began as state initiatives and still operate independently at the state level, they have been subject to increasing federal oversight and involvement. The Jacob Wetterling Act of 1994 represented the first national mandate for states to develop sex offender registries, and was amended several times over the next decade, including the 1996 passage of Megan's Law requiring states to provide public access to registration information. In 2006, The Adam Walsh Child Protection and Safety Act (AWA) introduced a comprehensive new set of federal mandates, ostensibly in an effort to establish greater uniformity and standardization across states. In contrast with most prior federal legislation, which granted states a fair degree of latitude in how to implement their registries, Title I of the AWA, the Sex Offender Registration and Notification Act (SORNA), set forth a wide array of requirements governing the structure and operation of sex offender registries for states, U.S. territories, and tribal nations. In passing SORNA, Congress invoked its spending authority as a means of compelling jurisdictional compliance—the law provided for a 10% reduction in federal Justice Assistance Grant (JAG) funding for jurisdictions not compliant with SORNA mandates.

Despite this potential funding reduction, however, the majority of covered jurisdictions have been unable or unwilling to bring their systems into SORNA compliance. As of the July 2011 compliance deadline, a total of 38 jurisdictions—fifteen states, twenty one tribal jurisdictions, and two U.S. territories—had been deemed by the U.S. Department of Justice to have substantially implemented SORNA's provisions. Pennsylvania recently became the 16th state to comply. Notably, while two of the compliant states (Florida and Michigan) are among five largest sex offender registries in the country—the remaining three states in that group (California, Texas, and New York—which together account for nearly one third of the nation's registered sex offenders) have affirmatively repudiated SORNA's mandate, suggesting that they view SORNA as a step backwards from their existing systems.

While the Department of Justice, through its Office of Sex Offender Sentencing, Monitoring, Apprehension, Registration, and Tracking (SMART), has worked diligently with covered jurisdictions to help expand the ranks of SORNA states, their work remains constrained by a federal law that is deeply in need of revision. Implementation barriers are diverse and complex, with jurisdictions identifying a range of legal, fiscal, and practical concerns and remaining wary of the law's unintended public safety impacts. This commentary delineates the shortcomings that have plagued the law since its inception, and sets forth recommendations for a more effective and responsive federal policy governing sex offender registration and notification.

II. A Consensus Does Exist

As the story of SORNA has unfolded, the debate over its future has often taken on an acrimonious and polarizing tone. SORNA's most ardent supporters, believing that their approach represents a "model" system, have often characterized those criticizing the law as advocates for sex offenders and unconcerned about the safety or children. This rhetoric, aside from impeding progress on improving the nation's sex offender registries, has obscured important areas of consensus shared by SORNA supporters and critics alike.

III. SORNA Provides Opportunities for Dialogue About Sexual Assault and Victimization

Over the past twenty years, the expansion of online registries had helped the public to become increasingly aware of convicted sex offenders living in our communities. Meanwhile, countless talk shows, crime dramas, and news outlets have addressed issues of sexual assault, using both fictionalized portrayals and accounts of real victims to share information that can lead to awareness and prevention. This expanded awareness has opened up a dialogue, facilitating discussion of the formerly taboo subject of sexual assault and victimization. Within families and communities, the dialogue has provided opportunities for parents to speak with their children about sexual abuse, remind children of appropriate boundaries, and reinforce the availability of adults to whom children can turn in times of need. At the policy level, the national discourse about sexual victimization is a healthy one that eluded public attention in previous generations. Scores of agencies, organizations, and services have been developed to promote awareness and education about sexual assault and to provide assistance for victims. Many of these services are publicly funded at the national, state, and local levels. Congress and state legislatures have recognized the need to support investigation and enforcement of sex crime laws, and to subsidize services for sexual assault victims. Grassroots efforts have sprung up in communities, in public schools, and on college campuses to educate boys and girls, men and women, about the importance of consensual sexual behavior, respectful intimate relationships, bystander responsibilities, and

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the consequences of sexual assault. Considering that policy enactment can serve to inspire and reinforce social solidarity by uniting toward a commonly accepted goal,[1] registration and notification laws send a clear message that sexual victimization will not be tolerated and that politicians are willing to address public concerns.[2]

IV. There Is Need for Standardization

It is generally acknowledged—by SORNA supporters and critics alike—that significant variation exists across state registration systems. SORNA's guidelines have attempted to bridge gaps between state laws and to provide a foundation of standardization to states' processes and procedures. There are important operational reasons for uniformity; beyond creating more consistency between states, common definitions and data collection methods can also potentially lead to better nationwide data integration. In this way, uniformity might facilitate a wealth of data regarding registrants and their offenses, leading to better understanding and management of the national sex offender population. In addition, national data can be utilized to frame public policy debates, allocation of resources, and justification for operational decisions.[3]

V. Registries Represent One Legitimate Element of a Comprehensive Sex Offender Management Policy

Without a doubt, some individuals convicted of a sexual crime pose an ongoing risk for future offending. Moreover, the ability for law enforcement, supervising authorities, and in some cases the general public to have information on the whereabouts of high risk individuals represents a valid public policy goal.

It is vital, however, to recognize two important realities related to sex offender registration and notification. First, despite the pronounced role that the registries have played in the public discourse about community management of sex offenders, they are simply one of many tools that should be deployed as part of a more comprehensive strategy. Second, the potential public safety utility of registries is related to their ability to effectively distinguish the most dangerous offenders from those who present a lesser risk. Viewed in this context, the debate over SORNA should not be thought of as questioning whether or not states should invest in improving the utility and reliability of registration and notification systems—there is a fair degree of unanimity on this point. Rather, the more fundamental issue pertains to how states might optimize the scope, reach, and discriminatory value of their registries.

VI. Flawed Policy: The Roots of Controversy

There are many reasons for SORNA's implementation difficulties, and they may be rooted largely in the circumstances and processes leading to the law's development during the 109th Congress. Following a decade of increased federal government involvement in the issue of sex offender registration and notification, the years immediately preceding AWA passage witnessed increasing news reports focused on the problem of noncompliant sex offenders and the inaccuracy of state registries. One "poster child" for these problems was Jessica Lunsford, a nine-year-old Florida girl who in 2005 was abducted from her bed, raped, and buried alive by a repeat sex offender who was not living at his registered address. Based on these reports and on testimony provided to Congress, a fairly cohesive and compelling narrative emerged—namely that the nation's sex offender registries were plagued by lax standards that could be easily exploited by sexual predators seeking to prey on children.[4]

A review of Congressional hearing transcripts from 2005 suggests that SORNA's recipe for reforming the nation's registries was driven by a limited and select circle of stakeholders holding fairly narrow assumptions about the nature of sexual offending, the problems with the nation's registries, and the formula for addressing those problems. Information provided by clinical experts, such as testimony concerning the diverse nature of the sex offender population and recidivism risk, was met with relative hostility during congressional hearings, and was largely disregarded in the final legislation. While some input may have been sought from states and tribal jurisdictions, there are no indications in the official record that state registry officials or legislators were consulted in any systematic way. Nor are there any indications of a serious attempt to analyze and understand the precise nature of the problems with registries, the scope of potential barriers to the proposed law, or the relative efficacy of alternative approaches.

VII. Will SORNA Increase Public Safety?

Over the past two decades, states have made varied choices regarding the means of classifying offenders for registration purposes, registration duration and reporting requirements, parameters of public disclosure, and the inclusion of adjudicated juveniles. These choices have been driven by a complex array of variables, including legal and organizational constraints, fiscal efficiency considerations, and the division of responsibilities among units and levels of government—factors that are highly idiosyncratic from one state to the next. Addressing variation between states has been a significant and prominent goal of SORNA. Many of the law's requirements are related to a set of minimum classification standards based exclusively on the offense of conviction and the number of prior offenses, without regard for other factors that may affect the risk of re-offense. This offense-based classification system and its related requirements governing the duration and frequency of registration as well as public disclosure have emerged as the most significant sources of resistance among the states.

Yet in repudiating SORNA's mandates, many states have asserted that, in its quest for uniformity, SORNA has compromised fundamental public safety goals. The goal of SORNA is to facilitate protection of the public from known sex offenders through increased public awareness and enhanced law enforcement monitoring. Though the research in this area is still in a nascent stage, the literature seems to support that a more refined approach to classification and public notification results in better outcomes. Most empirical investigations of registration and notification have not detected significant reductions in reoffending.[5] Notably, the two exceptions—studies that have detected a decrease in sex crime recidivism as a result of registration and

notification—were conducted in Minnesota[6] and Washington;[7] both states use empirically derived risk assessments to classify offenders and limit public notification only to those who pose the greatest threat to community safety. A national analysis examining over 300,000 sex offenses in fifteen states found that while registration with law enforcement appeared to reduce recidivistic sex offenses, public notification did not.[8]

Increased public awareness is often cited as a goal of SORNA, and most studies concur that citizens are strongly in favor of public notification.[9] Other studies have found, however, that knowledge of a sex offender living nearby does not seem to produce long-term change in protective behaviors.[10] Notification can also increase citizens' anxiety due to a lack of education and information about protecting oneself or one's children from sexual assault.[11]

In sum, the research supports a "less is more" approach—that methods limiting information disclosed to the public might actually be better aligned to the public safety goals of SORNA. While the implementation barriers to SORNA are diverse and complex, comprising a range of legal, fiscal, and practical concerns,[12] many states have resisted federalization due to a belief that their existing systems have been uniquely tailored to local needs and that state governments should be able to determine what is in the best interests of their residents. Some states have implemented more refined approaches to SORNA which utilize empirically derived risk factors to screen offenders into relative risk categories and disclose registry information to the public in a more discretionary way. These states should not be penalized for choosing not to conform to the offense-based classification system required by the Adam Walsh Act.

VIII. Does SORNA Improve Data Reliability and Consistency Between States?

Citing a range of data integrity and data consistency issues, researchers have noted the significant variability in the scope, content, and format of information contained within state registries—a factor that complicates inter-jurisdictional comparisons and challenges efforts to develop a comprehensive descriptive portrait of the nation's RSO population.[13] States that have implemented SORNA are no more immune to these problems than those that have not. Despite SORNA's intent to instill uniformity, the current guidelines simply do not address critical definitional issues that directly impact the utility of registry information for law enforcement and the general public. Consider, for instance, the concern about the nation's "100,000 missing sex offenders." It turns out that a range of designations exist across the states, that few states distinguish absconders from other types of registration violators, and that it is sometimes difficult to discern offender noncompliance from administrative inaccuracies. Labels such as "noncompliant," "delinquent," "address unknown," "whereabouts unknown," "unverified," and "homeless" or "transient" obscure the ability to determine how many offenders are truly missing.[14] SORNA guidelines do not assist states to develop a more universal array of definitions that might help create a more integrated management system.

Beyond data reliability and definitional issues, there are other factors that will continue to compromise SORNA's vision of a seamless and uniform web of state registries. First, the positioning of the guidelines as "minimum" rather than "absolute" standards means that there will continue to be some states that operate with more rigorous registration requirements than others. In turn, RSO designations (for example, tier or risk level status) will continue to have different meanings across jurisdictions. Second, and perhaps more critically, we have seen a marked policy shift in recent years related to the criteria applied in determining whether jurisdictions have met SORNA requirements. Implicitly recognizing the unique aspects of each jurisdiction's legal and operational landscape, the Department of Justice has shifted from a fairly rigid approach ("substantial compliance") to a more flexible standard ("substantial implementation"). While this shift reflects DOJ's increasing attunement to the barriers to state compliance and represents a perfectly sensible approach, it has also underscored the difficulties in establishing a uniform national system.

It has yet to be determined whether SORNA standards will improve the public safety utility of individual state registries. Though SORNA might improve some aspects of some existing state systems, there will be others for which attempts at SORNA implementation could disrupt and compromise an otherwise well-functioning process. Ultimately, the quest for consistency as envisioned in the initial SORNA legislation is emerging as an increasingly untenable goal.

IX. Evidence Can Inform Policy Initiatives

Reliability of registries involves more than simply creating replicable methods and definitions across states. It also requires that public registries provide citizens with a valid and practical means for communicating the risk an offender may pose to individuals in the community. Successful implementation of a uniform classification system requires the ability to test hypotheses about risk categories, evaluate the outcomes of new procedures, and continue to refine the process using data learned from ongoing analyses.

Recent studies have suggested that the federally-mandated system of classification based on the categories of offenses listed in the Adam Walsh Act (AWA) failed to accurately identify offenders who present significant threats to public safety and those who present lower risk. For instance, in New York, AWA tiers did a poor job of identifying sexual recidivists. In fact, lower-tiered individuals had higher recidivism rates that those who were assigned into ostensibly higher-risk tiers. Empirically derived risk factors, in contrast, were better able to predict recidivism.[15] In a four-state study, AWA tiers showed an inverse relationship with risk and recidivism, with Tier 2 offenders having higher actuarial risk assessment scores and reoffending at higher rates than Tier 3 offenders, while actuarial assessment proved to be better at identifying sexual recidivists.[16]

Research has also indicated a substantial "net-widening" effect of AWA classification, placing a significant majority of registrants into the highest risk tier.[17] This effect contradicts evidence that the highest risk of sexual re-offense is concentrated among a much smaller group of offenders.[18] Nationally, under current state classification schemes, about 14% of public reg-

istrants have been designated as high risk, predator, or sexually violent,[19] suggesting that AWA inflates risk in many cases. For instance, in Ohio, which previously classified 73% of sex offenders as "sexually oriented" lower risk offenders and 18% as habitual or predatory, the AWA reclassification assigns only 16% to the low risk category and reclassifies 40% as tier 3 offenders.[20] In Oklahoma, of 6,721 previously designated non-aggravated and non-habitual registrants, 19% were classified as Tier 1, 5% as Tier 2, and 76% as Tier 3.[21]

As more sex offenders are placed on registries, the public becomes less able to discern truly dangerous predators, and law enforcement resources are stretched thinner to monitor a much more heterogeneous population. At least 85% of registered sex offenders nationally are first time offenders with no prior sex offense.[22] In New York, 95% of all arrests for sexual offenses were found to be offenders without a prior sexual offense conviction.[23] Despite fears that most sex offenders are compulsive and repetitive, research has found that over four to six years, about 14% of more than 20,000 sex offenders in an international sample were re-arrested for a new sexual crime.[24] A 24% recidivism rate was observed over 15 years,[25] and 27% were re-arrested over 20 years.[26] It is true that arrest data naturally underestimate true re-offense rates, because some crimes are never detected or reported to authorities. The available research suggests, however, that after two decades the majority of convicted sex offenders have not re-offended. Recidivism varies with the presence of risk factors such as criminal history and victim preferences, and consideration of those factors can help identify those more likely to pose an ongoing threat to community safety.[27]

SORNA minimum standards require specific durations of registration dependent on the tier classification assigned to an offender. Tier 1 offenders (primarily misdemeanor offenders in most states) must register for ten years, Tier 2 for 25 years, and Tier 3 offenders for life. The result of this movement is a growing number of sex offender registrants and little attrition, requiring increased fiscal and personnel resources to update technology, enforce registration rules, and incarcerate violators. Research indicates, however, that risk for sexual re-offending is reduced by half if the offender has spent 5-10 years offense-free in the community, and that risk continues to decline as time offense-free in the community lengthens.[28] Furthermore, risk for sexual recidivism decreases with advancing age,[29] meaning that the aging sex offender population is likely to pose less of a threat to public safety.

Thus, it behooves us to re-think the wisdom of an over-inclusive registry and to consider the virtues of a more selective registry that targets resources toward the riskiest group of offenders. A more inclusive registry with longer durations and little attrition results in a costly and confusing conglomeration that offers little ability for the public to distinguish those who pose the greatest threat to potential victims. Over time, ever-expanding requirements—and the associated workload increases on already overburdened systems—may in fact undermine public safety by increasing the probability of administrative errors and creating an inefficient distribution of limited resources.

Does a jurisdiction's level of compliance with SORNA denote a more effective and reliable registry system? Does deviation from SORNA necessarily imply an inferior system? More broadly, do SORNA standards produce a better, more effective national system of sex offender registration and notification? SORNA's de facto position (yes, yes, and yes to the above questions) is that registry systems that place greater restrictions on larger groups of offenders are implicitly better and more effective than those that are more selective. This position follows logically from SORNA's fundamental narrative that states choosing more selective standards had established themselves as "safe havens" for sex offenders, and therefore needed to have their ways corrected through federal action. The simple and straightforward message was simple: *More is Better.*

But in reality the questions have never really been asked and answered. Do registered sex offenders systematically engage in "jurisdiction shopping" and migrate to places with less onerous registration restrictions? How is non-compliance with registration associated with increased risk of re-offense? Do states with more expansive registration laws produce better public safety outcomes? How might the contours of sex offender registration laws affect plea bargaining and other legal case processing factors? Empirically examining and answering these and similar questions—all of which relate in some way to SORNA's potential efficacy as a public policy—can help to inform the development of a national sex offender registration policy that is driven more by data than by conjecture and rhetoric.

X. Where Do We Go from Here? Considerations for Thoughtful Reform

In a key respect, the root of SORNA's implementation difficulties has been the limited evidence base in support of its core assumptions. SORNA has been based on a series of presumed "truths" about the nature of sexual offending, the motivations and behaviors of known sex offenders, and the extent and etiology of problems with the nation's sex offender registries. Few of SORNA's underlying assumptions have an empirical basis, and evidence offered in support of SORNA has often taken the form of anomalous and egregious case examples rather than results generated from systematic research.

Development of an effective national sex offender policy requires that the claims driving those policies be put forth as testable research questions, not as "self evident" statements. While it may seem that by casting a wider net, states can generate greater public safety outcomes than those using more refined approaches, no research evidence produced to date has supported this assertion. In fact, there is a compelling argument that the opposite may be true, and that identifying smaller pools of high risk offenders helps the public and law enforcement focus their attention on the more dangerous individuals. Moreover, the question remains whether states with systems that adhere more closely to SORNA standards are any more immune to administrative and operational problems than those with systems that deviate from SORNA.

There is little question that many state registry systems are in need of improvements. Yet if Congress is to continue to assert its role in the nation's sex offender policy matters, it needs

to take a fresh look at SORNA and its attendant assumptions, informed by recent experience. Congress should begin by acknowledging that an inherently superior system of registration may take a form different from SORNA as currently written, and that key stakeholders in covered jurisdictions need to have a voice in shaping public policy. State and practitioner concerns about federal intervention cannot be discounted and attributed to simple intransigence; they need to be carefully considered and integrated into cohesive policies based on greater consensus. As well, policy implementation should include a process for analysis by which strategies can be refined and enhanced based upon ongoing evaluation of progress toward measurable goals.

Developing meaningful and viable national standards requires a more inclusive process through which input is actively solicited from law enforcement and supervision professionals, state legislative representatives, researchers, and a broadly representative cross-section of the victim advocacy community. Much to its credit, the Department of Justice SMART Office has recently moved in this direction through its Sex Offender Management and Policy Initiative, which seeks to engage diverse stakeholders and promote the diffusion of more evidence-based approaches to sex offender management. In this spirit, Congress needs to follow suit by ensuring that federal laws support, rather than impede, the advancement of effective practices. Through these steps, we can begin to move toward a more cohesive, evidence-based, and realistically-implemented national sex offender registration policy.

Endnotes

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Environmental Law & Property Rights

Lenity: An Essential Rule for Interpreting Environmental Crimes Statutes

*By Roger J. Marzulla**

Unclear environmental laws and vague regulations defeat their stated purpose—environmental protection. The success of our framework of environmental laws and regulations depends on how well people follow the regulations' mandates and prohibitions. But if no one can understand them, and no one knows what is required or prohibited, these laws will not achieve their intended result. The more complex the regulatory regime, the less clear the laws and regulations, and the more difficult it is for the most well-intentioned individual to comply because he or she cannot ascertain what is expected. Imprisoning people for unintentional violation of ambiguous laws and regulations undermines the principles of fairness, due process, and respect for the law—all of which underlie the legal rule called "lenity."

The Rule of Lenity

The rule of lenity is a judicial doctrine that requires ambiguous criminal laws to be interpreted in favor of persons subjected to them.

This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.[1]

Reasons for the Rule of Lenity

- Due process: It is unfair to convict a person who cannot determine what the law requires.
- Deterrence: A person cannot act in accordance with a statute that is unclear; therefore, the statute will not have the desired deterrent effect.
- Separation of powers: Congress, and not the courts, must decide what conduct is criminal under our constitutional system.

The Rule of Lenity and Environmental Crimes

Some aspects of important environmental statutes are ambiguous. Consider, for example, the statutory definitions of "wetlands," "take" (of endangered species), or "hazardous waste," all of which have been repeatedly defined by regulations, agency interpretative memoranda, as well as often- conflicting court decisions. Consider the example given by leading environmental criminal attorney, Judson Starr:

> If [a] solvent is poured first on the machinery and then wiped with a clean rag, the rag is a hazardous waste. However, if the solvent is poured first on the rag and then is used to wipe the machinery clean, the rag is not a hazardous waste. Go figure.[2]

According to Don R. Clay, former Assistant Administrator for the EPA Office of Solid Waste and Emergency Response, only about five people in the agency actually know what a hazardous waste is.[3]

Environmental issues, which are often contentious in Congress, result in a compromise statute that is less than clear. For example, the Supreme Court has twice re-defined "navigable waters" in the Clean Water Act,[4] yet Congress has not yet mustered the support to adopt a definition.

Environmental law is often aspirational. The Clean Water Act, for example, prohibits discharge of all pollutants (even water that is cleaner than the stream it is discharged into) and required the cessation of all discharges by 1985.[5] But as of the date of this article, discharges are still occurring. This physical inability of entities to comply with certain environmental statutes and regulations breeds a level of disregard and even disrespect for environmental regulatory regimes.

Environmental protection, which requires clarity in prescribing conduct, is lost when regulated companies and individuals are convicted of acts that they could not know were criminal—or even against the law. As one federal judge stated:

> In a reversal of terms that is worthy of *Alice in Wonderland,* the regulatory hydra which emerged from the Clean Water Act mandates in this case that a land owner who places clean fill dirt on a plot of subdivided dry land may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."[6]

The Prosecution of Ambiguity

In the 1980s Congress passed laws making violation of many environmental statutes and regulations felonies, punishable by hard prison time. These crimes do not require any damage to people or the environment. In turn, EPA created its Office of Criminal Enforcement and the Justice Department created its Environmental Crimes Section, both dedicated exclusively to prosecuting such felonies. The success of these environmental crimes programs is generally measured by the number of convictions, the years in jail, and the fines that they collect.

Those who intentionally violate environmental statutes and endanger others or destroy valuable natural resources should be criminally prosecuted. But some proportion of environmental criminal prosecutions are for paperwork violations of ambiguous regulations. Although these prosecutions give the illusion of protecting the environment, they violate the rule of lenity while fostering disrespect for

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environmental protection. As one federal judge who wrestled with EPA's hazardous waste regulations finally stated: "The people who wrote this ought to go to jail. They ought not to be indicted, that's not enough."[7]

Conclusion

The rule of lenity is violated when people go to prison for breaking ambiguous laws and regulations. The imposition of fines and penalties upon those who are unable to comply with unclear regulations undermines the legitimacy of the very program it is intended to advance. This problem is particularly acute in the environmental realm.

Such prosecutions of ambiguous laws and regulations undermine the clarity and due process requirements of the rule of lenity and actually discourage citizens from complying by making it virtually impossible for them to do so.

Endnotes

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The Rule of Lenity by Jurisdiction

Jurisdiction	Status of Rule of Lenity in the Courts	Sample Case	Relevant Statutory Provisions
Alabama	Followed	*Ex parte* Bertram, 884 So.2d 889 (Ala. 2003) (applying rule of lenity).	Ala. Code § 13A-1-6: "All provisions of this title shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law . . . ."
Alaska	Followed	State v. Parker, 147 P.3d 690 (Alaska 2006) (declining to apply rule of lenity).	None
Arizona	Followed	State v. Munoz, 228 P.3d 138 (Ariz. Ct. App. 2010) (declining to apply rule of lenity).	Ariz. Rev. Stat. Ann. § 13-104: "The general rule that a penal statute is to be strictly construed does not apply to this title, but the provisions herein must be construed according to the fair meaning of their terms to promote justice and effect the objects of the law . . . ."
Arkansas	Followed	Rickenbacker v. Norris, 206 S.W.3d 220 (Ark. 2005) (declining to apply rule of lenity).	None
California	Followed	People v. Manzo, 270 P.3d 711 (Cal. 2012) (declining to apply rule of lenity).	Cal. Penal Code § 2-24(4): "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."
Colorado	Followed	People v. Simon, No. 09SC665 (Colo., Dec. 19, 2011) (declining to apply rule of lenity).	Colo. Rev. Stat. Ann. § 18-1-102: "This code shall be construed in such manner as to promote maximum fulfillment of its general purposes, namely: (a) To define offenses . . ."; (b) To forbid commission of offenses, deter them, and provide for rehabilitation; (c) Distinguish between "serious and minor offenses" and prescribe proportionate sentences; (d) Prevent arbitrariness and "oppressive treatment" of accused.
Connecticut	Followed	Castonguay v. Comm'r of Corr., 16 A.3d 676 (Conn. 2011) (declining to apply rule of lenity).	None
Delaware	Not followed	Dixon v. State, 673 A.2d 1220 (Del. 1996) (noting legislative prohibition of application of rule of lenity).	Del. Code Ann. tit. 11, § 203: "The general rule that a penal statute is to be strictly construed does not apply to this Criminal Code . . . ."
Florida	Followed	Clines v. State, 912 So.2d 550 (Fla. 2005) (applying rule of lenity).	Fla. Stat. § 775.021(1): "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."
Georgia	Followed	Woods v. State, 608 S.E.2d 631 (Ga. 2005) (declining to apply rule of lenity).	None

Jurisdiction	Status of Rule of Lenity in the Courts	Sample Case	Relevant Statutory Provisions
Hawaii	Followed	State v. Wheeler, 219 P.3d 1170 (Haw. 2009) (applying rule of lenity).	Haw. Rev. Stat. § 701-104: "[I]n order to promote justice and effect the objects of the law, all of [this Code's] provisions shall be given a genuine construction, according to the fair import of the words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."
Idaho	Followed	State v. Anderson, 175 P.3d 788 (Idaho 2008) (declining to apply rule of lenity).	Idaho Code Ann. § 73-102(1): "The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice."
Illinois	Followed	People v. Gutman, 959 N.E.2d 621 (Ill. 2011) (declining to apply rule of lenity).	720 Ill. Comp. Stat. 5/1-2: "The provisions of this Code shall be construed in accordance with the general purposes hereof, to: (a) Forbid and prevent the commission of offenses; (b) Define adequately the act and mental state which constitute each offense, and limit the condemnation of conduct as criminal when it is without fault; (c) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders; (d) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses."
Indiana	Followed	George v. Nat'l Collegiate Athletic Ass'n, 945 N.E.2d 150 (Ind. 2011) (applying rule of lenity).	Ind. Code § 35-32-1-1: "This title shall be construed in accordance with its general purposes, to: . . . (5) preserve the public welfare and secure the fundamental rights of individuals.").
Iowa	Followed	State v. Hearn, 797 N.W.2d 577 (Iowa 2011) (declining to apply rule of lenity).	None
Kansas	Followed	State v. Chavez, 254 P.3d 539 (Kan. 2011) (declining to apply rule of lenity).	None
Kentucky	Followed	Crouch v. Commonwealth, 323 S.W.3d 668 (Ky. 2010) (declining to apply rule of lenity).	Ky. Rev. Stat. Ann. § 500.030: "All provisions of this code shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law."
Louisiana	Followed	State v. Brown, 879 So.2d 1276 (La. 2004) (declining to apply rule of lenity).	La. Rev. Stat. Ann. § 14:3: "[I]n order to promote justice and to effect the objects of the law, all of [this Code's] provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."
Maine	Followed	State v. Harrell, 2012 ME 82, 45 A.3d 732 (applying rule of lenity).	None
Maryland	Followed	McCloud v. Dep't of State, Police Handgun Permit Review Bd., No. 101 (Md., May 21, 2012) (declining to apply rule of lenity).	None

Jurisdiction	Status of Rule of Lenity in the Courts	Sample Case	Relevant Statutory Provisions
	Followed	Commonwealth v. Hamilton, 945 N.E.2d 877 (Mass. 2011) (applying rule of lenity).	None
Michigan	Followed	People v. Fulton, No. 296114 (Mich. Ct. App., Mar. 10, 2011) (after acknowledging legislative prohibition of application of rule of lenity, stating that the rule applies to ambiguous statutes and therefore declining to apply it).	Mich. Comp. Laws § 750.2: "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."
Minnesota	Followed	State v. Maurstad, 733 N.W.2d 141 (Minn. 2007) (applying rule of lenity).	Minn. Stat. § 609.01: "[This chapter's] provisions shall be construed according to the fair import of its terms, to promote justice, and too effect its purposes which are declared to be: (1) to protect the public safety and welfare by preventing the commission of crime through the deterring effect of the sentences authorized, the rehabilitation of those convicted, and their confinement when the public safety and interest requires; and (2) to protect the individual against the misuse of the criminal law by fairly defining the acts and omissions prohibited, authorizing sentences reasonably related to the conduct and character of the convicted person, and prescribing fair and reasonable postconviction procedures."
Mississippi	Followed	Tipton v. State, 41 So.3d 679 (Miss. 2010) (applying rule of lenity).	None
Missouri	Followed	State v. Liberty, No. SC91821 (Mo., May 29, 2012) (applying rule of lenity).	None
Montana	Followed	State v. Pirello, No. DA 11-0480 (Mont., July 20, 2012) (declining to apply rule of lenity).	Mont. Code Ann. § 45-1-102(2): "The rule of the common law that penal statutes are to be strictly construed has no application to this code."
Nebraska	Followed	State v. Dinslage, 789 N.W.2d 29 (Neb. 2010) (declining to apply rule of lenity).	Neb. Rev. Stat. § 28-102: "The general purposes of the provisions governing the definition of offenses are: (1) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; (2) To subject to public control persons whose conduct indicates that they are disposed to commit crimes; (3) To safeguard conduct that is without fault and which is essentially victimless in its effect from condemnation as criminal; (4) To give fair warning of the nature of the conduct declared to constitute an offense; and (5) To differentiate on reasonable grounds between serious and minor offenses."
Nevada	Followed	State v. Lucero, 249 P.3d 1226 (Nev. 2011) (applying rule of lenity).	Nev. Rev. Stat. § 193.030: "Every provision of this title shall be construed according to the fair import of its terms."

Jurisdiction	Status of Rule of Lenity in the Courts	Sample Case	Relevant Statutory Provisions
New Hampshire	Followed	State v. Dansereau, 956 A.2d 310 (N.H. 2008) (applying rule of lenity).	N.H. Rev. Stat. Ann. § 625:3: "The rule that penal statutes are to be strictly construed does not apply to this code. All provisions of this code shall be construed according to the fair import of their terms and to promote justice."
New Jersey	Followed	State v. Regis, 32 A.3d 1109 (N.J. 2011) (declining to apply rule of lenity).	N.J. Stat. Ann. § 2C:1-2c: "The provisions of the code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this section and the special purposes of the particular provision involved."
New Mexico	Followed	State v. Tafoya, 237 P.3d 693 (N.M. 2010) (declining to apply rule of lenity).	None
New York	Followed	People v. Green, 497 N.E.2d 665 (N.Y. 1986) (declining to apply rule of lenity).	N.Y. Penal Law § 5.00: "The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law."
North Carolina	Followed	State v. Hinton, 639 S.E.2d 437 (N.C. 2007) (applying rule of lenity).	None
North Dakota	Followed	State v. Geiser, 763 N.W.2d 469 (N.D. 2009) (applying rule of lenity).	N.D. Cent. Code § 12.1-01-02: "[T]he provisions of this title are intended, and shall be construed, to achieve the following objectives: 1. To ensure the public safety through: a. vindication of public norms by the imposition of merited punishment; b. the deterrent influence of the penalties hereinafter provided; c. the rehabilitation of those convicted of violations of this title; and d. such confinement as may be necessary to prevent likely recurrence of serious criminal behavior. 2. By definition and grading of offenses, to define the limits and systematize the exercise of discretion in punishment and to give fair warning of what is prohibited and of the consequences of violation. 3. To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders. 4. To safeguard conduct that is without guilt from condemnation as criminal and to condemn conduct that is with guilt as criminal. 5. To prevent arbitrary or oppressive treatment of persons accused or convicted of offenses. 6. To define the scope of state interest in law enforcement against specific offenses and to systematize the exercise of state criminal jurisdiction."
Ohio	Followed	State v. Elmore, 122 Ohio St. 3d 472, 2009-Ohio-3478 (declining to apply rule of lenity).	Ohio Rev. Code Ann. § 2901.04: "[S]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."
Oklahoma	Followed	Walters v. JC Penney Co., 82 P.3d 578 (Okla. 2003) (applying rule of lenity).	None
Oregon	Not followed	State v. Partain, 239 P.3d 232 (Or. 2010) (noting legislative prohibition of application of rule of lenity).	Or. Rev. Stat. § 161.025(2): "The rule that a penal statute is to be strictly construed shall not apply to [the criminal code] or any of its provisions. [The criminal code] shall be construed according to the fair import of its terms . . . ."

Jurisdiction	Status of Rule of Lenity in the Courts	Sample Case	Relevant Statutory Provisions
Pennsylvania	Followed	Commonwealth v. Jarowecki, 985 A.2d 955 (Pa. 2009) (applying rule of lenity).	18 Pa. Stat. Ann. § 105: "The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title and the special purposes of the particular provision involved."
Rhode Island	Followed	Such v. State, 950 A.2d 1150 (R.I. 2008) (declining to apply rule of lenity).	None
South Carolina	Followed	Berry v. State, 675 S.E.2d 425 (S.C. 2009) (applying rule of lenity).	None
South Dakota	Followed	State v. Dillon, 632 N.W.2d 37 (S.D. 2001) (applying rule of lenity).	S.D. Codified Laws § 22-1-1: "The rule of the common law that penal statutes are to be strictly construed has no application to this title. All its criminal and penal provisions and all penal statutes shall be construed according to the fair import of their terms, with a view to effect their objects and promote justice."
Tennessee	Followed	State v. Marshall, 319 S.W.3d 558 (Tenn. 2010) (applying rule of lenity).	Tenn. Code Ann. § 39-11-104: "The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code."
Texas	Followed	State v. Johnson, 219 S.W.3d 386 (Tex. Crim. App. 2007) (declining to apply rule of lenity).	Tex. Penal Code Ann. § 1.05(a): "The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code."
Utah	Followed	State v. Bradshaw, 152 P.3d 288 (Utah 2006) (declining to apply rule of lenity).	Utah Code Ann. § 76-1-106: "The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of Section 76-1-104."
Vermont	Followed	State v. LaBounty, 892 A.2d 203 (Vt. 2005) (noting but not explicitly applying rule of lenity).	None
Virginia	Followed	Commonwealth v. Amerson, 706 S.E.2d 879 (Va. 2011) (declining to apply rule of lenity).	None
Washington	Followed	State v. Mandanas, 228 P.3d 13 (Wash. 2010) (declining to apply rule of lenity).	Wash. Rev. Code § 9A.04.020(2): "The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title."

Jurisdiction	Status of Rule of Lenity in the Courts	Sample Case	Relevant Statutory Provisions
West Virginia	Followed	State v. Stone, No. 11-0519 (W. Va., June 21, 2012) (applying rule of lenity).	None
Wisconsin	Followed	State v. Long, 2009 WI 36, 317 Wis. 2d 92, 765 N.W.2d 557 (declining to apply rule of lenity).	None
Wyoming	Followed	Jones v. State, 256 P.3d 536 (Wyo. 2011) (declining to apply rule of lenity).	None
District of Columbia	Followed	*In re* C.L.D., 739 A.2d 353 (D.C. 1999) (applying rule of lenity).	None
United States	Followed	Skilling v. United States, 130 S. Ct. 2896 (2010) (applying rule of lenity).	None

Intellectual Property

The America Invents Act May Be Constitutionally Infirm if It Repeals the Bar Against Patenting After Secret Commercial Use

*By Ron D. Katznelson, Ph.D.**

Note from the Editor:

This paper analyzes the constitutionality of the new conditions for patentability set forth in the recently passed America Invents Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the structure of the U.S. intellectual property system. To this end, we offer links below to various sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- America Invents Act, Pub. L. No. 112-29: http://www.govtrack.us/congress/bills/112/hr1249/text
- Implementation of the Leahy-Smith America Invents Act, House Judiciary Committee Report, Serial No. 112-128: http://judiciary.house.gov/hearings/printers/112th/112-128_74258.PDF
- Patents in the 21st Century: The Leahy-Smith America Invents Act, Westlaw Journal Expert Commentary Series: http://www.mofo.com/files/Uploads/Images/120206-Patents-21st-Century.pdf
- The America Invents Act: A Patent Law Game-Changer, The Brookings Institution, David Kappos, Director of the U.S. Patent and Trademark Office: http://www.brookings.edu/events/2011/09/30-patent-reform#ref-id=20110930_kappos

I. Introduction

The America Invents Act[1] (AIA) is perhaps the most sweeping and consequential patent legislation since 1870. It contains a provision that will become effective on March 16, 2013, but its constitutional implications have yet to be discussed. The provision sets forth new conditions for patentability provided in 35 U.S.C. § 102(a) as amended under the AIA. This paper discusses an important constitutional aspect of this provision; this paper is not about the "first-to-file" elements of § 102 under the AIA but rather it seeks to answer the following question: Does the U.S. Constitution empower Congress to grant patents to inventors on their inventions *after* they have had an *unlimited* period of exclusive commercial use of the invention? Current law bars a patent for inventions exploited commercially more than one year before the patent application date (the "grace period"); in contrast, the AIA is purported to repeal that bar for secret commercial use of the invention, where such use does not disclose the invention to the public. Inventions that easily fall into this category are methods of manufacture, process, or composition of matter which cannot be learned from the end product sold to the public.

This constitutional question has not received prior public attention because the AIA drafters did not discuss the meaning of the new § 102 until *after* the Senate voted and passed the bill (S. 23). A day after the vote, a "clarification" of the relevant provision was entered into the Congressional Record as a "colloquy"—an exchange that never actually took place on the Senate floor. The colloquy substantially changes the ordinary meaning of the statutory text to a meaning that had never been discussed publically—Senators had no opportunity to either learn of the "intended" construction or to debate it.

To be sure, some authors have not been persuaded that the courts will agree with the Senate colloquy's interpretation of the statute and have argued that the AIA does not actually repeal the bar against patenting after secret commercial use, but rather that it vitiates the one-year grace period.[2] While it is uncertain whether or not the U.S. courts would actually interpret the new statute as the colloquy intends, this paper analyzes AIA's § 102 under such a construction. Analyzing the statute under this construction is important now that the AIA's House Report actually incorporates by reference the Senate colloquy to explain the meaning of the statute[3] and because the U.S. Patent and Trademark Office (USPTO) appears to have similarly adopted that construction.[4]

After March 15, 2013 the AIA would enable companies to extend their commercial exclusivity for certain inventions indefinitely by exploiting and profiting secretly from certain technologies for years and then take out patents on these technologies for another 20 years. It would delay disclosure and abolish an essential pillar of the patent bargain established under the U.S. Constitution. The following describes why the provision would likely raise substantial constitutional challenges.

To begin, the Constitution empowers Congress to grant patents on inventions, but that authority is bounded by Article I, Section 8, Clause 8:

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> The Congress shall have 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.

That is, Congress may not amend the patent laws to secure exclusive rights that are not of "limited times" or to *retard* the "progress of the useful arts." As shown below, features of the AIA appear to exceed these constitutional limits on Congress' power.

II. The Repeal of the "Forfeiture" Bar May Exceed the "Limited Times" and "Progress" Limits on Congress' Authority

Under current law, an inventor has one year from any public or commercial use of an invention to file an application for patent on that invention, else the right to patent is forfeited. Existing patent law provides in pertinent part the following:

> 35 U.S.C. § 102 Conditions for Patentability; Novelty and Loss of Right to Patent.
> A person shall be entitled to a patent unless —
> (a)…
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

Over nearly two centuries of American jurisprudence, the meaning of the terms "public use" and "on sale" have been meticulously laid out in constitutionally-based holdings of precedential case law spanning more than 640 federal cases as reviewed in detail in two American Law Reports.[5] Under current law, a company with a new technology cannot have things both ways: the company must either file for a patent on the technology with reasonable diligence, thereby giving the public fair notice of its patent right, or else irreversibly choose to use the invention without patent protection, keeping it a trade secret. A company cannot commercially exploit the invention in secret for more than a year, and then, when commercial circumstances change, or when a leak of its secret is imminent, reconsider and seek a delayed patent right to sue competitors.

The foremost purpose of this bar is to encourage prompt disclosure and to prevent an inventor from exploiting the commercial value of an invention while *delaying* unduly the beginning of the patent term. As Judge Markey noted, "our Forefathers had some experience with that from the Guilds in Europe and did not want a secret technology. They created the patent system to encourage disclosures."[6] Thus, current law preserves several important interests. It prevents removal of inventions from the public, after the public has justifiably come to believe those inventions are freely available to all as a consequence of prolonged commercial activity, and it prevents extension of the inventor's exclusive period beyond the constitutionally-based "limited time" set by Congress.[7]

A. The "Forfeiture" Rule of Current Patent Law is Constitutionally mandated

This limit on the time to file a patent application after its first commercial exploitation is grounded in the U.S. Constitution. From the Patent Act of 1790 to the present day, any sale or public use of an article, if not closely followed by filing a patent application, has acted as a forfeiture of patent protection for any idea embodied in the article or its manufacture. The U.S. Supreme Court recognized that Article I, Section 8, Clause 8 of the Constitution vests in Congress authority, "unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown . . . It was written against the backdrop of the practices . . . of the Crown in granting monopolies to court favorites in goods or businesses which *had long before been enjoyed by the public*."[8] The Court observed that "Congress *may not* authorize the issuance of patents whose effects are . . . to restrict free access to materials *already available*."[9] The Court articulated these principles and the grounds for the "public use" and "on sale" bar more than 180 years ago in *Pennock v. Dialogue*:

> As long as an inventor keeps to himself the subject of his discovery, the public cannot be injured: and even if it be made public, but accompanied by an assertion of the inventor's claim to the discovery, those who should make or use the subject of the invention would at least be put upon their guard. But if the public, with the knowledge and the tacit consent of the inventor, is permitted to use the invention without opposition, it is *a fraud upon the public* afterwards to take out a patent.[10]

The *Pennock* decision was anchored to constitutional grounds as follows:

> While one great object was, by holding out a reasonable reward to inventors and giving them an exclusive right to their inventions *for a limited period*, to stimulate the efforts of genius; the main object [of patent law] was "to promote the progress of science and useful arts;" and this could be done best, by giving the public at large a right to make, construct, use, and vend the thing invented, *at as early a period as possible*; having a due regard to the rights of the inventor. If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should for a long period of years retain the monopoly, and make, and sell his invention publicly, and thus gather the whole profits of it, . . . and then . . . he should be allowed to take out a patent, and thus exclude the public from any farther use than what should be derived under it during [the patent term,] it would *materially retard the progress of science and the useful arts*, and give a premium to those who should be least prompt to communicate their discoveries.[11]

Thus, invoking the Constitution, *Pennock* held that an inventor could not extend the period of patent protection by postponing the application for the patent while exploiting the invention commercially. Nearly thirty years after the *Pennock* decision, the Supreme Court reiterated the constitutional grounds to the "public use" and "on sale" bar in *Kendall v. Winsor*:

> The true policy and ends of the patent laws enacted under this government are disclosed in that article of the Constitution, the source of all these laws, viz., "to promote the progress of science and the useful arts,"

> contemplating and necessarily implying their extension, and increasing adaptation to the uses of society. By correct induction from these truths, it follows that the inventor who designedly, and with the view of applying it *indefinitely and exclusively* for his own profit, withholds his invention from the public *comes not within the policy or objects of the Constitution* or acts of Congress. *He does not promote,* and, if aided in his design, *would impede, the progress of science and the useful arts*.[12]

It is important to note that the cotemporaneous meaning of the word "progress" as used in the Intellectual Property Clause was not the contemporary meaning ascribed to this term today—that of a "qualitative improvement" in technology. Rather, "progress," in this instance, means "spread," i.e. "diffusion," "distribution" or "dissemination."[13] If an inventor is allowed to patent an invention after a significant period of selling the patented product without disclosure, "progress" is retarded because a delayed patent application would delay disclosure, the public access to the inventive concepts (as opposed to the inventive product), and the ability of the public to use this knowledge.

The Framers' writings around the time of the Constitution's adoption provide strong corroboration that they viewed Congress' power "to promote the progress of the useful arts" as confined to securing exclusive rights only to inventors who are diligent and not unduly dilatory in disclosing and filing patent applications on their inventions. A common refrain that undergirds these writings is the need for caution in crafting and granting exclusive rights. First, Thomas Jefferson, having certain aversions for granting exclusive rights, recognized that "[c]onsidering the exclusive right to invention as given not of natural right, but for the benefit of society, I know well the difficulty of drawing a line between the things which are worth to the public the *embarrassment* of an exclusive patent, and those which are not."[14] Second, sometime after leaving the presidency, James Madison wrote a series of "detached memoranda," one of which states Madison's justification for the Intellectual Property Clause of the Constitution:

> Monopolies tho' in certain cases useful ought to be granted with caution, and guarded with strictness agst abuse . . . There can be no just objection to a temporary monopoly in [books and useful inventions]: *but it ought to be temporary*, because under that limitation a sufficient recompence and encouragement may be given. The limitation is particularly proper in the case of inventions, because *they grow so much out of preceding ones* that there is the less merit in the authors: and because for the same reason, the discovery *might be expected in a short time from other hands*.[15]

This excerpt demonstrates that the "sufficient recompence" Madison envisioned ought to be for *timely* disclosure of inventions in a manner that facilitates the evolving invention process about which he wrote—by securing a period of exclusive right that *matches* the temporal characteristics of sequential inventions and *commences shortly after* the invention or discovery without undue delay. What necessarily flows from Madison's constructs is as follows: because inventions "grow so much out of preceding ones" (that were *disclosed to the public*), an inventor who commercially exploits the invention in secret for years, delays related follow-up inventions and improvements by others, and thereby *retards* the "progress of the useful arts." Moreover, should an exclusive right be given to such inventor with a term *commencing* after years of secret commercial use of the invention, the delayed disclosure of the invention may constitute no real consideration or value imparted to the public because by that time, "the discovery might be expected . . . from other hands" anyway. There can be little doubt that Thomas Jefferson could *not* have meant that such a one-sided hollow "bargain" could be "worth to the public the embarrassment of an exclusive patent." As the Supreme Court observed, permitting inventors to take out patents only after years of secret commercial exclusive exploitation would frustrate Madison's vision of early disclosure as an essential element of the *sequential* invention process, extend patentees effective exclusive term beyond the "limited time" set by the patent term, and would be further inconsistent with Madison's "guarded" plan for granting exclusive rights "with strictness agst abuse."

Judge Learned Hand reviewed the law and produced a detailed analysis with an oft-cited opinion that captured the constitutional principles on the subject of secret commercialization that fails to inform the public about the invention: "[i]t is a condition upon the inventor's right to a patent that he shall not exploit his discovery competitively after it is ready for patenting; he must content himself with either secrecy or legal monopoly."[16]

B. The AIA May Contradict the U.S. Constitution by Securing to Inventors an Indefinite Period of Exclusive Right to Their Inventions

As the previous section demonstrates, the Framers recognized that the constitutional goal of "promoting the progress of the useful arts" is inextricably linked to ensuring that the exclusive right is of "limited time." If inventors are afforded unlimited or unspecified exclusive period to exploit their inventions, they would have less incentive to disclose their invention early. As of March 16, 2013, the AIA would enable companies to extend their commercial exclusivity indefinitely by exploiting and profiting secretly from certain technologies for years and then taking out patents on these technologies. By its nature, this provision is retroactive; it would also permit for the first time market incumbent companies to "evergreen" old secret technologies into a windfall of patents on subject matter for which patent protection had been previously forfeited. The AIA provides in pertinent part the following:

> 102 (a) Novelty; Prior Art.—
> A person shall be entitled to a patent unless—
> (1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention;"

First, note that in § 102(a)'s title, the phrase "loss of right to patent" found in the old statute is removed. However, the reader who cannot otherwise discern in this language an

exemption for *secret* commercial exploitation and for products that are used for commercial gain or offered for sale but do not readily reveal the invention for "reverse engineering" is by no means alone. In fact, the plain reading of new § 102 suggests otherwise—that the bar for secret commercial use is preserved and that the one-year grace period for such use prior to filing a patent application is eliminated.[17] There is much ambiguity in this language and the meaning of the new statutory term "or otherwise available to the public." Nevertheless, it is purported to repeal the meaning of the terms "public use" and "on sale" as set forth in nearly two centuries and more than 640 federal cases. This ambiguity apparently led to a Senate "colloquy" in which Senator Leahy explained:

> One of the implications of the point we are making is that subsection 102(a) was drafted in part to *do away with precedent under current law* that private offers for sale or private uses or secret processes practiced in the United States that result in a product or service that is then made public may be deemed patent-defeating prior art. *That will no longer be the case*. In effect, the new paragraph 102(a)(1) imposes an overarching requirement for availability to the public, that is a public disclosure, which will limit paragraph 102(a)(1) prior art to subject matter meeting the public accessibility standard that is well-settled in current law, especially case law of the Federal Circuit . . . ."[18]

This interpretation, however, appears contrary to the "limited time" constitutional imperative. At the time of the Framing, the word "limited," meant what it means today: "confine[d] within certain bounds," "restrain[ed]," "circumscribe[d]," or "not [left] at large."[19] The word "limited" was also used in defining the term "definite," and the antonym "unlimited" was used to define the term "discretionary."[20] It is important to recognize that the *exclusive right* which Congress is to *secure* for *limited times* to inventors is unmoored to specific administrative instruments such as patents or registrations. Because an invention that is patentable under the AIA would not have been previously known or available to the public, the inventor (or a permitted user) would necessarily be the exclusive user during the secret exploitation period, which is an exclusive period. Under the AIA, however, the *total* exclusive period that Congress will have "*secured*" for the inventor would not be "definite" or "circumscribed." It would be of an *unlimited* term because a "discretionary" decision as to when the last twenty years of the exclusive period begins—when a patent application is filed—is left to the inventor.

It is worth noting that prior to 1861, when inventors *were* accorded some discretion to extend their exclusive period, it was *after* they have made the pertinent disclosure, as Congress set a definite limit of seven years for patent extensions. In 1861, Congress amended the term of patents, from a fourteen-year term plus opportunity for a seven–year extension to a flat seventeen years with no extension permitted.[21] Clearly, providing inventors *discretion* as to the length of their exclusive period does not appear to be cabined within the constitutional framework.

III. The Illusory "Harmonization" Pretext

New § 102 under the AIA is purported to achieve a greater degree of "harmonization" with international patent laws.[22] However, while foreign patent law denies a patent on subject matter available in the prior art or in publicly available information that may be learnt from available products, pre-AIA U.S. patent law, *in addition*, identifies conditions for the "loss of right to patent" that are not based on prior art. It proscribes patenting after certain *abandonment* and *forfeiture* acts of the inventor who does not timely seek a patent after commencing with commercial exploitation of the invention. Proponents of the AIA too often glossed over these differences and conflated "prior art" that defeats a patent with inventor actions and/or inactions that *abandon* or *forfeit* the right to a patent. As explained above, these latter legal requirements are grounded in the U.S. Constitution.

Other countries' legislators are not bound by a constitution that requires that their patent system "promote the progress of useful arts" or that exclusive rights be secured to inventors for "limited time." Other countries' legislatures may have the power to favor certain activities and selected parties in a way that our Framers forbade. Within its constitutional directives "to promote the progress of useful arts," the U.S. Congress has also deemed it in the public interest to provide a robust grace period of *limited time* to allow inventors time to vet and perfect their invention by public testing and early marketing activities prior to filing an application.

Proponents of repealing the bar against patenting after secret commercial use have argued that allowing patents in such circumstances would result in disclosures that would otherwise not take place. This rationale is predicated on the fact that only inventions that are otherwise unknown to the public, despite years of secret commercial use, would be patentable. However, this argument of increased disclosure ignores the fundamentals of adaptive applicant behavior in the face of incentives to patent later—fewer disclosures will be made early and a greater portion of those disclosures made later may constitute an inadequate consideration for a patent grant because by that time, "the discovery might be expected from other hands." This shift in the timing of disclosure runs counter to the U.S. Constitutional framework under which U.S. patent applicants disclose the most,[23] a framework that produces the highest number of patents per capita in the world.[24]

The effort to shoehorn foreign patent priority concepts in order to transform a well-developed 200 year-old American patent system that has a proven record as the best in the world into foreign structures that are inconsistent with the U.S. Constitution and its laws can prove challenging, if not futile. This effort would likely be met with legal challenges on constitutional grounds.

IV. Conclusion

This paper raises the question: Does the U.S. Constitution empower Congress to grant patents to inventors on their inventions *after* they have had an *unlimited* period of exclusive commercial use of the invention? As explained above, the answer is probably *no*. In interpreting new § 102 under the AIA, courts

are likely to encounter these constitutional questions, creating substantial uncertainty. The ALR Reports[25] on cases addressing "public use" and "on sale" list sixteen Supreme Court cases, the majority of which were decided after enactment of the Patent Acts of 1839 and 1870. These Acts codified certain changes in the grace period and clarified the parties affected by the "public use" and "on sale" bar. Note that although these changes were substantially less dramatic than those made under the AIA, it took *more than two decades* of Supreme Court decisions to achieve legal certainty regarding the key aspects of "public use" and "on sale" law, wherein no further Supreme Court intervention was subsequently required for a century. Therefore, under the AIA, one should expect decades of legal uncertainty as to only one aspect of the new § 102—the clarification of the term "otherwise available to the public" and the new meaning (if any) of the terms "public use" and "on sale." One should also expect increased litigation to resolve these legal uncertainties in hundreds of Federal Circuit and Federal District court decisions that would replace the 640 decisions listed in the ALR Reports. This does not include any period during which the constitutionality of the AIA may be challenged in the courts.

Whereas U.S. courts would not be bound by the meaning given to the statute in a colloquy of two Senators after the bill's passage, it is uncertain how the new § 102 under the AIA would be interpreted. What is virtually certain, however, is that courts will be required to presume that in this statutory change, Congress "intends its amendment to have real and substantial effect."[26] While the courts must grant the AIA the full measure of deference owed to federal statutes, if a certain desired construction appears unconstitutional, as new § 102 does, the Supreme Court has explained that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[27] A "fairly possible" construction[28] that does so is one in which the terms "public use" and "on sale" have their historically accepted meanings, which in turn means that the one-year grace period is eliminated for inventions on "public use" or "on sale" prior to filing an application. Unfortunately, this likely outcome will deny inventors U.S. patent protection that would not be denied under foreign patent laws.[29]

Endnotes

1 Pub. L. No. 112-29, 125 Stat. 284–287 (2011).

2 *See* Harold C. Wegner, The "Gold Standard" Grace Period Under Fire, Paper prepared for the Fordham University School of Law Nineteenth Annual Conference, International Intellectual Property Law & Policy, (April 28-29, 2011), at 5–6, 17–24, *available at* http://fordhamipconference.com/wp-content/uploads/2011/04/Wegner.pdf; Ron D. Katznelson, Section 2 of America Invents Act: the undisclosed story of legislative obfuscation, (April 17, 2011), *available at* http://bit.ly/Public-Use.

3 H.R. Rep. No. 112-98, pt. 1, at 43 (2011) (citing 157 Cong. Rec. S1496–97 (daily ed. March 9, 2011)).

4 Examination Guidelines for Implementing the First-Inventor-to-File Provisions of the Leahy-Smith America Invents Act, 77 *Fed. Reg.* 43759, 43765 (proposed July 26, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-07-26/html/2012-17898.htm.

5 Kurtis A. Kemper, *When Is Public Use of Invention, More Than One Year Before Patent Application, for Experimental Purposes, so that 35 U.S.C.A. § 102(b) Does Not Prevent Issuance of Valid Patent*, 171 A.L.R. Fed. 39 (2010); William G. Phelps, *When does on–sale bar of 35 U.S.C.A. § 102(b), which denies patentability to invention that has been on sale for more than one year prior to date of patent application, prevent issuance of valid patent*, 155 A.L.R. Fed. 1 (2010).

6 Howard T. Markey, *Some Patent Problems*, 80 F.R.D. 203, 206 (1978) (discussing the patent bargain).

7 General Elec. Co. v. U.S., 654 F.2d 55, 61 (Ct.Cl. 1981).

8 Graham v. John Deere Co., 383 U.S. 1, 5 (1966) (emphasis added).

9 *Graham*, 383 U.S. at 6. (emphasis added).

10 Pennock v. Dialogue, 27 U.S. 1, 4 (1829) (emphasis added).

11 *Pennock*, 27 U.S. at 19 (emphasis added).

12 Kendall v. Winsor, 62 U.S. 322, 328 (citing U.S. Const. art. I, § 8, cl. 8) (emphasis added).

13 Vivian Fong, *Are We Making Progress: The Constitution as a Touchstone for Creating Consistent Patent Law and Policy*, 11 U. Pa. J. Const. L. 1163 (2009); *see also* Orrin G. Hatch & Thomas R. Lee, *To Promote the Progress of Science: The Copyright Clause and Congress' Power to Extend Copyrights*, 16 Harv. J.L. & Tech. 1 (2002-2003); Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754 (2001).

14 Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* The Writings of Thomas Jefferson (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) (emphasis added), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html.

15 James Madison, *Aspects of Monopoly One Hundred Years Ago*, 128 Harper's Mag. 489, 490 (March 1914) (emphasis added), *available at* http://books.google.com/books?id=UWICAAAAIAAJ&pg=PA489.

16 Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 520 (2nd Cir. 1946*), cert. denied*, 328 U.S. 840 (1946); *see also* Bonito Boats v. Thunder Craft Boats, 489 U.S. 141, 149 (1989) (quoting *Metallizing Engineering* with approval).

17 *See* Wegner, *supra* note 2; Katznelson, *supra* note 2. Reading the proposed statute in its plainest meaning, it appears that the Senate has created the strange result discussed in a recent brief article on the grace period. *See* Ron D. Katznelson, Section 2 of America Invents Act Will Deny Inventors U.S. Patent Protection that Would Not Be Denied Under Foreign Patent Laws, (Mar. 6, 2011) [hereinafter Katznelson, U.S. Inventors], *available at* http://bit.ly/Grace-Period-USA .

18 157 Cong. Rec. S1496 (daily ed. Mar. 9, 2011) (statement of Sen. Leahy) (emphasis added), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2011-03-09/pdf/CREC-2011-03-09-pt1-PgS1496.pdf#page=1.

19 Samuel Johnson, A Dictionary of the English Language (7th ed. 1785); *see* Thomas Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("confine[d] within certain bounds"); Webster's Third New International Dictionary 1312 (1976) ("confined within limits"; "restricted in extent, number, or duration").

20 Johnson, *supra* note 19.

21 Act of Mar. 2, 1861, ch. 88, § 16, 12 Stat. 249 (1861).

22 America Invents Act, H.R. 1249, 112th Cong. § 3(q) (2011) (Enactment "will harmonize the United States patent registration system with the patent registration systems commonly used in nearly all other countries throughout the world . . . [and will] promote a greater sense of international uniformity and certainty in the procedures used for securing the exclusive rights of inventors to their discoveries.")

23 E. Archontopoulos et al., *When small is beautiful: Measuring the evolution and consequences of the voluminosity of patent applications at the EPO*, 19 Info. Econ. & Pol'y 103, 125 (June 2007) (showing that U.S. originated patent applications have the largest average number of pages in the disclosure part of the application.)

24 Org. for Econ. Cooperation & Dev., Divided We Stand—Why Inequality Keeps Rising 96 (2011) (U.S. tops the list in Figure 1.13. Patents per capita), *available at* http://dx.doi.org/10.1787/9789264119536-5-en .

25 Kemper, *supra* note 5; Phelps, *supra* note 5.

26 Pierce County, Wash. v. Guillen, 537 U.S. 129, 145 (2003) ("[W]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect . . . That reading gives the amendment no real and substantial effect and, accordingly, cannot be the proper understanding of the statute.") (internal citations and quotations omitted); Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal citations and quotations omitted).

27 Hooper v. California, 155 U. S. 648, 657 (1895).

28 Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

29 *See* Katznelson, U.S. Inventors, *supra* note 17.

Labor & Employment Law

Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA

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Note from the Editor:

This paper analyzes the evolution of worker centers as advocates for workers' rights. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to foster further discussion and debate about the status of worker centers under U.S. labor law. To join the debate, you can e-mail us at info@fed-soc.org.

I. Introduction

The labor union, the primary collective advocate for workers' rights in the United States for more than a century, has experienced a significant decline in membership. In 2011, only 6.9%[1] of American workers in private industry were union members, compared to 9% in 2000 and 16.8% in 1983.[2] As a result of this decline, workers' rights advocates, whether part of a traditional labor union or not, have sought new and innovative means to effectuate change in the workplace.

One of the most significant examples of this effort is the development of organizations known as "worker centers." Today there are hundreds of worker centers across the country. Their structures and composition vary. Typically, they are non-profit organizations funded by foundations, membership fees and other donations, that offer a variety of services to their members, including education, training, employment services and legal advice.[3] They also advocate for worker rights generally through research, communication, lobbying and community organizing.[4] Increasingly, however, worker centers are directly engaging employers or groups of employers to effectuate change in the wages, hours, and terms and conditions of employment for their members. Indeed, when it comes to such direct engagement, these worker centers act no differently than the traditional labor organization.

Yet, few, if any of these worker centers are required to comply with the laws that regulate labor organizations—meanwhile some worker centers use these same laws to promote the rights of the workers they represent.[5] Many provisions of these laws were enacted to ensure certain minimum rights of workers *vis a vis* the organizations that represent them. Statutes like the National Labor Relations Act (NLRA)[6] and the Labor Management Reporting and Disclosure Act (LMRDA)[7] contain significant protections with respect to promotion of the principles of organizational democracy, access to basic information and promotion of a duty of fair representation.[8]

Although compliance with these laws would confer benefits upon the workers these groups represent, many are reluctant to define themselves as labor organizations because the NLRA and the LMRDA are perceived as creating an impediment to the organizational goals of these workers centers.[9] In a 2006 interview, Saru Jayarman, the Executive Director of Restaurant Opportunities Center (ROC), a worker center located in New York, said one of the primary benefits of *not* being classified as a labor organization is the ability to avoid certain legal duties associated with the union-member relationship.[10] According to Jayaraman, this includes not having to spend time and money arbitrating worker grievances because, unlike labor organizations, worker centers do not owe a duty of fair representation to workers.[11] Second, worker centers have not considered themselves to be limited by the NLRA restrictions on secondary picketing and protracted recognitional picketing, and such conduct is a common tool used by these groups to convey their message.[12]

Without the restrictions of the NLRA and LMRDA, these organizations can avoid the legal duty of accountability to the workers they represent. As will be discussed in this article, the laws that provide protections to workers *vis a vis* their labor organizations were designed precisely to establish that accountability. While some of these groups may consider it cumbersome to comply with these obligations, that burden pales in comparison to the benefits afforded to the workers.

The missions of many worker centers are often seen as being an important means of advocating on behalf of underrepresented employees who do not have access to or knowledge of the legal mechanisms to protect their rights.[13] We certainly do not take any position in this article with respect to the value these worker centers may offer to workers. However, no organization, no matter how laudable its mission, is above reproach. Just as corruption plagued the labor movement in the last century, and gave rise to the legislation that governs labor organizations and provides workers the basic protections enjoyed today, so too could similar malfeasance cloud the efforts of worker centers. Compliance with the NLRA and LMRDA serves not only as a protection for workers, but also, perhaps, as a validator of the worker centers that claim to represent them.

A goal of many worker centers is to ensure that employers

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of their members comply with the basic laws that offer protections to the workers. It is quite reasonable to expect worker centers to comply with them as well. Ultimately, the benefits of the laws that govern labor organizations flow to the workers they represent, and, as such, there seems to be no viable justification not to comply with them.

II. Previous work in this area—A continuation of the dialogue

The rapid rise of worker centers has caused them to evolve quickly. There is little scholarship or legal precedent available with respect to whether the groups qualify for treatment as labor organizations for purposes of the NLRA and LMRDA. Scholarly attention to this issue has been largely limited to two law review articles, each containing divergent views.

In 2006, attorney David Rosenfield hypothesized that most worker centers lacked sufficient interactions with employers to be considered labor organizations.[14] Rosenfeld postulated, however, that as worker centers gained strength and became more effective, they likely would qualify as labor organizations subject to regulation.[15] Three years later, a colleague of Rosenfield, Eli Naduris-Weissman, reached the opposite conclusion.[16] In his 2009 article, Naduris-Weissman concluded that the groups did not sufficiently "deal with" employers and were therefore not labor organizations. He further challenged the notion that worker centers could *ever* qualify as labor organizations because the groups did not aspire to negotiate with employers.[17]

In the few years that have followed publication of these articles, we believe Rosenfeld's predictions have come true. Worker centers have directly engaged employers on topics traditionally associated with collective bargaining, and have sought to become a significant force of change in certain work places. This article seeks to continue the dialogue started by Rosenfeld and Naduris-Weissman within the context of the rapidly evolving worker center movement.

III. The Legal Framework Governing the Rights of Workers Vis a Vis their Representatives.

A. The Origins of the Statutory Regulation of Labor Organizations

1. The Wagner Act—The Absence of Rights for Workers vis a vis their Labor Organizations

In 1935, Congress passed the Wagner Act which came to be known as the National Labor Relations Act.[18] At this time, union membership was under three million people.[19] The new law's effects were immediate and by the end of World War II, union membership grew to fifteen million.[20] During this period, labor unions requested, and largely received, significant improvements in wages and benefits.[21] However, during the post-war economic contraction employers were unwilling to continue to meet the unions' increasing economic demands.[22] The resulting conflict generated large-scale work stoppages, some of which were national in scope.[23]

Although the purpose behind the Wagner Act was "to eliminate . . . obstructions to the free flow of commerce . . . by encouraging . . . collective organizing and by protecting . . . workers[‘] full freedom of association, self-organization and designation of representatives . . . to negotiate the terms and conditions of their employment,"[24] it did not regulate the power of the labor organizations it promoted. The absence of such regulation subjected the law to criticism[25]—particularly due to incidents of corruption and undemocratic actions exhibited by some labor unions of the time.[26]

There was also another policy force pushing change. Under the structure established by the Wagner Act, when a group of employees designated a labor organization as their representative, that labor organization possessed the right to negotiate on behalf of *all* workers, including those who did not support it.[27] Union security clauses, which required employees to become and remain members of the labor organization or lose their job, were also commonplace.[28] Thus, the system accorded labor organizations tremendous power over the workers, but imposed no corresponding accountability.[29]

2. The Taft-Hartley Amendments – The Creation of Basic Rights for Workers vis a vis Labor Organizations

Concern about the power of labor organizations grew swiftly following World War II.[30] This led to the introduction of the Taft-Hartley Act, which later became the Labor Management Relations Act of 1947.[31] A major goal of the legislation was to provide workers the same protections from labor organizations that the Wagner Act offered from employers.[32]

Congress's intentions were clear. The Senate Report stated, "the freedom of the individual workman should be protected from duress by the union as well as from duress by the employer."[33] The House Report echoed this sentiment, saying "the American workingman had been deprived of his dignity as an individual . . . cajoled, coerced, and intimidated . . . in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act . . . .His whole economic life has been subject to unregulated monopolists."[34]

The Taft-Hartley Act was designed to protect employees from the labor organizations that represented them by defining and outlawing a series of unfair labor practices.[35] Protections included a prohibition on a labor organization's restraint and coercion of employees in the exercise of rights guaranteed to them by Section 7, which includes the right to form, join, or decline to join a labor organization of their own choosing for purposes of collective bargaining.[36] Another section prohibited labor organizations from causing an employer to discriminate against a worker because of the worker's support for a rival labor organization or none at all, or because the employee had been denied membership in the labor organization for any reason other than the failure to tender periodic dues and initiation fees.[37] The amendments also imposed an affirmative duty on labor organizations to bargain collectively with the employer in good faith,[38] created a variety of unfair labor practices related to secondary activity,[39] prohibited the assessment of excessive dues and fees on workers,[40] and outlawed the practice of "featherbedding," in which a labor organization causes an employer to pay for work not performed.[41]

The Taft-Hartley Act also created protections for workers from collusion between labor organizations and employers. The legislation added Section 302 to the NLRA which outlawed employer payments to labor organizations except under a few

limited situations, and similarly banned labor organizations from demanding or accepting such payments.[42] Examples of these exceptions included the payment of dues deducted from employee wages, and contributions to trust funds created for the sole benefit of employees, such as pension or health and welfare funds.[43]

Finally, the Taft-Hartley Act contained a new Section 9(f) which provided that no labor organization could take advantage of the rights and protections afforded to them by the statute unless they had filed a copy of their constitution and bylaws with the Secretary of Labor.[44] Labor organizations also were required to file with the Secretary of Labor a report containing the name and address of the labor organization; the names, compensation and allowances of its three principal officers; the manner in which the officials were elected, appointed or otherwise selected; applicable initiation fees; and a detailed statement outlining the procedures and limitations on membership, election of officers or stewards, the calling of meetings, levying of assessments, imposition of fines, authorization for bargaining demands, ratification of contract terms, authorization of strikes, authorization for disbursement of union funds, audits of financial transactions, participation in insurance or other benefit plans and the expulsion of members and the grounds therefore.[45] While this provision may have been influenced in part by the anti-communist tone of the day (Section 9(h) was included to require officers of labor organizations to file affidavits denouncing communism), it was also grounded in concerns about misuse of the labor organization's funds and power.[46] Ultimately, these requirements were not included in Taft-Hartley, but did eventually become law in the Landrum Griffin Act of 1959.[47]

3. Continued Concern and Labor Union Corruption

Even with the limitations on unions and protections for workers offered by the Taft-Hartley Act, significant public concern remained over the lack of oversight of labor organizations.[48] Neither the Wagner Act nor the Taft-Hartley Act addressed the internal affairs of labor organizations.[49] This concern prompted a series of hearings by the Senate Select Committee on Improper Activities in the Labor or Management Field, popularly known as the McClellan Committee.[50] In preparation for the hearings, the McClellan Committee:

> [C]ompiled a monumental record of wrongdoing on the part of certain labor unions and their officers; of coercion of employees and smaller employers through the use of secondary boycotts, hot cargo agreements, and organizational picketing; and of shady dealings and interference with employees' rights by certain 'middlemen' serving as management consultants.[51]

During its two-year investigation, the McClellan Committee documented corruption in a number of prominent labor organizations.[52] The McClellan Committee, which conducted one of the first televised congressional hearings, introduced dozens of witnesses to testify about "fraudulent union elections, pilfered union treasuries, employer-union collusion at the expense of rank and file members and . . . other unsavory tales."[53] The investigations exposed situations where many leaders of labor organizations remained in power by threatening dissenters with expulsion.[54] The McClellan hearings also made clear to the Committee, and the public in general,[55] that there was an abuse of power by labor organizations at the expense of the workers they purported to represent. [56]

4. The Landrum-Griffin Act

The McClellan Committee's first interim report stressed the need for federal regulations to require honest representation for each member of a labor organization.[57] Another conclusion reached in the Committee's report was that labor organizations lacked the democratic procedures necessary to protect the rights of members.[58] Labor organizations with established democratic procedures held their leaders accountable to members in a meaningful way.[59]

The McClellan Committee sparked the debate over further regulation of the structure of labor unions, and ultimately spawned the Landrum-Griffin Act, or the Labor Management Reporting and Disclosure Act of 1959.[60] During floor debates, Senator McClellan compared union members to individual citizens and emphasized that they should have the same protections from labor organizations that citizens receive from the government.[61] He remarked:

> It is through unionization and bargaining collectively that [the worker] is able to make himself heard at the bargaining table. It seems clear, therefore that this justification becomes meaningless when the individual worker is just as helpless within his union as he was within his industry, when the tyranny of the all-powerful corporate employer is replaced with the all-powerful labor boss. The worker loses either way.[62]

McClellan emphasized that because labor organizations had rights over workers vested in them by the federal government, they should represent workers in accordance with democratic principles and offer workers the basic rights of liberty, freedom and justice.[63]

Congress created Title I of the LMRDA, often referred to as the Worker Bill of Rights, to specifically address issues of organizational democracy and basic member protections.[64] The Bill of Rights contained a variety of provisions designed to safeguard certain fundamental rights of workers.[65] These included provisions granting equal rights and privileges to all union members to nominate and elect representatives of their choosing and to attend membership meetings and participate in deliberations of the labor organization;[66] granting members the freedom to assemble and to express their views, arguments, or opinions to other members and during meetings of the labor organization;[67] protecting members from increases in dues or initiation fees without majority approval;[68] and providing due process protections for members in disciplinary matters including requiring the labor organization to inform members of any disciplinary charges against them and grant members a reasonable time to prepare a defense prior to a full and fair hearing.[69] Title I further required labor organizations to retain copies of all collective bargaining agreements and to make them available for review by any member or by any employee whose rights are affected by such agreement.[70] Finally, the Bill of Rights gave members the right to pursue civil enforcement of the statute's

protections in federal court.[71]

Title II of the LMRDA required labor organizations to disclose information to members regarding the financial condition of the organization, as well as financial information concerning its officials.[72] Title II also required labor organizations to have a constitution and by-laws containing requirements for membership, regular meetings, censure and removal of union officers, and provisions for how the organization's funds may be spent.[73] In addition to promoting transparency and protecting workers' rights to fair elections of union officials, the disclosure requirements imposed by Title II were also intended to have a deterrent effect on the misuse of an organization's funds.[74] The rationale behind these requirements was that financial disclosure promoted transparency and membership knowledge of a labor organization's affairs—this, in turn, would enable members to exercise their rights of voting and free speech.[75] The McClellan Committee believed officers of labor organizations would be less likely to embezzle or misuse union funds if the organization's finances were documented in reports available to the public.[76] Title II required labor organizations to report this information to the Department of Labor's Office of Labor Management Standards (OLMS) by submitting various disclosure forms, including the LM-1 and LM-2.[77] Those reports are available for review through the OLMS.[78] Title II also granted members, but not the public, the right to inspect and verify records that support an organization's reports to the Department of Labor.[79]

In addition to the protections described above, Title IV of the LMRDA established rules that require secret ballot elections of officers and required that they occur every five years for national and international labor organizations, and every three for local ones.[80]

Title V created a fiduciary duty for union officers and employees to union members regarding the organization's money and property.[81] It required union officers to hold the union's money solely for the benefit of the organization and refrain from "holding or acquiring any pecuniary or personal interest which conflicts with the interest of such organization."[82]

Finally, the legislation amended the National Labor Relations Act to include section 8(b)(7), which imposed a limitation on picketing for organizational or recognitional purposes by a union for more than 30 days if it has not filed a petition with the NLRB to represent the workers.[83] Congress believed that protection was necessary to prevent labor organizations not elected by a majority of workers from forcing their representation on employees.[84]

B. The "Labor Organization" under the NLRA and LMRDA

1. The NLRA Definition of "Labor Organization"

Section 2(5) of the NLRA defines "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[85] Courts and the NLRB have broadly construed this definition.[86] To fall within the coverage of the NLRA, a group such as a worker center must satisfy each element of the definition.

The first element of the test is whether the group constitutes an "organization." The concept of an organization has been construed broadly, and a group will be found to be an "organization" even if it lacks any formal structure, does not elect officers, or meet regularly.[87]

A second element of the test is whether employees participate in the organization.[88] The definition of an organization is broad, and includes any group of employees.[89] Similarly, the definition of employee is also broad. However, there are several express exemptions.[90] One that is particularly relevant to the worker center movement[91] is the "agricultural laborer."[92] In defining that term, the NLRB and the courts apply Section 3(f) of the Fair Labor Standards Act (FLSA).[93] The FLSA defines "agriculture" to include farming operations, such as the cultivation and tillage of the soil, dairying, the production and harvesting of any agricultural or horticultural commodities, the raising of livestock or poultry, and any practices performed on a farm as an incident to or in conjunction with such farming operations.[94] The party asserting the exemption bears the burden of establishing that workers are engaged in direct farming operations.[95] To the extent they are engaged in processing or other indirect operations associated with farming, they are not agricultural laborers.[96]

Where an organization represents *only* agricultural laborers, it does not represent employees as defined by the NLRA and, therefore, is not a labor organization.[97] The statute does not, however, have a de minimis standard. If an organization enjoys the participation of *any* employee covered by the NLRA, it will be deemed a "labor organization" subject to the NLRA.[98]

The final component of the labor organization definition under the NLRA is whether the group "exists in whole or part for the purposes of dealing with employers."[99] Within the context of the worker center movement, this clause has generated significant debate.[100] The analysis can be broken down into two parts—"dealing with" and "exists in whole or part for the purpose of."

The concept of "dealing with" has been the subject of extensive litigation. One thing is clear: the phrase is far broader than collective bargaining in the traditional sense. When the Senate debated definitions in the original draft of the Wagner Act, the Secretary of Labor recommended "dealing with" be replaced with "bargaining collectively."[101] That recommendation was rejected in favor of broader language.[102] The Supreme Court considered the legislative history of the definition in *NLRB v. Cabot Carbon Co.*[103] and held that "dealing with" was not synonymous with the term "bargaining with."[104]

The NLRB has also developed a significant body of law surrounding these two words, and has reached the same conclusion.[105] Most of the analysis arises within the context of employer dominated unions or employee committees established for the purpose of regularly meeting with management to discuss matters of employee interest.[106] Section 8(a)(2) of the NLRA, makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[107]

"The [NLRB] has explained that 'dealing with' contem-

plates 'a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in section 2(5), coupled with real or apparent consideration of those proposals by management.'"[108] For example, where an organization makes recommendations to an employer regarding policies and employment actions, and the employer responds to the demand, the Board will find the "dealing with" requirement satisfied,[109] however, there generally needs to be more than a one-time communication with an employer over a discrete issue.[110]

With respect to the second part of the analysis, "which exists for the purpose, in whole or in part," it is the *intent* of the organization that controls. If the group *intends* to deal with the employer, it satisfies the requirement even if there is no dealing at all.[111] To that end, the NLRB has found groups of employees to be labor organizations where they sought to "deal with" an employer but never managed do so.[112] The mere making of demands, even if those demands never amount to anything, is evidence that a group's purpose is to "deal with" an employer.[113] Such demands need not be of much significance to satisfy the requirement. For example, the NLRB has found that refusing to work with an unpopular employee is evidence of an intent to "deal with" because it amounts to "asserting a grievance and seeking to effect a change in their working conditions."[114]

2. The NLRB's Limited Treatment of Worker Centers

The NLRB has had limited occasion to address how worker centers fit into the definition of a Section 2(5) labor organization. While there have been a number of cases addressing incipient labor unions,[115] few have involved advocacy groups such as worker centers. Cases that do exist show the principal criteria necessary to satisfy the "dealing with" prong is intent. If the group's intent is to address topics such as wages, hours, and terms and conditions of employment with an employer, it is likely to be found a labor organization.

In a case from the early 1970's, an organization known as the Center for United Labor Action (CULA) interceded in a dispute between a traditional labor union and manufacturer.[116] CULA, referred to as a "protest group," engaged in boycotts, protests and other actions designed to persuade retailers to cease selling products manufactured by the employer involved in the dispute.[117] The employer filed a charge with the NLRB claiming CULA was a labor organization and was engaged in an unlawful secondary boycott.[118] The NLRB concluded that CULA was not a labor organization under the NLRA because the organization never "*sought* to deal directly with employers concerning employee labor relations matters."[119] The Board concluded that because CULA was affecting a social cause and did not seek to directly engage the employer on terms and conditions of employment, it did not exist for the purpose of "dealing with" the employer.[120]

Similarly, in the late 1970's the NLRB considered whether a chapter of the "9 to 5" group was a labor organization under Section 2(5), and concluded that it was not for much the same reason.[121] In that case, the Administrative Law Judge wrote that "an organization which exists for the purpose of assisting women workers, among others, 'in their asserted struggle against organizations which are adversely affecting their rights and interests' but *eschews* a collective-bargaining role is not a labor organization within the meaning of the Act."[122]

Yet, in a series of NLRB Advice Memoranda[123] issued around the same time, the NLRB's General Counsel considered the subject and concluded that in order for a group to be deemed to exist for the purpose of "dealing with" an employer, it merely needs to express intent to do so.[124] For example, in *Blue Bird Workers Committee*, the Division of Advice concluded that a group known as the Blue Bird Workers Committee (BBWC), which was comprised of former Blue Bird employees acting independent of any official organized labor organization, was a labor organization.[125] The reasoning distinguished groups such as CULA and 9 to 5, which picketed or handbilled for the purpose of supporting a general social cause, from the BBWC, which engaged in conduct intended to persuade the employer to adopt certain terms and conditions of employment advocated by the worker group.[126] It concluded the group existed for the purpose of "dealing with" employers because "it is clear that BBWC [was] attempting to achieve these employment-related aims not simply by picketing and handbilling but also by *communications* and *discussions* with [the employer]."[127]

In another case, *Acme/Alltrans Strike Committee*, the Division of Advice opined that a group of former employees picketing an employer constituted a labor organization because the purpose of the pickets was to pressure the employer into dealing with and hiring the picketers.[128] The Committee "was *attempting* to deal with" the employer, and even though it had no communications with the employer other than mere picketing, it was still considered by the Division of Advice to be a 2(5) labor organization.[129] "[T]he absence of any evidence that the Committee had any communication with any of the employers involved in the case or that it intended to engage in collective bargaining with . . . any . . . employer is not dispositive of its status as a labor organization."[130]

In *Protesting Citizens and its Agent Elvin Winn*, the Division of Advice concluded that a group of unemployed workers who picketed an employer's worker site, met with the employer on four separate occasions, and convinced the employer to pay union scale wages and benefits and to hire several picketers was a labor organization.[131] According to the General Counsel, the failure of an organization "to concern itself with negotiating a collective bargaining agreement or with all subjects listed in Section 2(5) is not dispositive of its status as a labor organization."[132] Moreover, the fact that the group in this case "may have sought to rally public opinion in support of its activities does not alter the fact that it also existed for the purpose, at least in part, of dealing with employers over Section 2(5) matters."[133]

In *Michael E. Drobney, an Agent of Laborers Local 498 (T.E. Ibberson)*, the Division of Advice opined that a group of job applicants who picketed an employer in hopes the employer would hire them was not a labor organization because there was no evidence the applicants actually wanted the employer to deal with them as a group, but simply hire them.[134]

Finally, in his 2006 article, Rosenfield looked at the NLRB's treatment of this subject and noted the inherent contradiction between the "dealing with" requirement of the definition and the clause "exists, in whole or part, for the purposes of" dealing with the employer.[135] As Rosenfield explained, the wording of this provision suggests that worker centers do

not have to successfully negotiate with employers in order to be labor organizations, so long as *a* purpose of the group is to deal with employers.[136]

3. Restaurant Opportunity Center—The NLRB's Narrow Interpretation of the Definition of a Labor Organization

In 2006, the NLRB Division of Advice again visited the issue of whether a worker center is a Section 2(5) labor organization when it considered charges filed against Restaurant Opportunity Center of New York (ROC-NY), a worker center focused on employees in the restaurant industry.[137] In that case, the Division of Advice concluded that ROC-NY was not a labor organization.[138] In reaching this conclusion, the Division of Advice analyzed the very narrow issue of "whether, in its role as legal advocate, ROC-NY's attempt to settle employment discrimination claims has constituted 'dealing with' the Employers over terms and conditions of employment."[139] This narrow analysis by the Division of Advice disregarded certain well-established elements of the test which, had they been considered, would have likely resulted in the opposite conclusion.

At the time the charges were filed, ROC-NY was engaged in a campaign against restaurants in New York City with the goal of improving working conditions of those who worked in those restaurants.[140] In conjunction with those efforts, ROC-NY filed EEOC charges and a lawsuit in which it alleged a variety of claims.[141] It was its activities in furtherance of settlement that were the focus of the Division of Advice's analysis: "The parties' discussions were limited to settling legal claims raised by employees,"[142] and while those discussions may have taken place over a period of time, they "were limited to a single context or a single issue – resolving ROCNY's attempts to enforce employment laws."[143]

The Division of Advice concluded that ROC-NY met all the criteria necessary to be a Section 2(5) labor organization, but found insufficient evidence to show a purpose of the group was to deal with employers.[144] Applying the test to determine whether ROC-NY met the "dealing with" prong of the test, the Division of Advice concluded that the communications were isolated instances of exchanging proposals, focused on settling the discrimination claims raised by employees.[145] The opinion explained that the discussions between the parties were limited to issues raised in the lawsuit and there was no evidence the parties would continue to negotiate after its resolution.[146] Because ROC-NY was not a labor organization, it followed that the group's activities did not violate the NLRA.[147]

In reaching its conclusion, the Division of Advice overlooked a crucial piece of the analysis—intent.[148] One commentator, Professor Michael C. Duff, described this omission as an "infirmity" in the analysis because of "its focus on the functional relationship between ROC-NY and the few employers involved in specific cases rather than on ROC-NY's overall purpose."[149] He wrote that "the primary consideration in assessing . . . a labor organization's NLRA status would appear to revolve around its *purpose*, which was not the General Counsel's focus in the memorandum."[150] Specifically, he cited the group's stated accomplishments of conducting campaigns and negotiating settlements that, among other things, involved '"compensation for discrimination, paid vacations, promotion, the firing of an abusive waiter, and a posting in the restaurant guaranteeing workers the right to organize and the involvement of ROC-NY in the case of any future discrimination.'"[151] As such, he postulated that ROC-NY's own publicity raised doubts about whether it was not a Section 2(5) labor organization. [152]

A second flaw in the Division of Advice's analysis noted by Professor Duff was the fact that the settlements consisted of "open-ended, future-oriented terms concerning promotions, workplace language issues and a fully functional arbitration process."[153] In most litigation under federal and state discrimination or wage payment statutes, relief is typically limited to monetary damages and attorneys' fees.[154] Yet, according to Eli Weissman-Nussbaum, the settlements[155] included a promotion policy, wage increases, and the requirement that "the restaurant give ROC-NY's lawyers three days' notice when it wishes to fire an employee so that ROC-NY can assess whether the motive is prohibited retaliation."[156] Those provisions were in addition to payment of money to the eight workers, which presumably constituted settlement of the damages portion of the lawsuit.[157] Not only did the settlement appear to make the claimants whole, but the broad additional provisions also modified terms and conditions of employment for all employees employed by the restaurant at the time of resolution and into the future. These broad-based approaches to the terms and conditions of employment are more akin to modifying working conditions for workers generally, than they are to remedying a past harm.[158]

Ultimately, the Advice Memorandum involving ROC-NY displayed how simple it is for a worker center to engage in activities that satisfy the third prong of the Section 2(5) test. Both Professor Duff and Naduris-Weissman have acknowledged this reality.[159] Indeed, one commentator has even gone so far as to conclude that ROC-NY has crossed that threshold because "[t]hey do indeed raise grievances with particular employers on behalf of particular employees."[160] A worker center's Section 2(5) status is defined in "terms of purpose,"[161] and it seems clear that a purpose of ROC-NY was to deal with employers, even if that dealing was done under the auspices of resolution of litigation. Had the NLRB's Division of Advice looked at ROC-NY within the context of its overall actions, and not merely through the narrow lens it used, it is highly likely that the outcome would have been consistent with earlier opinions by the office, as well as existing Board law.

4. The LMRDA—A Broader Definition of a Labor Organization

The definition of a labor organization under the LMRDA is far broader than that under the NLRA. The LMRDA definition appears in two subsections of the statute, Section 3(i) and 3(j).[162] Section 3(i) defines a labor organization as any organization:

> engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates

of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.[163]

Section 3(j) provides five examples of organizations that qualify as labor organizations.[164] A labor organization shall be deemed to be engaged in an industry affecting commerce if it:

1. is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

2. although not certified, is national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

3. has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

4. has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

5. is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.[165]

Congress defined labor organizations under the LMRDA broadly "to provide comprehensive coverage of groups engaged *in any degree* in the representation of employees or administration of collective bargaining agreements."[166] If an organization represents its members in any manner regarding grievances, labor disputes, or terms or conditions of employment, regardless of the organization's formal attributes or the nature of the exchange with the employer, it will meet the definitional requirements of the LMRDA.[167] For example, in *Donovan v. National Transient Division*,[168] the 10th Circuit Court of Appeals concluded that a local union representing transient employees that held few in person meetings and had no collective bargaining agreements was a labor organization subject to LMRDA.[169] In this situation, rather than seeking to negotiate a collective bargaining agreement, the organization sought to address isolated issues on behalf of their members.[170] The court was satisfied that the conduct met the "dealing with" standard.[171]

The LMRDA and its implementing regulations are very clear with respect to the intent to bring within the ambit of the statute *all* organizations not expressly excluded from coverage.[172] Labor organizations that represent agricultural workers,[173] workers covered under the Railway Labor Act,[174] and others in industries where the NLRB has not exercised jurisdiction, are subject to the LMRDA. For example, in *Stein v. Mutual Clerks Guild of Massachusetts, Inc.*,[175] certain dissident union members who had been expelled from a union that represented employees in the horse racing industry (an industry excluded from coverage under the NLRA) sued the union under the LMRDA. The guild objected to the court's jurisdiction in the case in part because the NLRB has declined jurisdiction over the industry.[176] The court rejected the guild's argument and held NLRB jurisdiction was not a prerequisite for coverage under the LMRDA.[177] The court further concluded that 3(i) of the LMRDA gave the Department of Labor jurisdiction over any labor organization in an industry effecting commerce and a determination by the NLRB not to extend its jurisdiction does not divest courts of their jurisdiction over an entity under the LMRDA.[178]

In his 2009 worker center article, Naduris-Weissman, argued that the LMRDA does not cover worker centers.[179] In support of that position, he asserted that there was no definitive guidance on how the two sections should be read, and therefore sections 3(i) and (j) should to be read together so that the delineation contained in 3(j) substantially limits the breadth of 3(i).[180] Specifically, Naduris-Weissman claims that worker centers are not "labor organizations" under the LMRDA because the description of worker centers is not included among the examples of labor organizations contained section 3(j).[181] This argument has been tried before and has been unsuccessful.

More than 30 years before Naduris-Weissman's article, the United States Court of Appeals for the District of Columbia rejected this argument in *Brennan v. United Mine Workers*.[182] In that case, the labor organization asserted it was not covered by the statute because it was referred to as a "District" and the term did not appear on the list under Section 3(j) or referenced in 3(i).[183] Citing legislative history, the court rejected the argument and held "it is clear, however, that this portion of § 402(i) was added to the general coverage provisions . . . to increase the scope of the statute's reach and not restrict it."[184] As such, the interpretation advocated by Naduris-Weissman would seem to contradict both the legislative history and available precedent.

IV. The Worker Center Movement

A. The History of the Worker Center Movement

Worker centers can trace their origin to the South in the late 1970s and early 1980s, a time when the manufacturing sector in the United States was in significant decline and service work on the rise.[185] Few traditional labor unions were in place to advocate for worker rights in the region, which created an opening for worker centers.[186] Their origins varied. For example, in the Carolinas, worker centers arose to challenge issues of institutional racism in employment,[187] and along the U.S.-Mexico border immigrant worker centers arose to support textile workers.[188]

In 1992 there were only five known worker centers in the United States.[189] By 2005 there were 139 in 32 states, and by 2007 there were 160.[190] While worker centers of the 1970's tended to focus on southern and African-American workers, most modern worker centers represent transient and immigrant employees.[191] The increase in the number of worker centers can be attributed to a variety of factors, but the factor considered most significant is the increase in immigration during this

period.[192] Between 1990 and 2010, the nation's immigrant population doubled,[193] with over half living in four states: California, New York, Texas, and Florida.[194] These four states have the largest concentration of worker centers.[195]

Immigrant workers frequently find work in the service and agricultural sectors, which often are low-level and temporary.[196] Traditional labor unions have tended not to pursue these populations because they can be difficult to organize and the work environments do not lend themselves to union organizing in the traditional sense.[197] As a result, many worker centers serve workers who do not work in any stable workplace, such as day laborers, while other worker centers serve workers of a particular ethnic group, occupation, or community without regard to any particular employer.[198] At least one prominent worker center is dedicated to the employees of a single employer.[199]

Worker centers offer a variety of services based on their membership that typically fall into three categories. The first consists of social services such as education, English as a second language, hiring halls, child care, training, employment services, and legal advice.[200] The second consists of advocacy and includes research, lobbying, and public policy efforts.[201] The third includes organizing and representing employees in connection with employers, and pursuing litigation strategies.[202]

Because individuals represented by these groups tend to be transient, some within the worker center movement do not view the traditional process of organizing workers under the NLRA as a viable option.[203] Instead, these groups work outside the typical confines of the NLRA, and leverage the complaints of a few individuals to facilitate changes for the broader group.[204] Because they operate outside of the bounds of the NLRA, they engage in a wide variety of activities that could otherwise be considered illegal for a traditional union, including protests, picketing, and secondary boycotts, in order to pressure those who are the target of their efforts.[205]

The worker center movement is highly dynamic and there are too many worker centers to address each in detail. Instead, what follows are brief profiles of five prominent worker centers developed from publicly available information, accompanied by an analysis of the application of the NLRA and LMRDA to each. All but one, in our opinion, satisfy the definitions of a labor organization under both statutes.

B. Profiles of Several Prominent Worker Centers

1. Retail Action Project

a. Structure and Organization

The Retail Action Project (RAP) was founded in 2005 as an organization of workers in the retail sector and is "dedicated to improving opportunities and workplace standards in the retail industry."[206] Although originally founded as a community organization, in 2010, RAP expanded to a membership organization of retail workers.[207] Not unlike other worker centers, RAP provides education and advocacy for underserved workers, directly and in conjunction with other organizations.[208] RAP pursues a number of political and social causes, such as increases in the minimum wage and expansion of mandatory health insurance, in addition to managing targeted campaigns at retailers in New York City.[209]

RAP also works in conjunction labor unions and other community advocacy organizations. The Retail, Wholesale and Department Store Union (RWDSU), which is part of the United Food and Commercial Workers Union (UFCW), lists RAP as an RWDSU campaign on its website.[210] RAP and the labor unions also work closely in administering their campaigns against target employers.[211]

The organization's initial success came through a campaign it initiated in 2006 against a New York City clothing chain. Following reports from several employees, RAP accused the chain of violating state and federal minimum wage and overtime laws, failing to comply with New York's reporting pay requirements, and forcing stock employees to work in poor conditions.[212] As part of its campaign RAP engaged in mass picketing in front of the clothing store during business hours,[213] wrote blogs,[214] and talked to customers about the alleged violations.[215] RAP also helped employees file complaints with the New York Attorney General, which led to wage and hour lawsuits against the employer.[216] In February 2008, the chain reached a settlement with the state and RAP for back wages.[217] Rather than negotiate a code of conduct or settlement agreement with increased wages or seniority, RAP appears to have used the lawsuit as a means to convince the employer to enter into a neutrality agreement with RWDSU.[218]

In addition to garnering neutrality agreements on behalf of RWDSU, RAP has also pursued campaigns to pressure employers to increase wages and services to workers. In one instance, RAP led protests, marches, and a media campaign at a shopping center to force employers within the shopping center to pay workers a "living wage," which RAP defines as "$10 per hour with benefits or $11.50 per hour without benefits;" to protest the shopping center's "employees' right to organize a union without intimidation;" and to provide community space within the shopping center for "English as a Second Language classes and job training programs."[219]

b. RAP as a Labor Organization

Applying the test under Section 2(5) of the NLRA, it is likely RAP would be deemed a labor organization subject to the provisions of the statute. It is a membership organization in which employees, namely retail workers covered by the NLRA and the LMRDA, participate.[220] RAP also deals with employers regarding terms and conditions of employment for its members. Worker centers typically attempt to organize and represent workers that traditional labor unions are unable to organize, such as service employees (who often are transient workers).[221] RAP, on the other hand, appears to serve as an agent of the RWDSU labor union by organizing workers and has convinced employers to enter into a neutrality agreement with RWDSU.[222] Aside from facilitating the negotiation of neutrality agreements on behalf of RWDSU, RAP has also directly dealt with employers on issues such as instituting "living wages" and providing space for services such as English as a second language courses.[223] Through RAP's various interactions with employers, RAP engages in a bilateral mechanism with employers regarding various terms and conditions of its members employment as required by 2(5) of the NLRA. As

such, a purpose of RAP is to "deal with" employers.

Because RAP meets the definition of a labor organization under the NLRA, it also does so under the LMRDA. Moreover, the group also satisfies the definition under the LMRDA because it was formed by RWDSU and acts as an organizing arm for the union.[224]

2. Organization United for Respect at Walmart (OUR Walmart)

a. Summary of the Worker Center and its Activities

One of the most active worker centers to date is the Organization United for Respect at Walmart (OUR Walmart) which claims to have organized thousands of hourly workers in dozens of Walmart stores across the United States.[225] OUR Walmart is distinct from most worker centers because its efforts are aimed at a single corporation instead of an industry or sector. Some of the group's chapters purport to have 50 members or more.[226] Membership is open to any current or former hourly Walmart employee.[227] The effort is supported, in part, by the United Food and Commercial Workers (UFCW) labor union which claims the group as a "subsidiary" in its filings with the U.S. Department of Labor.[228] The group has been involved with another UFCW-affiliated organization called "Making Change at Walmart" to challenge the company's employment practices and expansion efforts.[229] The UFCW also supplies organizers to recruit workers and is alleged to have paid members to engage in recruiting.[230]

Through its "Declaration of Respect"[231] OUR Walmart seeks to have the company change wages, hours, and terms and conditions of employment.[232] The changes sought include "confidentiality in the Open Door and provide in writing resolution to issues that are brought up and always allow associates to bring a co-worker as a witness;"[233] wages of "at least $13 per hour and expand the percentage of full-time workers;"[234] "provid[ing] wages and benefits that ensure that no Associate has to rely on government assistance;"[235] "mak[ing] scheduling more predictable and dependable;"[236] and establishing policies and enforcing them evenly.[237]

The group's pursuit of these goals has included making demands directly to Walmart. In June of 2011, a group of OUR Walmart members traveled to the company's headquarters and demanded to meet with Walmart's CEO.[238] When he did not appear, the group presented the Declaration of Respect to another member of senior management.[239] The group has also sought to meet with members of the company's board of directors.[240] As part of its ongoing effort to promote its demands, OUR Walmart has held marches and rallies at company locations across the country on behalf of the workers the group claims to represent.[241] Even if the group has not succeeded in meeting with the company to discuss its demands, in at least one store the group claims to have successfully demanded the discipline and replacement of an unpopular supervisor.[242]

b. OUR Walmart as a Labor Organization

OUR Walmart meets the definition of a labor organization under the NLRA and LMRDA. First, it constitutes an "organization" because the broad definition encompasses a group of workers, and, among other things, it collects dues from its members and organizes events at which it promotes its declaration for respect.[243] Second, it is an organization of "employees" as defined under the NLRA.[244]

With respect to the third or "dealing with" prong of the test, because of its stated mission, and efforts in furtherance of that mission, OUR Walmart satisfies the test. A purpose of the group is to convince Walmart's management to meet with it and address concerns regarding wages, hours, and terms and conditions of employment at the company.[245] In short, it seeks to engage the "bilateral mechanism" necessary to meet the dealing with element. It does not matter that Walmart may not have formally responded to OUR Walmart's demands or will ever do so. All that is required is the presence of *intent* to deal with the company.[246] Thus, OUR Walmart presents the same situation as in *Coinmach Laundry Co.* and *Early California Industries*, where the NLRB found groups of employees to be 2(5) labor organizations even though they never actually dealt with an employer on behalf of their members.[247]

Because OUR Walmart meets the definition of a labor organization under the NLRA, it also does so under the LMRDA. However, in addition to that criteria, the group satisfies the definition under the LMRDA through another route. This group is a subsidiary of the United Food and Commercial Workers (UFCW) union,[248] and as such, it is also expressly covered by the statute.[249]

3. The Coalition of Immokalee Workers

a. Summary of the Worker Center and its Activities

The Coalition of Immokalee Workers (CIW) is a worker center organization based in Immokalee, Florida.[250] It claims its membership consists of immigrant workers employed by tomato producers in Immokalee.[251] Initially, CIW sought to meet and negotiate directly with growers, but eventually the group came to focus its efforts on retailers and other end users of tomatoes.[252] The result was the Fair Food Program campaign through which the CIW sought to improve working conditions for its members.[253] Through this and its "penny-a-pound" campaign, CIW sought to engage major retailers to enter into Fair Food Agreements and Codes of Conduct.[254] In the past decade, according to CIW, it has waged ten successful campaigns with national companies under this program.[255] Signatories to the Fair Food Agreements pay a little extra per pound of tomatoes purchased, which is passed on to workers represented by CIW, and commit to purchase tomatoes solely from growers that abide by a Code of Conduct.[256]

In October 2010, CIW entered into a Fair Food Agreements with the Florida Tomato Grower's Exchange, a trade association that represents the majority of Florida's tomato farmers.[257] By signing the agreement, the signatory growers became part of the Fair Food Program—where they agreed to increase wages for employee pickers and abide by the Code of Conduct.[258]

The Code of Conduct covering the Florida Tomato Growers Exchange has not been made public. However, similar codes of conduct covering other growers have.[259] A template for the Code of Conduct appears on the Fair Food Standards Council's website.[260] It contains many basic terms and conditions of em-

ployment one might find in a traditional collective bargaining agreement.[261] In addition to the requirement that growers pass on the "penny per pound" charges paid by retail signatories of the Fair Food Agreement and abide by state and federal wage and hour laws,[262] it includes requirements that growers install time clocks, permit break periods, monitor worker health and safety, and provide written guidelines for employee advancement opportunities.[263] The code requires the grower to grant CIW access to their facility to perform training and orientation of all employees, and creates a CIW investigation mechanism to ensure the employer complies with the requirements of the code and remedies any complaints.[264]

b. CIW as a Labor Organization

Applying the same test under the NLRA, there is little doubt that CIW meets most of the elements of a statutory labor organization. Like most worker centers, CIW is a membership organization.[265] CIW has a central leadership structure,[266] files IRS form 990s for tax exemptions,[267] and organizes regular meetings with retailers and growers.[268] CIW likely meets the third prong of the Section 2(5) test because a purpose of the organization is to deal with employers. As evidenced by the existence of Code of Conduct agreements it has with retailers and end users of tomatoes, and the agreements it has with employers and their associations such as the Tomato Growers Exchange, a purpose of the CIW is to deal with employers over wages, hours, and other terms and conditions of employment.[269] In addition to establishing these terms, CIW promotes the agreements through training, and retains the right to enforce mechanisms to address employee complaints and grievances.[270] Finally, through a third party organization created by CIW, the group maintains the contractual right to monitor the payment of the "penny-per-pound" wage increases for workers.[271]

The one prong of the Section 2(5) test that is not clear is whether CIW represents "employees" as that term is defined by the NLRA. CIW does not release information regarding its members, except to refer to them as "farmworkers."[272] Relying on information put forth by CIW, it would appear that because agricultural laborers are not covered by the NLRA, CIW would not satisfy that prong of the test, and would not be a Section 2(5) labor organization. Were CIW to represent any workers that do not qualify for the "agricultural laborer" exemption, the worker center certainly would qualify as a labor organization under the NLRA.[273] It is possible the group's expansion in recent years has brought non-agricultural workers under its umbrella. If that were the case, the CIW would constitute a Section 2(5) labor organization, because all that is required is for CIW to represent one non-agricultural laborer in order for the exemption to no longer apply.

Even though information currently available regarding CIW does not support the conclusion that the group is a Section 2(5) labor organization under the NLRA, it clearly falls under the definition under the LMRDA where the exemption for "agricultural laborers" is not present.[274] As such, it is likely that CIW would be bound by the duties established by that statute.

4. Restaurant Opportunities Center and its Affiliates

a. Summary of the Worker Center and its Activities

The Restaurant Opportunities Center (ROC) is a national worker center organization with affiliates in various cities throughout the United States, including New York, Los Angeles, Chicago, and Washington, DC.[275] Known commonly as ROC United, it evolved from ROC-NY, a worker center founded by the labor union HERE Local 100 and former employees of the Windows on the World Restaurant.[276] Immigration attorney Saru Jayaraman and Windows on the World employee Fekkak Mamdouh launched the group as a worker center for all restaurant employees in New York City.[277]

ROC and its affiliates offer a variety of services to workers, which can be divided into three categories. The first involves research and policy efforts, including lobbying at the state and federal levels.[278] The second is the organization's High Road Initiative, which includes an organization of employers with ROC approved employment practices, non-profit organizations, and government offices.[279] The third category is the workplace justice campaign. It is this third category that provides the most factual clarity with respect to whether ROC is a labor organization under the NLRA and the LMRDA.

According to its website publications, ROC has organized over 400 workers and won more than $5 million in settlements of lawsuits.[280] Through its efforts, ROC has secured other benefits for workers at restaurants that have been the subject of its campaigns, which include improvements in workplace policies, including grievance procedures, raises, sexual harassment and anti-discrimination policies, sick days, and job security.[281]

In recent years the group has increased its efforts to obtain benefits that are similar to those contained in a traditional collective bargaining agreement, such as paid sick days, seniority provisions, and grievance procedures.[282] In a 2009 campaign in Michigan, 100 members of the ROC affiliate there submitted a demand letter to a restaurant alleging violations of wage and hour laws and racial discrimination, and demanded to bargain with the restaurant's ownership over terms and conditions of employment.[283] The demand letter stated that if the restaurant did not negotiate with ROC, the workers would take legal action.[284] When the restaurant's response was not deemed satisfactory to the group, it filed a variety of claims against the restaurant, including a federal lawsuit alleging violations of the FLSA,[285] charges of retaliation and surveillance with the NLRB,[286] and a charge of discrimination with the EEOC.[287] ROC-NY also began weekly protests at the restaurant, and several labor unions joined the group's boycott.[288] In 2011, after nearly two years of protests and litigation, the parties engaged in mediation and reached a settlement agreement resolving their dispute.[289] Although the settlement was confidential, the joint press release revealed that not only did the settlement address the legal disputes, but it also created complaint-resolution procedures, and policies for training, hiring, breaks, and uniforms and equipment.[290]

In another example, ROC's national policy coordinator, Jose Olivia, in a 2010 interview, likened the worker center movement to auto industry labor unions, stating that "[b]efore people were unionized in the auto industry, it was dragging down the rest of manufacturing. Restaurants set the standards for the service industry. We're trying to create a culture of or-

ganizing there, to make restaurant jobs stable jobs."[291]

ROC has also become active in its efforts to convince employers to change their employment practices and terms and conditions of employment. Agreements ROC has negotiated since 2009 contain provisions requiring employers to provide ROC written notice prior to terminating any employee in order to permit ROC the opportunity to investigate.[292] The settlement agreements also contain grievance and arbitration provisions that allow ROC to investigate and grieve a violation of the settlement agreement before it is turned over to arbitration.[293]

b. ROC United as a Labor Organization

Applying the test under Section 2(5) of the NLRA, ROC and its affiliates are likely to be considered labor organizations subject to the provisions of the statute. It is an organization in which employees who are covered by the NLRA participate.[294] The critical question, as was addressed by the NLRB in its 2006 Advice Memorandum, is whether a purpose of ROC is to deal with employers over wages, hours, and terms and conditions of employment. As described *supra*, other commentators have reviewed the group's conduct, and argued that, contrary to the Division of Advice's analysis, the goals and successes ROC has achieved from campaigns against employers demonstrate that a purpose of the group is to "deal with" employers.[295] Finally, because ROC is a Section 2(5) labor organization, it is likewise a labor organization for purposes of application of the LMRDA.

5. Koreatown Immigrant Workers Association

a. Summary of the Worker Center and its Activities

The Koreatown Immigrant Workers Association[296] (KIWA) is a worker center focused on organizing garment, grocery store, and restaurant workers in the Los Angeles neighborhood of Koreatown. KIWA was founded in 1992 just prior to the Los Angeles riots spurred by the Rodney King verdict.[297] Koreatown was one of the communities hardest hit by the riots,[298] and workers whose places of employment were damaged lost income, and, in some cases, their jobs as a result.[299] KIWA's first campaign was organizing workers to protest the Korean American Relief Fund for denying relief money to workers.[300] KIWA organized 45 displaced Korean and Latino workers who successfully demanded and received inclusion of the workers in the relief fund distribution.[301]

From 1996 to 2000, KIWA focused on organizing restaurant workers to oppose poor working conditions.[302] The campaign, called the Koreatown Restaurant Workers Justice Campaign, targeted Korean restaurant owners that violated the FLSA and forced employees to work long hours.[303] KIWA and its members would picket, protest, boycott, and petition employers, and, in some cases, even engage in hunger strikes until the employer agreed to pay back wages, comply with FLSA requirements, and rehire employees.[304]

KIWA also filed suit against the Korean Restaurant Owners Association (KROA) on behalf of a worker who had been blacklisted.[305] KIWA won the worker back wages as well as a $10,000 "Workers Hardship Fund," administered by KIWA, to compensate workers who were unjustly fired for speaking out.[306]

The organization's early successes led KIWA to establish the Restaurant Workers Association of Koreatown (RWAK) in 2000, which offered members English classes and wage claim advice.[307] RWAK targeted the KROA and several of the largest restaurant members of KROA to pressure employers to pay minimum wages up to FLSA standards.[308] As part of the campaign "KIWA trained workers at individual restaurants to confront employers over abusive and illegal work conditions; filed lawsuits against specific restaurants challenging egregious labor law violations; organized targeted boycotts; and publicized these work conditions through townhall meetings and stories in the media."[309] By 2005 the KROA agreed to work with KIWA to change industry pay practices and established a Labor Mediation and Arbitration Panel designed to resolve labor disputes in Koreatown restaurants.[310]

KIWA's most recent successes have come through organizing of independent grocery store workers into the worker center's Immigrant Workers' Union (IWU). In 2001, KIWA and the IWU[311] attempted to unionize workers at one of Koreatown's largest supermarkets.[312] The IWU filed a petition for an election with the NLRB on November 15, 2001.[313] The election resulted in a tie, with the NLRB officially declaring "no result."[314] The IWU filed multiple unfair labor practice charges with the NLRB, which were ultimately settled.[315]

Although the organization failed in its attempts to organize super-market workers through the IWU, the experience led KIWA to undertake its "Living Wage Campaign" in 2005. The campaign's goal is to achieve "living wages," for workers in Koreatown markets through voluntary wage agreements with supermarket owners.[316] According to Naduris-Weissman, "In May, 2005, two markets signed an agreement setting a wage floor of $8.50 per hour and committing to adjust the floor annually by up to three percent based on inflation."[317] Since 2001, KIWA has reached living wage agreements with five separate grocers, including one agreement that tied wage conditions to a private development's land use appeals.[318]

b. KIWA as a Labor Organization

KIWA claims that the RWAK and IWU are organizations wholly independent from the worker center. Despite the organization's efforts to convey the appearance of independence, there is little support for this argument.[319] KIWA created, staffed, and housed both organizations, and thus any claim that the organizations are independent simply is not supported by the evidence.[320] The IWU was a labor organization; it not only existed for the purpose of representing employees in dealings with the employer, but it filed a petition with the NLRB for an election to become the certified representative of grocery store workers.[321] Thus, by its affiliation and member involvement with IWU, KIWA also was a labor organization.

Even were KIWA independent from IWU and RWAK, it would still likely qualify as a labor organization under both the NLRA and LMRDA. KIWA is an organization in which employees covered by both statutes participate.[322] KIWA also deals with employers regarding wages and terms and conditions of employment of its members. Through its living wage agreements with grocery store employers, KIWA is trying to

set a level of working conditions well above and beyond that mandated by federal or state law.[323] KIWA also services the agreements independently to ensure annual wage increases are paid as required by the terms of the living wage agreement.[324]

Naduris-Weissman claims KIWA is not a labor organization because it does not have "an organizational purpose to form an ongoing bilateral relationship with the signatories" of its living wage campaigns because KIWA sets a wage and simply asks employers to sign on to pay the wage, as opposed to negotiating.[325] That conclusion is probably no longer viable given KIWA's recent activities. KIWA negotiated with the owners of two super-markets for several months before the markets finally agreed to implement KIWA's living-wages.[326] Another grocer, according to KIWA's own website, agreed to a "groundbreaking living agreement," attaching wage conditions to a private development's land use agreement "for the first time in the city."[327] "Groundbreaking" and "first the first time" suggest that KIWA bargained with the employer for something different from its typical living wage demands. As such, KIWA is likely a labor organization under the NLRA, and because of that status, also under the LMRDA.

V. Conclusion

As is evidenced by the recent evolution of worker centers, their role in the economy and society is expanding into areas that have historically been occupied by traditional labor organizations. Indeed, traditional labor organizations provided the foundations upon which certain worker centers were built. While they may operate in a different manner than the traditional labor organization, they still seek to represent workers with respect to their dealings with employers on certain aspects of their wages, hours, and terms and conditions of employment. Some even collect dues from their members. As such, they are vulnerable to some of the same shortcomings that traditional labor unions faced, and which the NLRA and the LMRDA sought to address, including risks of embezzlement and other financial impropriety. Similarly, if such organizations are to represent workers in their dealings with employers, they should also be held accountable to their membership in the same way as the traditional labor organization. Any inconvenience to the worker center movement is outweighed by the benefit to the members they serve. In short, once a worker center crosses the threshold into addressing the terms and conditions of employment of their members, the institutional interests of the organizations should necessarily give way to the interests of the employees themselves. Legislation that currently exists, such as the NLRA and LMRDA, provide protections for employees, and worker centers, just like traditional labor unions, should be governed by these laws.

Endnotes

1 Bureau of Labor Statistics, Union Members Summary 2011, January 27, 2012, *available at* http://www.bls.gov/news.release/union2.nr0.htm; *see also,* Steven Greenhouse, *Union Membership Rate Fell Again in 2011*, N.Y Times, January 27, 2012. *available at* http://www.nytimes.com/2012/01/28/business/union-membership-rate-fell-again-in-2011.html.

2 James Walker, *Union Members in 2007: A Visual Essay*, Monthly Lab. Rev., October 2008, at 30. 1983 was the first year BLS tracked union membership. There are competing theories as to the cause of this decline. Richard Bales, *Article: The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U.L. Rev. 687, 694-702 (October 1997) (describing the various theories behind the decline of union membership in the United States).

3 Janice Fine, *Workers Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. Sch L. Rev. 417, 420 (2006) [hereinafter Fine, *Workers Centers*].

4 *Id.*

5 For example, OUR Walmart promotes the NLRA's protections on its web site. http://forrespect.org/our-rights/employee-rights/. ("The National Labor Relations Act protects us acting collectively to address workplace issues. That means that any time we stand together, the law has our back." *Id.*

6 29 U.S.C. §§ 151-169 (2006).

7 29 USC §§ 141-144, 167, 172–187 (2006).

8 *See* Department of Labor Office of Labor-Management Standards compliance page, *available at* http://www.dol.gov/olms/regs/compliance/compllmrda.htm (last visited Sept. 6, 2012) (explaining that "the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), grants certain rights to union members and protects their interests by promoting democratic procedures within labor organizations. The LMRDA establishes: a Bill of Rights for union members; reporting requirements for labor organizations, union officers and employees, employers, labor-relations consultants, and surety companies; standards for the regular election of union officers; and safeguards for protecting labor organization funds and assets.").

9 *See* Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law*, 30 Berkeley J. Emp. & Lab. L. 232, 238 (2009) [hereinafter Naduris-Weissman, *Worker Center Movement*].

10 Alan Hyde, *New Institutions for Worker Representation in the United State: Theoretical Issues*, 50 N.Y.L. Sch L. Rev. 385, 393 (2006) [hereinafter Hyde, *New Institutions*].

11 *Id.*

12 *Id.*

13 Fine, *Workers Centers*, *supra* note 3, at 419.

14 David Rosenfeld, *Worker Centers: Emerging Labor Organizations - Until They Confront the National Labor Relations Act*, 27 Berkeley J. Emp. & Lab. L. 469 (2006) [hereinafter Rosenfield, *Emerging Labor Organizations*].

15 *Id.*

16 Naduris-Weissman, *Worker Center Movement, supra* note 9, at 232.

17 *Id.* at 238.

18 Pub. L. No. 74-198, 49 Stat. 449-50 (1935).

19 Michael J. Nelson, *Comment: Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 Geo. Mason L. Rev. 527, 530 (2000) [hereinafter Nelson, *Slowing Union Corruption*].

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 Pub. L. No. 74-198, 49 Stat. 449-50 (1935).

25 The Developing Labor Law, 32–33(BNA 2010) (citing Millis & Brown, From The Wagner Act to Taft-Hartley, University of Chicago Press, 284 (1950)).

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 Nelson, *Slowing Union Corruption*, *supra* note 19, at 530.

31 *Id.* at 531. The opening line of that legislation provided that "[i]ndustrial

strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other…" Labor-Management Relations Act, 29 U.S.C § 141 (1947).

32 S. Rep. No. 106, Supplemental Views, *reprinted in* 1 Legislative History of the Labor Management Relations Act of 1947, at 456.

33 *Id*.

34 H.R. Rep. No. 245 on H.R. 3010 , *reprinted in* 1 Legislative History of the Labor Management Relations Act of 1947, at 295.

35 *See* 29 U.S.C. § 158(b). Section 8(b) pertains solely to unfair labor acts by "labor organizations" towards covered employees and employers.

36 *See* 29 U.S.C. § 158(b)(1).

37 H.R. Rep. No. 510 on H.R. 3020 (Conf. Rep.), *reprinted in* 1 Legislative History of the Labor Management Relations Act of 1947, at 547; *see* 29 U.S.C. § 158(b)(2).

38 *Id*.

39 Section 8(b)(4) outlaws various types of picketing including those that result from secondary boycotts.

40 29 U.S.C. § 158(b)(5).

41 29 U.S.C. § 158(b)(6).

42 H.R. Rep. No. 510 on H.R. 3020 (Conf. Rep.), *reprinted in* 1 Legislative History of the Labor Management Relations Act of 1947, at 570; *see* 29 U.S.C. § 186(a).

43 *See* H.R. Rep. No. 510 on H.R. 3020 (Conf. Rep.), *reprinted in* 1 Legislative History of the Labor Management Relations Act of 1947 at 571.

44 Section 9(f) of the LMRA, 61 Stat. 145 (1947).

45 Section 9(f)(1)-(6) of the LMRA, 61 Stat. 145 (1947).

46 Remarks of House Representative Hugh A. Meade, Congressional Record, House, April 24, 1947, *reprinted in* 1 Legislative History of the Labor Management Relations Act of 1947, at 869 ("Every member of a union is entitled to know what his dues are used for – how much the union officials are paid and what becomes of the profits on the huge funds they have accumulated, which run into millions of dollars.").

47 *See* Sec. 302 of the LMRDA, 29 U.S.C. § 431.

48 Nelson, *Slowing Union Corruption*, *supra* note 19, at 531–532.

49 The Labor Reform Law, Bureau of National Affairs: Washington, D.C. (1959).

50 *Id.*

51 *Id.*

52 Nelson, *Slowing Union Corruption*, *supra* note 19, at 533–34. The labor organizations with documented corruption included Bakery and Confectionery Workers, Allied Trades Union, International Union of Operating Engineers, United Textile Workers Union and International Brotherhood of Teamsters.

53 *Id.*

54 *See* 2 NRLB Legislative History of the Labor-Management Recording and Disclosure Act of 1959, at 1104, 1115–16.

55 The McClellan Committee hearings were televised nationally.

56 Rinku Sen and Fekkak Mamdouh, The Accidental American: Immigration and Citizenship in the Age of Globalization23 (2008) [hereinafter The Accidental American) ("The unions were roiled by infighting and corruption, competing to represent the same workers . . . and rushing to offer employers sweetheart deals.").

57 Leslie Marshall, *The Right to Democratic Participation in Labor Unions and the Use of the Hobbs Act to Combat Organized Crime*, 17 Fordham Urb. L. J. 189, 196 (1989) [hereinafter Marshall, *The Right to Democratic Participation*]; S. REP. No. 187, 86th Cong., 1st Sess. 5 reprinted in 1 NRLB Legislative History of the Labor-Management Recording and Disclosure Act of 1959 at 397.

58 *Id*. at 197.

59 *Id*.

60 29 USC §§ 141-144, 167, 172-187 (2006).

61 See 2 NRLB Legislative History of the Labor-Management Recording and Disclosure Act of 1959, at 1098 (The bill of rights "would bring to the conduct of union affairs and to union members the reality of some of the freedoms from oppression that we enjoy as citizens by virtue of the Constitution of the United States.").

62 *Id*.

63 *Id*.

64 Risa L. Lieberwitz, *Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace*, 29 B.C.L. Rev. 21, 34 (1987). Title I of the LMRDA contains the following provisions: "SEC. 101. (a)(1) EQUAL RIGHTS.-- Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) FREEDOM OF SPEECH AND ASSEMBLY.-- Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) DUES, INITIATION FEES, AND ASSESSMENTS.-- Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except-

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) PROTECTION OF THE RIGHT TO SUE.-- No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such

action, proceeding, appearance, or petition.

(5) SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION.--No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

SEC. 102. Civil Enforcement

Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

SEC. 103. Retention of Existing Rights

Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

SEC. 104. Right to Copies of Collective Bargaining Agreements

It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement, and in the case of a labor organization other than a local labor organization, to forward a copy of any such agreement to each constituent unit which has members directly affected by such agreement; and such officer shall maintain at the principal office of the labor organization of which he is an officer copies of any such agreement made or received by such labor organization, which copies shall be available for inspection by any member or by any employee whose rights are affected by such agreement. The provisions of section 210 shall be applicable in the enforcement of this section." 29 U.S.C. §§ 411-415.

65 *Id.*

66 29 U.S.C. § 411(a)(1).

67 29 U.S.C. § 411 (a)(2).

68 29 U.S.C. § 411 (a)(3).

69 29 U.S.C. § 411 (a)(5).

70 29 U.S.C. § 412.

71 29 U.S.C. § 414.

72 29 USC § 431(a); *Id.* at 199. Much of this reporting information initially appeared in Section 9(f) of the Taft Hartley Act. *See* 61 Stat. 145 (1947).

73 Marshall, *The Right to Democratic Participation*, *supra* note 57, at 99; Nelson, *Slowing Union Corruption*, *supra* note 19, at 551.

74 *Id.* at 527, 551.

75 Marshall, *The Right to Democratic Participation*, *supra* note 57, at 197.

76 *Id.*

77 U.S. Dep't of Lab., Office of Labor Standards, Online Public Disclosure Room, http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm (last visited Sept. 6, 2012).

78 *Id.*

79 29 U.S.C. §431(c) ("Every labor organization required to submit a report under this title shall make available the information required to be contained in such report *to all of its members,* and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." (emphasis added))

80 29 U.S.C. § 481. Of lesser relevance to the analysis of this article, but not to the overall policy objective of the statute, Title III of the LMRDA limits a parent labor organization's ability to create a trusteeship over local or subordinate unions. 29 U.S.C. § 461.

81 29 USC § 501.

82 29 U.S.C. § 501(a).

83 *See* 29 USC § 158(b)(7).

84 *See, e.g.*, 2 Leg. History of the Labor Management Reporting and Disclosure Act, at 975–76, 993, 994–95, 1029, 1174–93 (1959). Senator Ervin noted, at 105 Cong. Rec. 6656, 2 Leg. Hist. LMRDA 1183 (1959): "Recognition picketing is picketing which is designed to compel the employer to accept the union as the bargaining agent for the employees, regardless of whether the union represents a majority of the employees."

85 29 U.S.C. § 152(5).

86 *See* NLRB v. Cabot Carbon Co., 360 US 203, 211–13 (1959) (citing S. Rep No. 573, 74th Cong. 1st Session. 7(1935) ("The protections of Section 8 shall extend to all organizations of employees that deal with employers in regard to grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. This definition includes employee-representation committees.")). "The fact that a union is in its early stages of development and has not as yet won representation rights does not disqualify it as a labor organization." NLRB Office of the General Counsel - An Outline of Law and Procedure in Representation Cases, at 51 (2005) (citing Michigan Bell Telephone Co., 182 NLRB 623 (1970)).

87 29 U.S.C. § 152(5); Yale New Haven Hospital, 309 NLRB 363 (1992) (finding the existence of an organization even though the group lacked a constitution, bylaws, meetings or filings with the Department of Labor); *see* Betances Health Unit, 283 NLRB 369, 375 (1987) (no formal structure and no documents filed with the Department of Labor); Butler Mfg. Co., 167 NLRB at 308 (no constitution, bylaws, dues, or initiation fees); East Dayton, 194 NLRB at 266 (no constitution or officers); *see also* NLRB v. Kennametal, Inc,, 182 F.2d 817 (3d Cir. 1950) (finding an informal group of employees who came together to present grievances was sufficient to make them a labor organization under Section 2(5)).

88 29 U.S.C. § 152(5)

89 "Organization" encompasses "any organization of any kind, or any agency or employee representation committee or plan." *See* Electromation, Inc., 309 N.L.R.B. at 994.

90 The exemptions include agricultural workers, domestic workers, independent contractors, supervisors or any individual employed by an employer subject to the Railway Labor Act. 29 U.S.C. § 152(3)

91 As will be described, *infra*, one of the worker centers that has come to prominence is the Coalition of Immokalee Workers, which represents agricultural workers.

92 *Id.*

93 29 U.S.C. 203(f); *see also* NLRB Representation Case Law Review of Developments 2008, at 205, *available at* http://www.nlrb.gov/publications/manuals (last visited Sept. 6, 2012).

94 29 U.S.C. § 203(f).

95 Agrigeneral L.P., 325 NLRB 972 (1998).

96 Bayside Enterprises v. NLRB, 429 U.S. 298 (1977).

97 These groups may, however, qualify as labor organizations under the LMRDA which defines "employee" to include agricultural laborers. *See* 29 CFR 451.3(a)(3) stating that employer of agricultural laborers who are excluded from coverage by the NLRA are employees within the meaning of the LMRDA.

98 The United Farm Workers union faced this situation in the 1960's and

1970's. To address this concern, it pursued a strategy through which the union spun off groups of non-agricultural workers who they had organized. *See* Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. Lab. & Emp. L. 1, 15, n. 45 (2005) [hereinafter Gordon, *Law, Lawyers, and Labor*].

99 29 U.S.C. § 152(5). The term "employer" is broadly defined and only excludes state and federal government and employers covered by the Railway Labor Act, 29 U.S.C. § 152(2).

100 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 285. Naduris-Weissman argues that previous scholarship by Rosenfield and Hyde which concludes that worker centers "deal with" employers are required for coverage by the NLRA are "overly-broad" and inconsistent with case law.

101 *Id.*; S. 1958, 74th Cong., 1st Sess. 66–67.

102 *Id.*

103 360 U.S. 203 (1959).

104 *Id.*

105 Syracuse University, 350 NLRB 755 (2007) (finding that a grievance committee which passed on actions of the employer was not a 2(5) labor organization because it performed an "adjudicative function" and did not make proposals to management to which management was expected to respond).

106 *See e.g.*, Electromation, Inc., 309 NLRB 990 (1992); E.I. du Pont & Co., 311 NLRB 893 (1993); Keeler Brass Co., 317 NLRB 1110 (1995).

107 29 U.S.C. § 158(a)(2).

108 Crown Cork & Seal Co., 334 NLRB 699, 700 (quoting Electromation, Inc., 309 NLRB 990, 995 n. 21 (1992)).

109 Keeler Brass Co., 317 NLRB 1110 (1995)

110 Stoody Co., 320 NLRB 18 (1995); Vencare Ancillary Services, Inc., 334 NLRB 965, 969–970 (2001), enf. denied on other grounds, 352 F.3d 318 (6th Cir. 2003). *But see* Porto Mills, Inc.,, 149 NLRB 1454 (1964) (holding that an informal group had "dealt with" the employer by demanding the termination of an employee leading a union organizing effort).

111 Coinmach Laundry, 337 NLRB 1286 (2002); Early California Industries, 195 NLRB 671.

112 In *Coinmach Laundry*, 337 NLRB 1286 (2002), the Administrative Law Judge wrote that "under this definition, an incipient union which is not yet actually representing employees may, nevertheless, be accorded 2(5) status if it admits employees to membership and was formed for the *purpose* of representing them." (emphasis added). *See also* Early California Industries, 195 NLRB 671, 674 (1972) (finding a group of employees to constitute a labor organization where the group's *purpose* was to negotiate wages, hours and working conditions with an employer, even though it had yet to come to fruition).

113 Betances Health Unit, 283 NLRB 369 (1987).

114 Porto Mills, Inc., 149 NLRB 1454, 1471 (1964).

115 *See supra* notes 99–100.

116 Center for United Labor Action, 219 NLRB 873 (1975); *see also Protest Groups and Labor Disputes – Toward a Definition of "Labor Organization: Center for United Labor Action*, 17 Wm. & Mary L. Rev. 796 (1976).

117 *Id.*

118 *Id.*

119 *Id.* (emphasis added).

120 *Id.*

121 Northeastern University, 235 NLRB 858 (1978).

122 *Id.* at 859.

123 It should be noted that NLRB Advice Memoranda are creations of the NLRB's General Counsel's Office, and serve as legal opinions of the office "which provides guidance to the Agency's Regional Offices with respect to difficult or novel legal issues arising in the processing of unfair labor practice charges." *See* Press Release, National Labor Relations Board, Jayme Sophir named Deputy Assoaciate General Counsel in the Division of Advice (February 1, 2012), *available at* http://www.nlrb.gov/news/jayme-sophir-named-deputy-associate-general-counsel-division-advice (February 1, 2012) (last visited Sept. 6, 2012). As such, Advice Memoranda do not constitute precedent or serve as law. *See* D. R. Horton, Inc. and Michael Cuda, 2012 NLRB Lexis 11, *28 n.14, (refusing to apply an NLRB advice memorandum, explaining that an advice memorandum is merely "the then-General Counsel's advice to the Board's Regional Offices," which "is not binding on the Board").

124 *See* Acme/Alltrans Strike Committee, Case No. 21-CB-6318, Advice Memorandum dated April 25, 1978; *P*rotesting Citizens and its Agent Elvin Winn, Case 15-CC-681, Advice Memorandum dated August 30, 1977; Central Arizona Minority Employment Plan, Advice Memorandum dated November 30, 1977; Michael E. Drobney, an Agent of Laborers Local 498 (T.E. Ibberson), Cases 8-CC-835, 8-CB-3229 Advice Memorandum dated December 30, 1976.

125 Blue Bird Workers Committee, 1982 NLRB GCM Lexis *10.

126 *Id.* at *11.

127 *Id.* (emphasis added).

128 Acme/Alltrans Strike Committee, Case No. 21-CB-6318, Division of Advice Memorandum dated April 25, 1978, 6 AMR ¶ 14,025, 5033.

129 *Id.* at 5034.

130 *Id.* (citing Porto Mills, Inc., 149 NLRB 1454, 1471-72 (1964)).

131 Protesting Citizens and its Agent Elvin Winn, Case 15-CC-681, Advice Memorandum dated August 30, 1977.

132 *Id.*

133 *Id.*

134 Michael E. Drobney, an Agent of Laborers Local *498* (T.E. Ibberson),Cases 8-CC-835, 8-CB-3229 Advice Memorandum dated December 30, 1976, 4 AMR ¶ 10,081, 5102.

135 Rosenfield, *Emerging Labor Organizations*, *supra* note 14, at 493–494.

136 *Id.* at 494.

137 Restaurant Opportunities Center of NY, Cases 2-CP-1067, 2-CP-20643, 2-CP-1071, 2-CB-20705, 2-CP-1073 and 2-CB-20787, Advice Memorandum dated November 30, 2006 [hereinafter ROC Advice Memorandum].

138 *Id.*

139 *Id.*

140 *See Boulud settles discrimination suit*, Nation's Restaurant Group, July 30, 2007, *available at* http://nrn.com/article/boulud-settles-discrimination-suit (last visited Sept. 6, 2012); *see also* The Accidental American at page 168.

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *See* ROC Advice Memorandum, *supra* note 137, at 3.

146 *Id.*

147 *Id.* The Division of Advice also based its conclusion that ROC-NY was not a labor organization on the basis that the group's proposed settlement with restaurants did not contemplate a "continuing practice" of "dealing with" because it did not require ROC-NY to service the settlement agreement, rather any violations would be reviewed by a third party arbitrator. Advice Memorandum page 3. Advice's conclusion, that no "continuing practice" was contemplated by the proposed settlement agreement, simply is not correct. Moreover, the concept of "continuing practice" is not mentioned anywhere in the *Electromation* line of cases on which the Agency relied and, thus, never was a prerequisite for a "dealing with" determination.

148 Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 Denv. U. L. Rev. 93, 134–135 (2007) [hereinafter Duff, *Days Without*

Immigrants].

149 *Id*. at 134.

150 *Id*. at 135 (emphasis added).

151 *Id*.

152 *Id*. As noted *supra*, action of a group of employees to seek removal of a supervisor has been found sufficient to meet the dealing with element of the 2(5) test. *See Porto Mills*, *supra* note 110.

153 *Id*. at 136.

154 The Fair Labor Standards Act confers the rights of employees to recover for unpaid wages, liquidated damages and attorney fees. *See* 29 USC § 216. Title VII discrimination cases typically permit recovery for compensatory and punitive damages and attorney fees. *See* 29 USC § 1981.

155 Because the settlements themselves are not public documents, we must rely upon descriptions of those settlements by ROC-NY and others.

156 As Naduris-Weissman pointed out in his article, the settlement agreement between ROC-NY and Daniel which will remain in effect for five years, requires that the restaurant give ROC-NY's lawyers three days' notice when it wishes to fire an employee so that ROC-NY can assess whether the motive is prohibited retaliation. *See* Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 254. Such notice intimates future negotiations between the parties after the resolution of the parties' lawsuits.

157 *Id.*

158 See ROC-NY's mission at http://www.rocny.org/who-we-are (last visited Sept. 6, 2012).

159 Duff, *Days without Immigrants*, *supra* note 148, at 136 (noting that it is "undoubtedly unsettling (or should be in contemplating possible civil court litigation where courts may take a quite different view of the matter [than that taken by the NLRB]"). Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 255 (noting that "ROC-NY's efforts to settle workplace grievances have brought it close to the threshold of dealing with employers.")

160 Hyde, *New Institutions*, *supra* note 10, at 408.

161 Duff, *Days without Immigrants*, *supra* note 148, at 135.

162 29 U.S.C. 402(i) and (j).

163 29 U.S.C. 402(i).

164 29 U.S.C. 402(j).

165 29 U.S.C. 402(j).

166 Donovan v. National Transient Division, 736 F.2d 618 (10th Cir. 1984) (citing S. Rep. No. 187, 86th Cong., 1st Sess. 53, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2370).

167 *Id*.; *see also* Brennan v. United Mine Workers, 475 F.2d 1293, 1295–96 (D.C. Cir. 1973).

168 *Donovan*, 736 F.2d 618 (10th Cir. 1984).

169 *Id*. at 621–22 (holding that if an organization represents its members regarding grievances, labor disputes, or terms or conditions of employment, the organization is subject to the Act regardless of its formal attributes or the extent of its representative activities).

170 *Id*.

171 *Id*; *see also* Donovan v. NTD, 542 F. Supp. 957, 958 (D. Kan. 1982) (explaining that NTD did not negotiate collective bargaining agreements with employers, instead it negotiated general Articles of Agreement for the benefit of the NTD membership. This agreement labor disputes, grievances, and hours.).

172 Roddy v. United Transportation Union, 479 F. Supp. 57, 60 (N.D. Ala. 1979); *see also* 29 C.F.R. § 451.2.

173 *See* 29 CFR 451.3(a)(3).

174 *See* 29 U.S.C. § 402(e).

175 560 F.2d 486 (1st Cir. 1977).

176 *Id*. at 490; *see also* 29 C.F.R. § 103.3 in which the NLRB has declined jurisdiction over the horse and dog racing industries.

177 *Id*.

178 *Id*.

179 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 287–291.

180 *Id*.

181 *Id*.

182 475 F.2d 1293 (D.C. Cir. 1973).

183 *Id*. at 1295.

184 *Id*. (citing 105 CONG. REC. 6516 (1959) (remarks of Senators Goldwater and Kennedy); H.R. REP. No. 741, 86th Cong., 1st Sess. at 28).

185 Fine, *Worker Centers*, *supra* note 3, at 430.

186 *Id*.

187 Corey Kurtz, Worker Centers: Vehicles for Building Low-wage Worker Power 30 (2008).

188 *Id*. at 33.

189 Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, Economic Policy Institute Briefing Paper #159 (2005, December 14), *available at* http://www.epi.org/publications/entry/bp159/ [hereinafter Fine, Briefing Paper #159"] (last visited Sept. 6, 2012).

190 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 240.

191 Jennifer Hill, *Symposium: Whither the Board? The National Labor Relations Board at 75: Can Unions Use Worker Center Strategies?: In an Age of Doing More With Less, Unions Should Consider Thinking Locally but Acting Globally*, 5 FIU L. Rev. 551, 556 (2010); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407 (1995); *see also Los Angeles Black Worker Center, A New Sense of Power of the People: Fighting for Equity, Transparency, Accountability and Justice in the 21st Century Labor Market*, UCLA Center for Labor Research and Education Research and Policy Brief, February 7, 2011.

192 Fine, Briefing Paper #159, *supra* note 189.

193 Steven A. Camarota, A Record-Setting Decade of Immigration: 2000 to 2010, The Center for Immigration Studies, October 2011.

194 The Foreign-Born Population in the United States: 2010, The US Census Bureau, *available at* http://www.census.gov/population/foreign/ (last visited Sept. 6, 2012).

195 In 2005, there were 23 worker centers in New York, 29 in California, 6 in Florida and 7 in Texas. *See* Fine, Briefing Paper #159, *supra* note 189.

196 *Id*.

197 Fine, *Worker Centers*, *supra* note 3, at 430.

198 Many Worker Centers arise as a result of tragedies that displaced worker in a particular region. ROC-NY arose after the attack on the World Trade Center on September 11, 2001 left hundreds of Windows on the World restaurant employees without work. http://www.rocny.org/who-we-are. KIWA arose following the 1992 Los Angeles riots, spurred by the Rodney King verdict, in which 53 people died, 2,000 people were injured, 1,100 buildings were destroyed, and businesses were looted. *See* Jared Sanchez et al., Koreatown: A Contested Community at a Crossroads 1 (April 2012), *available at* http://dornsife.usc.edu/pere/documents/Koreatown_Contested_Community_Crossroads_web.pdf.

199 *See* OUR Walmart, FAQs, http://forrespect.org/our-walmart/faq/ (last visited Sept. 6, 2012).

200 The Restaurant Opportunities Center of New York offers members job training and development skills. See ROC-NY, http://www.rocny.org/what-we-do/job-training-and--job-development (last visited Sept. 6, 2012). The Coalition of Immokalee Workers offers members weekly community meetings, training sessions, leadership development workshops, cultural events, and classes, as well as non-profit grocery store that enables members to buy cooking supplies, food, phone cards and toiletries at low prices. *See*

http://www.ciw-online.org/Community_Center.html (last visited Sept. 6, 2012). The Coalition for Humane Immigrant Rights of Los Angeles offers members hiring hall services and citizenship assistance. *See* http://www.chirla.org/ (last visited Sept. 6, 2012).

201 The Retail Action Project advocates for increases to New York's minimum wages and state laws pertaining to "living wages" on its members' behalf, and also publishes studies on the effects of employer retail practices on immigrants and minorities. *See* http://retailactionproject.org/advocacy/ (last visited Sept. 6, 2012) and http://retailactionproject.org/category/studies-and-reports/ (last visited Sept. 6, 2012). KIWA advocates for increases in fair housing funds and building of low-income and fair-housing units in the Koreatown neighborhood of Los Angeles. *See* http://kiwa.org/about-kiwa/kiwa-victories/#kiwaleads (last visited Sept. 6, 2012).

202 OUR Walmart organizes employees to seek to negotiate employment terms with Wal-Mart stores. *See* http://forrespect.org/our-walmart/about-us/. ROC Unites organizes workers, and engages in litigation and public pressure to improve wages and working conditions for employees in the food-service industry. *See* http://rocunited.org/our-work/workplace-justice/ (last visited Sept. 6, 2012). KIWA organizes workers to pressure employers into entering living-wage agreements for grocery store workers. *See* http://kiwa.org/about-kiwa/kiwa-victories/ (last visited Sept. 6, 2012).

203 As Janice Fine explained in her worker center article "Many immigrant workers are migratory, undocumented, and lack conventional political power. The unskilled nature of their work creates an oversupply of labor and while employers and labor systems vary enormously from one another, they all present formidable challenges, albeit for different reasons, to union or other forms of traditional organizing." Fine, *Workers Centers*, *supra* note 3, at 442; *see also* the North American Alliance for Fair Employment (NAFFE) Working Paper on Worker Center Strategies, *available at* http://www.fairjobs.org/archive/sites/default/files/wp1.htm (The practical problems posed for union organizers by the contingent workforce include "small groups of workers dispersed throughout a broader workforce; high turnover; little shared "community of interest;" and employers that are often marginal and unable to pay higher wages") (last visited Sept. 6, 2012); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. Rev. L. & Soc. Change 397, 411–13 (2004) (noting the disparity between the realities of service industry workers and the traditional union strategies of collective bargaining) [hereinafter Rivchin, *Building Power*].

204 Richvin, *Building Power*, supra note 203, at 416.

205 *Id.*

206 Retail Action Project, About, http://retailactionproject.org/about/ (last visited Sept. 6, 2012).

207 *Id.*

208 Retail Action Project, About: Allies, http://retailactionproject.org/about/allies (last visited Sept. 6, 2012).

209 Amongst its social platforms, RAP is involving in the NYC Minimum Wage Campaign which lobbies to raise the minimum wage in New York State from the federal minimum of $ 7.25 per hour to $8.50 per hour, the NYC Paid Sick Days Campaign, which lobbies for minimum paid sick time for part-time and full-time employees. *See* http://retailactionproject.org/coalitions/.

210 See RWDSU's website at http://rwdsu.info/ (last visited Sept. 6, 2012).

211 *See* RWDSU, http://rwdsu.info/en/archives/7/rwdsu-community-rally-scoop-workers-7909.html (last visited Sept. 6, 2012). "Fired workers from high end retail clothing store Scoop NYC joined with leaders of the RWDSU and *its* Retail Action Project (RAP), elected officials and labor and community leaders to announce a lawsuit against the trendy clothing retailer for labor violations, wage theft and discrimination over a period of 8 years from 2000-2008." (emphasis added.)

212 *See* Lincoln Anderson, *Cornered, Yellow Rat Bastard must cough up green to workers*, The Villager, Volume 77 No. 37, Feb. 13-19, 2008, *available at* http://thevillager.com/villager_250/corneredyellowrat.html (last visited Sept. 6, 2012).

213 *Id.*; see also http://blogs.villagevoice.com/runninscared/2006/10/yellow_rat_bast_1.php (last visited Sept. 6, 2012).

214 *See* December 2011 blog entry "Yellow Rate Bastard May Have Violated Labor Laws" *available at* http://retailactionproject.org/2006/12/yellow-rat-bastard-may-have-violated-labor-laws/ (last visited Sept. 6, 2012) and January 2007 blog entry entitled "Yellow Rat Bastard Sued for $2million" *available at* http://retailactionproject.org/2007/01/yellow-rat-bastard-sued-for-2m/ (last visited Sept. 6, 2012).

215 *See* http://blogs.villagevoice.com/runninscared/2006/10/yellow_rat_bast_1.php (last visited Sept. 6, 2012).

216 *See Clothing Store Workers RAP to the Tune of $1.4 Million*, Brandworkers International, *available at* http://www.brandworkers.org/node/9075 (last visited Sept. 6, 2012).

217 *Id.*

218 *See* Mohammed Saleh, et al. v. Shoe Mania, LLC, 09-cv-04016-LTS, Document No. 125; *see also* Mischa Gaus, *NY Boutique Boss Arrested, Faces 4 Years in Jail for Stealing Wages*, Labor Notes, December 25, 2010, *available at* http://labornotes.org/2010/02/ny-boutique-boss-arrested-faces-4-years-jail-stealing-wages (last visited Sept. 6, 2012).

219 RAP's protests resulted in face to face negotiations with the owners of the shopping center. *See Protesters rally in front of Qns. Center*, Queens Chron., November 4, 2010, *available at* http://www.qchron.com/editions/central/protesters-rally-in-front-of-qns-center/article_38292a89-f2b8-5e4f-bcf2-7b22067b79fd.html (last visited Sept. 6, 2012).

220 RAP is described on its website as a membership organization of retail workers. See http://retailactionproject.org/about/ (last visited Sept. 6, 2012).

221 *See* discussion of Coalition of Immokalee Workers, Restaurant Opportunities Center, and Koreatown Immigrant Workers Alliance, *infra*.

222 See RAP's website explaining that its strategy is to use the lawsuits "to convince employers to sign neutrality agreements and then win union elections." Retail Action Project, http://retailactionproject.org/2010/06/u-s-social-forum-takes-detroit-by-storm/ (last visited Sept. 6, 2012); *see also* Pam Whitefield, Sally Alvarez, Yasmin Emrani, Is There A Women's Way Of Organizing? Gender, Unions, and Effective Organizing, Cornell University Division of Extension and Outreach School of Industrial and Labor Relations Report 13 (2009) (explaining that "RAP was created through the efforts of RWDSU as a way to reach out to young NYC retail workers, spark organizing campaigns, and establish a worker-community base") [hereinafter Is there a Women's Way of Organizing].

223 RAP's protests at the Queens Center shopping center in New York resulted in face to face negotiations with the owners of the shopping center over wages and employees services. *See Protesters rally in front of Qns. Center*, *supra* note 219.

224 RWDSU trains members of RAP in organizing: "With our Member Volunteer Organizing Training, we are trying to develop the leadership of RAP so they can get involved in organizing. We do workshops so they can build their skills and can step up. [We have workshops on] how to do outreach, how to talk to your coworkers, how to motivate them, how to deal with excuses, overcome fear, listening skills." *See* Is there a Women's Way of Organizing, supra note 222, at 26.

225 Steven Greenhouse, *Wal-Mart Workers Try the Nonunion Route*, N.Y. Times, June 14, 2011, *available at* http://www.nytimes.com/2011/06/15/business/15walmart.html?pagewanted=all (last visited Sept. 6, 2012).

226 *Id.*

227 *See* OUR Walmart, FAQs, available at http://forrespect.org/our-walmart/faq/ (last visited Sept. 6, 2012).

228 *See* UFCW National Headquarters' 2011 LM-2 filing with the Department of Labor, Question 11(b) ("The UFCW has a subsidiary organization maintained in Washington DC named the Organization United For Respect at Walmart whose purpose as stated in the by-laws will be the betterment of the conditions of the current and former associates at Wal-Mart Stores, Inc., within the meaning of Section 501(c)(5) of the Internal Revenue Code, and to make Wal-Mart a better corporate citizen. The financial transactions are included in the 12/31/11 filing of this LM2."), *available at* http://kcerds.dol-esa.gov/query/getOrgQry.do (last visited Sept. 6, 2012).

229 *See* Making Chance at WalMart, http://makingchangeatwalmart.

org/ (last visited Sept. 6, 2012).

230 *See* "Wal-Mart Workers Try the Nonunion Route", explaining that UFCW paid most of the salary of several hundred members, on leave from their jobs, to knock on doors and otherwise reach out to Wal-Mart employees to urge them to join OUR Walmart, *supra* note 174; *see also* Lila Shapiro, T*he Walmart Problem: Uncovering Labor's Place in an Era of Joblessness*, Huffington Post, December 12, 2011, *available at* http://www.huffingtonpost.com/2011/12/12/our-walmart-labor-unions_n_1143527.html (last visited Sept. 6, 2012). Article profiles Philip Meza, an member of the UFCW who is paid to organize Walmart employees on behalf of OUR Walmart.

231 Our Walmart, http://forrespect.nationbuilder.com/sign_the_declaration (last visited Sept. 6, 2012).

232 *Id*.

233 *Id*.

234 *Id*.

235 *Id*.

236 *Id*.

237 *Id*.

238 *See* Making Change at Walmart Stands With Walmart Associates in Bentonville, Arkansas, UFCW Newsletter, Volume 10, Issue 11, June 21, 2011, *available at* www.ufcw400.org/wp-content/uploads/2011/06/OnPoint10.11.pdf (last visited Sept. 6, 2012).

239 *Id*.

240 United Food and Commercial Workers Union, Respect DC, OUR Walmart Visits Walmart Board Member, March 27, 2012, http://www.ufcw400.org/2012/03/respect-dc-our-walmart-visit-walmart-board-member/ (last visited Sept. 6, 2012).

241 *See* Patrick Flannery, *Rockers Rally Against Low Wages and New Walmart Store in Los Angeles*, Rolling Stone Magazine, June 30, 2012, *available at* http://www.rollingstone.com/music/news/rockers-rally-against-low-wages-and-new-walmart-store-in-los-angeles-20120630#ixzz204bvswx6 (last visited Sept. 6, 2012).

242 *See* Spencer Woodman, *Labor Takes Aim at Walmart—Again*, The Nation, January 4, 2012, *available at* http://www.thenation.com/article/165437/labor-takes-aim-walmart-again (last visited Sept. 6, 2012).

243 Membership dues are $5.00 per month. *See* OUR Walmart, Become a Member, http://forrespect.nationbuilder.com/become_a_member (last visited Sept. 6, 2012).

244 Wal-mart has been the subject of a number of NLRB cases in which Associate coverage has been presumed. *See e.g.*, Wal-Mart Stores, Inc., 352 NLRB 815 (2008).

245 The OUR Walmart Vision and Mission posted on the organization's website confirms the participants in the organization are employees: "We envision a future in which our company treats us, the Associates of Walmart, with respect and dignity. We envision a world where we succeed in our careers, our company succeeds in business, our customers receive great service and value, and Walmart and Associates share all of these goals." OUR Walmart, About us, http://forrespect.org/our-walmart/about-us/ (last visited Sept. 6, 2012).

246 Moreover, given OUR Walmart's goals, it would hardly be credible for the group to claim that if given the chance it would not engage Wal-mart in bargaining with the company over the terms and conditions of employment of its members and other associates.

247 *Supra* note 105.

248 The UFCW's 2011 LM-2 filing with the Office of Labor-Management Standards (OLMS) explains "The UFCW has a subsidiary organization maintained in Washington, DC named the Organization United For Respect at Walmart whose purpose as stated in the by-laws will be the betterment of the conditions of the current and former associates at Wal-Mart Stores, Inc., within the meaning of Section 501(c)(5) of the Internal Revenue Code, and to make Wal-Mart a better corporate citizen." The UFCW's LM-2 report is available on the OMLS's website at http://kcerds.dol-esa.gov/query/getOrgQry.do and is on file with the author.

249 29 U.S.C. 402(j)

250 *See* Coalition of Immokalee Workers, About CIW, http://ciw-online.org/about.html (last visited Sept. 6, 2012).

251 *Id*.

252 *See Major Grower to Join Wage Plan*, Wall St. J., October 13, 2010, *available at* http://online.wsj.com/article/SB10001424052748704763904575550550086511426.html.

253 Coalition of Immokalee Workers, FAQs, http://www.ciw-online.org/FFP_FAQ.html (last visited Sept. 6, 2012).

254 *Id*.

255 *Id*.

256 *See* Bon Appetite Management Company, Code of Conduct for Sustainable Tomato Suppliers, April 24, 2009, *available at* http://www.bamco.com/sustainable-food-service/ciw-agreement (last visited Sept. 6, 2012). According to CIW's website, the Codes of Conduct contain the following provisions: 1) A pay increase supported by the price premium Participating Buyers pay for their tomatoes; 2) Compliance with the Code of Conduct, including zero tolerance for forced labor and systemic child labor; 3) Worker-to-worker education sessions conducted by the CIW on the farms and on company time to insure workers understand their new rights and responsibilities; 4) A worker-triggered complaint resolution mechanism leading to complaint investigation, corrective action plans, and, if necessary, suspension of a farm's Participating Grower status, and thereby its ability to sell to Participating Buyers; 5) A system of Health and Safety volunteers on every farm to give workers a structured voice in the shape of their work environment; 6) Specific and concrete changes in harvesting operations to improve workers' wages and working conditions, including an end to the age-old practice of forced overfilling of picking buckets (a practice which effectively denied workers' pay for up to 10% of the tomatoes harvested), shade in the fields, and time clocks to record and count all compensable hours accurately; and 7) Ongoing auditing of the farms to insure compliance with each element of the Fair Food Program. *See* Coalition of Immokalee Workers, Fair Food Program, Frequently Asked Questions, http://ciw-online.org/FFP_FAQ.html (last visited Sept. 6, 2012).

257 *See* Laura Layden, *Tasty deal: Farmworkers get raise, agreement with tomato growers*, Naples Daily News, Nov. 16, 2010, *available at* http://www.naplesnews.com/news/2010/nov/16/historic-deal-made-between-immokalee-workers-flori/ (last visited Sept. 6, 2012).

258 *Id*.

259 Pacific Tomato Growers, Ltd.'s Code of Conduct with CIW is available at www.news-press.com/assets/pdf/A41653681013.PDF (last visited Sept. 6, 2012).

260 The Fair Food Standard Council is a branch of CIW that monitors retailers compliance with Code of Conduct and investigates complaints. http://fairfoodstandards.org/code.html (last visited Sept. 6, 2012).

261 *Id*.

262 http://fairfoodstandards.org/code.html (last visited Sept. 6, 2012).

263 *See* Pacific Tomato Growers, Ltd., Code of Conduct, *available at* www.news-press.com/assets/pdf/A41653681013.PDF (last visited Sept. 6, 2012). The Code of Conduct also requires that the grower provide transparency to CIW and permit "third-party monitoring" to ensure the worker center is passing the "penny per pound" payments on to workers.

264 *Id.*

265 *See* Coalition of Immokalee Workers, http://www.ciw-online.org/101.html (last visited Sept. 6, 2012).

266 *See* CIW's 2010 Form 990 for 501(c)(3) tax exemption status identifying the organization's corporate structure. The Form 990 is available online at http://foundationcenter.org/findfunders/990finder/ and a copy is on file with the author.

267 *Id.*

268 See the discussion *supra* of Codes of Conduct negotiated by CIW with the Tomato Growers Exchange, individual growers, and retailers.

269 *See* Pacific Tomato Growers, Ltd., Code of Conduct, *available at* www.news-press.com/assets/pdf/A41653681013.PDF (last visited Sept. 6, 2012).

270 *Id*.

271 *Id*.

272 *Id*.

273 It was widely reported that the United Farm Workers had difficulties limiting representation solely to agricultural workers. Indeed, the UFW admitted that it had to create separate organizations for commercial workers on its membership rosters to avoid coverage by the NLRA. See Jennifer Gordon, *Law, Lawyers, and Labor*, 8 U. PA. J. Lab. & Emp. L. 1, 15, n. 45 (2005). *See* Laura Layden, Tasty deal: Farmworkers get raise, agreement with tomato growers, *supra* note 257.

274 *Supra* notes 92–93 and accompanying text.

275 *See* ROC United, About Us, *available at* http://rocunited.org/about-us/ (last visited Sept. 6, 2012).

276 *See Immigrant Restaurant Workers Hope to Rock New York*, Dollars and Sense, February 2004, *available at* www.dollarsandsense.org/archives/2004/0104labotz.html (last visited Sept. 6, 2012).

277 Until 2004, HERE listed Jayaraman and Mamdouh as employees on the union's LM-2 filings with the Department of Labor. *See* Unite HERE Local 100's LM-2 filings with the Department of Labor for 2002, 2003, and 2004, *available at* http://kcerds.dol-esa.gov/query/getOrgQry.do (last visited September 17, 2012).

278 *See* ROC United, Our Work, http://rocunited.org/our-work/ (last visited Sept. 6, 2012).

279 *See* ROC United, http://rocny.org/node/123 (last visited Sept. 6, 2012).

280 ROC-NY, Who we are, http://www.rocny.org/who-we-are (last visited Sept. 6, 2012).

281 *See* ROC United, Our Work: Workplace Justice, *available at* http://rocunited.org/our-work/workplace-justice/ (last visited Sept. 6, 2012).

282 A ROC website for the organization's Workplace Justice Campaign against one nationwide restaurant chain asks consumers to contact the company and ask it to negotiate with ROC United to increase wages and provide paid sick days to workers. *See* Dignity at Darden, http://www.dignityatdarden.org/get-involved---consumers.html (last visited Sept. 6, 2012).

283 *See Andiamo lawyer disputing ROC-MI allegations*, Press & Guide, Dec. 1, 2009, *available at* http://www.pressandguide.com/articles/2009/12/01/news/doc4b155eb173e5d094598629.txt; *see also* Olivia Carrino, '*U' students protest Andiamo restaurant of Dearborn for workers' rights breaches*, The Michigan Daily, February 18, 2010, *available at* http://www.michigandaily.com/content/u-students-protest-andiamo-restaurant-dearborn (last visited Sept. 6, 2012) (quoting Jaimie Philip, a ROC-MI intern, who said the organization began its campaign against Andiamo restaurant by delivering a demand letter to the restaurant on Nov. 5, which all the workers involved in the campaign had signed.).

284 *Id*. Philip explained that the demand letter stated that if the restaurant did not respond within two weeks, ROC-MI would take legal and community action. Andiamo claimed through its attorneys that is had only two days to respond, not two weeks. *See supra* note 283.

285 *Id*. ROC-MI and the workers filed suit in the U.S. District Court for the Eastern District of Michigan on January 12, 2010. *See* Case No. 2:10-cv-10110.

286 *See* NLRB Charge numbers 07-CA-052545, 07-CA-052607, 07-CA-052623, and 07-CA-052880.

287 *See* Sean Delaney, *Ex-Andiamo employees protest their treatment*, Press & Guide, January 16, 2010, *available at* http://www.pressandguide.com/articles/2010/01/16/news/doc4b51de66b6b05191110046.txt (last visited Sept. 6, 2012); *see also Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution*, Metro Times, March 9, 2011, *available at* http://metrotimes.com/news/cleared-plate-1.1116126 (last visited Sept. 6, 2012).

288 *See Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution*, *supra* note 287.

289 *Id*.

290 *Id*.

291 Paul Abowd, *Restaurant Workers Launch Multi-City Campaign to Transform Low-Wage Industry*, Labor Notes, February 4, 2010, *available at* http://labornotes.org/2010/01/restaurant-workers-launch-multi-city-campaign-transform-low-wage-industry (last visited Sept. 6, 2012).

292 *Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution*, *supra* note 287. The ROC-United Affiliate in Maine, ROC-ME, launched a similar campaign against the Front Room restaurant in 2010. *See Group of Restaurant Workers Sues Front Room*, Maine Business, *available at* http://www.pressherald.com/archive/group-of-restaurant-workers-sues-front-room_2010-01-06.html; *Employees Defend Owner of Restaurant*, Maine Business, *available at* http://mainebusiness.mainetoday.com/story.php?ac=PHbiz&id=308296 (last visited Sept. 6, 2012). And a Chicago affiliate, CHI-ROC, sued and settled with Ole Ole restaurant the same year. *See* ROC United Blog, http://rocunited.blogspot.com/search/label/Ole%20Ole (last visited Sept. 6, 2012).

293 *Id*.

294 ROC United, About us, http://rocunited.org/about-us/ (last visited Sept. 6, 2012).

295 Because Professor Duff and Weissman-Nussbuam covered this point so well in their materials, as summarized *supra* at 28–33, it would be duplicative to cover them here other than to restate the obvious conclusion that a purpose of ROC and its affiliates is to deal with employers and is therefore subject to the NLRA.

296 This organization originally was named "Korean Immigrant Worker Advocates."

297 Jennifer Sinco Kelleher, *Advocates for Immigrant Worker Rights*, L.A. Times, July 26, 2002, *available at* http://articles.latimes.com/2002/jul/26/local/me-thelaw26 (last visited Sept. 6, 2012).

298 *See* Jared Sanchez et al., Koreatown: A Contested Community at a Crossroads 1 (April 2012).

299 Jake Doherty, *Koreatown: Workers Called Hidden Riot Victims*, Los Angeles Times, April 24, 2004, *available at* http://articles.latimes.com/1994-04-24/news/ci-49982_1_american-workers (last visited Sept. 6, 2012).

300 *Id*.

301 KIWA, About us, https://kiwa.org/about-kiwa/kiwa-victories/#kiwaorganizeskorean (last visited Sept. 6, 2012).

302 *Id.*, KIWA Victories, http://kiwa.org/about-kiwa/kiwa-victories/ (last visited Sept. 6, 2012).

303 *Koreatown: Workers Called Hidden Riot Victims*, *supra* note 299.

304 Aziz Choudry et al., Organize!: Building from the Local for Global Justice 302 (2012) [hereinafter Choudry, et al., Organize!].

305 Fine, *supra* note 189, at 110.

306 *Id*.

307 *Id*. at 112. "Once a week, RWAK holds a protest outside a local restaurant and offers a seminar on workers' rights, education, or immigrant rights. In its effort to establish itself as a worker association that would operate as a quasi-union of restaurant workers, the organization offers a range of member benefits."

308 *Id*. at 109–12.

309 Daranee Petsod et al., Investing in Our Communities: Strategies for Immigrant Integration 161, *available at* http://www.aecf.org/~/media/Pubs/Topics/Special%20Interest%20Areas/Other/InvestinginOurCommunitiesStrategiesforImmigra/Investing%20in%20Our%20Communities%20%20compiled%20%20pdf.pdf.

310 *Id*.

311 The IWU was self-described as a new type of union that was worker-led, community-based, and independent of the AFL-CIO. KIWA created the IWU as a labor union with a focus on improving working conditions for low-wage immigrant workers with future goals of representing workers at multiple businesses and low-wage industries throughout Koreatown. Assi Super was IWU's first major campaign. After the Union lost the NLRB election of Assi Super employees the union withdrew it petition and its attempts to organize workers. *See* Yungsuhn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 Asian L.J. 67, 79–80 (2004).

312 *Id*.

313 *Id*. at 81.

314 *Id*.

315 *Id*. The IWU appears to have ceased further activities following the Assi Super campaign.

316 KIWA, KIWA Victories, http://kiwa.org/about-kiwa/kiwa-victories/ (last visited Sept. 6, 2012); *see also* Choudry, et al., Organize!, *supra* note 304, at 302; Angie Chung, Legacies of Struggle: Conflict and Cooperation in Korean American Politics 163 (2007).

317 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 248.

318 http://kiwa.org/about-kiwa/kiwa-victories/ (last visited Sept. 6, 2012); *see also* Choudry, et al., Organize!, *supra* note 304, at 302.

319 See Naduris-Weissman, *supra* note 9, at 327 ("KIWA, which has spawned several organizations that are tied to it but *nominally* independent, such as the RWAK and the IWU . . . .") (Emphasis added).

320 *See* Choudry, et al., Organize!, supra note 304, at 302; *see also* Yungsuhn Park, *The Immigrant Workers Union*: Challenges Facing Low-Wage Immigrant Workers in Los Angeles, 12 Asian L.J. 67 (2004) [hereinafter Park, *The Immigrant Workers Union*] ("The eight employees walked down the street one block into the office of Korean Immigrant Workers Advocates (KIWA), where the Immigrant Workers Union (IWU) was born . . . ."). KWIA's website chronicles the successes of both organizations, "After a militant and high-profile campaign during which KIWA organized Korean and Latino restaurant workers to demand an industry-wide reform, labor law compliance in the industry has dramatically increased to 50%. Through this campaign the Restaurant Workers Association of Koreatown was formed and continues organizing workers." *available at* http://kiwa.org/about-kiwa/kiwa-victories/ (last visited Sept. 6, 2012).

321 Park, *The Immigrant Workers Union*, supra note 320, at 81.

322 *See* KIWA, http://kiwa.org/ (last visited Sept. 6, 2012).

323 Naduris-Weissman, *The Worker Center Movement*, *supra* note 9, at 330.

324 *Id*.

325 *Id*. at 329.

326 KIWA, Victories, *available at* http://kiwa.org/about-kiwa/kiwa-victories/ (last visited Sept. 6, 2012).

327 *Id*.

Individualizing the FLSA: Collective Action Waivers and the Split in the Federal Courts

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Introduction

The ability of employees to proceed collectively under the Fair Labor Standards Act (FLSA) is a well-settled right. So, too, is the employer's right to negotiate for arbitration of employment disputes. A judicial clash between these two principles has emerged with class/collective action waivers in the employment context. Introduced in the late 1990's as a means of protecting against large-scale class and collective actions,[1] class/collective action waivers can be included in otherwise ordinary arbitration provisions. Together, an arbitration provision and class/collective action waiver attempt to do two things: (1) require arbitration of all employment disputes, including FLSA claims, and (2) require arbitration (or adjudication) of all such disputes on an individual rather than collective basis. For the employer, the intended result is a far more manageable claim.

The battle over the viability of class/collective action waivers, however, is far from over. This article addresses the current split in the federal courts over the legality of class/collective action waivers in employment agreements and analyzes the historical development of the competing rights to collective action and arbitration in hopes of anticipating the direction federal courts will take going forward. Though the Supreme Court has not weighed in on the debate, at least one case sitting on its doorstep could provide an opportunity to examine the tension between its twin commitments to collective actions and arbitration.

I. The Rise of the FLSA Collective Action

Scholars and courts alike have referred to the FLSA collective action as a "unique species of litigation."[2] Though written into law more than seventy years ago, collective action suits are largely a product of the last ten to twenty years. The number of FLSA collective action suits filed in federal courts more than tripled between 2000 and 2009.[3]

The recent explosion of FLSA collective actions has forced employers to make defending these cases a priority. But defending FLSA claims in court is neither a straightforward nor easy task. For one thing, the nature and dynamics of FLSA actions can vary dramatically, as such claims are often accompanied by other federal or state-law components.[4] Employers also face an uphill battle when it comes to the real fight in FLSA collective action suits: conditional certification. A lenient approach to conditional certification in many courts has effectively stacked the deck against employers. In response, employers and defense attorneys have turned their attention to solutions outside the courtroom, primarily collective action waivers.

A. The Legislative History of the FLSA Collective Action and the Court's Decision in Hoffman-La Roche

Passed on the heels of the federal courts' standoff with President Roosevelt in 1937, the Fair Labor Standards Act of 1938 created a specific cause of action for employees with minimum-wage and overtime pay claims and included in its original form provision for the modern day collective action device.[5]

As originally enacted, the FLSA allowed employees (i) to maintain suits "for and in behalf of himself or themselves and other employees similarly situated," or (ii) "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated."[6] Thus, the FLSA did not require plaintiffs to affirmatively opt-in to a suit but rather allowed plaintiffs to designate an agent or representative to maintain an action on behalf of all employees similarly situated.

In 1947, Congress amended this procedure in response to "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome"[7] and the "national emergency"[8] created by a flood of suits alleging unpaid portal-to-portal pay. Though leaving in place the provision for collective actions on behalf of "similarly situated" persons, the Portal-to-Portal Act of 1947 abolished the representative action brought by plaintiffs lacking a personal stake in the outcome and required plaintiffs to file written consent in federal court to become a party in FLSA suits.[9]

The FLSA's opt-in requirement distinguishes it from class actions under Rule 23 of the Federal Rules of Civil Procedure. When Rule 23 was overhauled in 1966, the FLSA collective action was left unchanged, with express direction from Congress that the FLSA's opt-in requirement was "not intended to be affected by Rule 23, as amended."[10] From that point forward, the procedural rights of plaintiffs bringing suit under the FLSA diverged from those of many other litigants.[11] Moreover, while the jurisprudence surrounding Rule 23 class certification developed into a fairly sophisticated framework, that surrounding FLSA collective actions remained stunted. And courts read in a separation between the two bodies of law.

The Supreme Court's decision in *Hoffman-LaRoche, Inc. v. Sperling*[12] in 1989 was the Court's first real foray into FLSA collective action certification requirements. Resolving a split among the federal circuits concerning the appropriate role of the courts with respect to notice, the Court ruled that district courts "have discretion, in appropriate cases, to implement [FLSA collective actions] . . . by facilitating notice to potential plaintiffs."[13] The Court stopped short of prescribing or even suggesting a certification-type procedure for implementing its directive. It also stopped short of defining what it means to be a

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similarly-situated employee under the FLSA such that collective action is appropriate.

B. The Search for a Certification Standard and the Battle over Conditional Certification

After *Hoffman-LaRoche*, lower courts began scrambling for a workable approach to FLSA collective action certification and court-facilitated notice to potential plaintiffs. A two-step process emerged as the prevailing standard in federal courts. At the first stage, plaintiffs move, prior to the completion of discovery, for court-ordered notice to similarly-situated employees, prompting the court to either grant or deny "conditional certification." At the second stage, which typically occurs towards the close of discovery, the defendant has an opportunity to move for decertification of the class.

During the first stage, the dominant approach is that established by the New Jersey District Court in *Lusardi v. Xerox Corp*.[14] Under *Lusardi*, the court analyzes several factors on an ad-hoc basis when deciding whether to grant conditional certification: (i) the extent to which employment settings are similar; (ii) the extent to which any potential defenses are common or individuated; and (iii) general fairness and procedural considerations.[15] The minority approach is to apply Rule 23's certification standard.[16]

The real battle for defendants in FLSA collective actions lies here, in the fight over conditional certification. Quite simply, court-ordered notice and the accompanying discovery required to provide adequate notice is expensive—very expensive. Moreover, the scale is tipped in favor of the employees. The standard for conditional certification is "fairly lenient," and "can even be met with a well-pleaded complaint prior to conducting discovery."[17] The conditional certification decision is typically based on minimal evidence and results in certification most of the time.[18] From here, employers face pressure to settle claims, regardless of merit, before reaching the second stage.[19]

Not surprisingly, this trend has prompted criticism by employers and the defense bar. Opponents of the prevailing approach typically focus on the due process concerns and fundamental fairness of "lenient" conditional certification, not to mention the enormous burden on employers of having to defend against claims that ultimately may not meet minimal standards of plausibility for class treatment. Opponents also argue[20] that the two-step approach is not supported, much less prescribed, by law and runs afoul of the stringent standards required under Rule 23 and recent cases such as *Wal-Mart Stores, Inc. v. Dukes.*[21]

But these arguments have made little headway with the courts. For example, in the case of *In re HCR Manorcare, Inc.*,[22] the employer petitioned the Sixth Circuit for a writ of mandamus on grounds that the district court's[23] approach to conditional certification violated both due process and statutory and judicial authorities. Supported by the defense bar, the employer's brief was a treatise on the ills of contemporary conditional certification, and suggested to the Sixth Circuit that it had "the rare opportunity" to provide guidance and tackle the conditional certification question head-on.[24] The Sixth Circuit denied mandamus without really addressing any of the employer's arguments.[25] The Supreme Court denied the employer's petition for certiorari.[26]

With mixed results in securing a more stringent conditional certification standard, employers have turned to a potentially more promising option: requiring employees to arbitrate FLSA claims on an individual basis.

II. The Historical Acceptance of Arbitration and the Development of the Class Waiver

Like the collective action, arbitration has been around for some time, but has found increased acceptance in the employment context in recent years. Courts have held that employers and employees may not only negotiate for the right to submit certain types of claims to arbitration, as a forum, but that parties have the right to proceed with arbitration on the procedural terms they see fit. Arbitration thus presented itself as a viable way for employers to avoid the pitfalls of FLSA collective actions.

A. The Federal Arbitration Act and the Arbitration of Statutory Rights

Since originally enacted in 1925 and reenacted and codified in 1947, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, embedded arbitration as a favored policy in federal law.

Mandatory arbitration of *statutory* claims, however, was slow to gain acceptance. Not until the 1980's did the Supreme Court really accept the idea that statutory claims could be subjected to an arbitral rather than judicial forum.[27] In a string of cases in the 1980's, the Court upheld the compulsory arbitration of claims under the Sherman Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the civil provisions of the Racketeering Influenced Corrupt Organization Act (RICO).[28]

Then, in 1991, the Court issued a definitive statement regarding arbitration in the employment context, ruling in *Gilmer v. Interstate/Johnson Lane Corp*.[29] to uphold the mandatory arbitration of claims under the Age Discrimination in Employment Act (ADEA). Recognizing that statutory claims could be made the subject of an arbitration agreement enforceable pursuant to the FAA, the Court observed that, by agreeing to arbitrate a statutory claim, an employee does not forego any substantive statutory rights.[30] The Court acknowledged an exception where "'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" The burden is on the party challenging arbitration to establish that Congress intended to preclude a waiver of the judicial forum.[31]

With *Gilmer*, the Supreme Court gave a clear instruction: statutory rights, including those under the FLSA, can be vindicated outside a judicial forum. The Court's decision left to the district courts the task of applying its instructions and figuring out what separated arbitrable statutory claims from the inarbitrable ones.

B. What Makes a Claim Arbitrable?

Gilmer mandates the arbitration of statutory claims insofar as the arbitration agreement is enforceable under the FAA and

Congress has not "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[32] Further, "the specific arbitral forum provided under an arbitration agreement must . . . allow for the effective vindication of that claim." This last notion comes from the Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[33] which upheld compulsory arbitration of Sherman Act claims but suggested that mandatory arbitration was permissible only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[34]

Parties challenging mandatory arbitration of statutory claims thus must establish one of three grounds for unenforceability: (i) unenforceability under the FAA; (ii) legislative preclusion of arbitration of the statutory rights at issue; or (iii) failure to provide a forum in which the plaintiff's rights can be vindicated.[35]

An arbitration provision is enforceable pursuant to the FAA "save upon such grounds as exist at law or in equity for the revocation of any contract."[36] Thus, state-law defenses such as fraud, duress, or unconscionability can be advanced.[37]

As for arbitration being precluded by Congress, *Gilmer* instructs that the burden is on the party challenging arbitration to show that Congress "intended to preclude a waiver of a judicial forum" for the claims at issue.[38] This is a high hurdle, and requires a clear showing of congressional intent to preclude arbitration.[39]

The last, and most litigated, basis for attacking mandatory arbitration is that the arbitral forum does not allow effective vindication of statutory rights.[40] In *Mitsubishi Motors*, the Supreme Court upheld the mandatory arbitration of federal antitrust claims pursuant to an arbitration provision containing international choice-of-forum and choice-of-law clauses, observing that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions."[41] In a footnote, however, the Court observed: "[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we have little hesitation in condemning the agreement as against public policy."[42]

While the precise reach of *Mitsubishi Motors* is uncertain,[43] it provided a framework for invalidating arbitration clauses that prevented the vindication of statutory rights. Prohibitively high cost is typically the lynchpin of a plaintiff's argument here, though any number of factors may come into play.[44] The Supreme Court set the standard and burden of proof for such arguments in *Green Tree Financial Corp. v. Randolph*,[45] providing that, where a party challenges arbitration as prohibitively costly, "that party bears the burden of showing the likelihood of incurring such costs."[46] Though contemplating a shift in the burden of proof, the Court stopped short of establishing when the party seeking arbitration must come forward with contrary evidence; the parties never reached this question in *Green Tree* itself.[47]

Among the questions presented in *Green Tree* was "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs."[48] The Court answered in the negative but cautioned: "It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[49] The Court's decision has become a guide for the premise that costs (or any other arbitration feature) effectively prevent a party from vindicating statutory rights in an arbitral forum. All federal courts of appeal have adopted the *Green Tree* standard.[50]

C. Introduction to the Class/Collective Action Waiver and the Supreme Court's Decision in Concepcion

Challenges to class and/or collective action waivers generally mirror those against the mandatory arbitration of statutory rights. That is, waivers have been challenged based on state-law defenses, as facially inconsistent with an underlying substantive federal statute, and as unenforceable for failure to allow effective vindication of statutory rights. State-law unconscionability doctrine found traction as a viable challenge to class waivers in certain states, most notably California, for a number of years.[51] However, in 2011, the Supreme Court pushed back against state-law attacks. Abrogating the California Supreme Court's ruling in *Discover Bank v. Superior Court* (commonly known as the "Discover Bank rule"),[52] the Supreme Court, in *AT&T Mobility v. Concepcion*, held that the FAA preempts state laws that effectively condition the enforceability of arbitration agreements on the availability of class-wide arbitration.[53]

Though stopping short of a wholesale endorsement of class/collective action waivers, *Concepcion* reaffirmed a federal policy favoring arbitration and suggested that such waivers are a permissible option for defendants wishing to reduce risk and exposure through individualized, non-aggregated arbitration. However, *Concepcion* did not involve a dispute over statutory rights, much less employment-related statutory rights; it centered on a dispute over consumer contracts and allegations of fraud and false advertising. Further, the arbitration agreement at issue contained features favorable to consumers: a choice of forum clause; an allocation of all costs to AT&T for non-frivolous claims; a specification that the arbitrator could award any form of individual relief; a provision for a minimum award and twice the amount of the claimant's attorney's fees where the customer received an award greater than AT&T's last written offer; and so forth.[54] In sum, the agreement was structured such that arbitration was in no way less favorable for the consumer than litigation.

All of which is to say, while *Concepcion* set forth a principle favoring arbitration and cast doubt on any "device [or] formula" that might provide a vehicle for "judicial hostility towards arbitration,"[55] it stopped short of answering the more contentious questions regarding the permissibility of class/collective action waivers in the employment context. It also firmly shifted the focus to the *Green Tree* framework and arguments premised on the failure of the arbitral forum to allow effective vindication of statutory rights.

III. The Circuit Split and the Clash in Supreme Court Precedent

While *Concepcion* changed the parameters of the debate, tension between federal policies favoring arbitration and the right of employees to collective action under the FLSA has produced a split in the federal circuits on the issue of whether an employee may waive the right to collective action under the FLSA. Short of guidance from the Supreme Court, it is likely the circuits will remain divided and employers will face uncertainty as to the protection provided by class/collective action waivers.

A. The Minority Position and the Search for Clarity in the Second Circuit

The Second Circuit has been a hot-spot for challenging class/collective action waivers in the employment context. A number of cases currently working their way through the Second Circuit present not only the broader question of whether and under what circumstances individualized arbitration might allow effective vindication of FLSA rights, but whether, instead, the FLSA collective action might be a substantive right such that waivers of that right are per se unenforceable.

1. The Minority Position: Collective Action Waivers are Per Se Unenforceable

The pending appeal in *Raniere v. Citigroup, Inc.*[56] raises the issue of whether the ability to pursue a FLSA collective action constitutes a substantive right. The suit involves allegations by employees (lending specialists) that their employer (Citigroup) misclassified them as exempt and wrongfully denied them overtime compensation under the FLSA. Citigroup moved to compel individualized arbitration under an arbitration agreement and collective action waiver contained in its employee handbook. The employees argued that the class waiver was unenforceable.

The district court judge considered two primary arguments: (i) that collective action waivers are per se unenforceable because collective actions are "unique animal[s]" and an integral part of the FLSA's remedy structure;[57] and, (ii) that the class waiver was unenforceable because, as a practical matter, it precluded the plaintiffs from effectively vindicating their rights under the FLSA.[58] The court rejected the latter argument, observing that the potential for adequate individual recoveries and mandatory shifting of attorneys' fees under the arbitration agreement ensured that the plaintiffs could effectively vindicate their rights on an individual basis.[59] In short, the plaintiffs failed to meet the *Green Tree* burden.[60]

As to the first argument, however, the trial judge took a more sympathetic view. Distinguishing *Gilmer* as limited to the general arbitrability of FLSA claims, as opposed to the waiver of collective treatment in arbitration, the court found collective action waivers "unenforceable as a matter of law" because the collective action itself is a substantive right afforded by the statute.[61]

Though in the minority, this decision does not stand alone. In *Chen-Oster v. Goldman, Sachs & Co.*,[62] the district court denied Goldman Sachs' motion to compel individual arbitration of Title VII claims, holding that class treatment of pattern discrimination claims constitutes a substantive right insofar as "a pattern or practice claim under Title VII can only be brought in the context of a class action."[63] *Chen-Oster* is also pending before the Second Circuit.[64] Whether the district court's decision will stand in light of *Wall-Mart Stores, Inc. v. Dukes*, remains to be seen.

Similar reasoning as that in *Raniere* only recently came before the Eighth Circuit.[65] In *Owen v. Bristol Care, Inc.*,[66] the district court held that class waivers are per se unenforceable in the employment context because collective actions constitute a substantive right under the "plain language of the FLSA" and *Concepcion* is "not controlling" in the employment context.[67] The district court's holding in *Owen* is therefore in line with that of the district court in *Raniere:* waivers of the right to proceed collectively under the FLSA are unenforceable as a matter of law.

The Eighth Circuit, however, disagreed. Finding nothing in the text or legislative history of the FLSA to suggest any congressional intent to preclude individual arbitration of claims under the statute, and no inherent conflict between the FLSA and the FAA, the court reversed the district court's decision and sent the case back for individual arbitration in accordance with the arbitration agreement between the parties.[68] In its decision, the court declined to follow *Chen-Oster* as well as the National Labor Relations Board's (NLRB) 2012 decision in *In re D.R. Horton, Inc.*,[69] wherein the NLRB refused to enforce a class action waiver in the context of an FLSA challenge based on Section 7 of the National Labor Relations Act.[70] Deferring instead to the pro-arbitration tone of more recent Supreme Court precedent, the court noted its alignment with decisions emerging from the other circuit courts of appeal.[71]

2. Tension in the Second Circuit

Raniere does not command unanimous support in the Second Circuit, or for that matter even in the district court that decided it.[72] Indeed, the very district court responsible for *Raniere* has also, albeit by the pen of a different judge, explicitly rejected its reasoning.[73] Such tension extends throughout the Second Circuit.

In *D'Antuono v. Service Road Corp.*,[74] for example, the district court granted an employer's motion to compel individualized arbitration of FLSA overtime claims brought on behalf of two exotic dancers who worked in the defendants' clubs. The suit centered on the enforceability of an arbitration clause that contained a class action waiver, a cost and fee-shifting provision, and a statute of limitations provision.[75] The defendants stipulated that they would not enforce the fee-shifting and limitations provisions.[76] With these concessions, the court found the arbitration clause, even with the waiver of collective action, enforceable under both state law[77] and the FLSA under the *Mitsubishi Motors-Green Tree* framework.[78] Looking to the remedies available to the plaintiffs, the court found persuasive the fact that, even with the potential for a "low" recovery, the FLSA provided for double damages and American Arbitration Association (AAA) rules shifted the bulk of arbitration costs to the defendant.[79] Also evident in the decision is the district court's attention to the pro-arbitration spirit of the Supreme Court's decision in *Concepcion*.[80] An interlocutory appeal of the

court's decision was denied.[81]

A similar ruling was issued in *Pomposi v. Gamestop, Inc.*,[82] decided even before *Concepcion*. The court granted the defendant-employer's motion to compel individualized arbitration of FLSA claims brought by one of the defendant's store managers. Citing the federal policy favoring arbitration and case law from other circuits, and distinguishing the Second Circuit's decision in *In re American Express Merchant Litigation*,[83] the court found the arbitration clause and waiver enforceable under both state law and federal arbitrability doctrine.[84] As in *D'Antuono,* the court noted that attorneys' fees and costs were available under the FLSA as well as the arbitration clause.[85]

Cited in both *Pomposi* and *D'Antuono*, the Second Circuit's ruling in *In re American Express Merchants' Litigation* (*AmEx*) is the primary word from the Second Circuit thus far concerning the permissibility of class waivers, though not in the FLSA context. The litigation actually includes two cases, "*AmEx I*"[86] and "*AmEx II*,"[87] and involves antitrust claims rather than employment-related allegations. In *AmEx I*, the court, ruling prior to the Supreme Court's decisions in *Concepcion* and *Stolt-Nielsen v. AnimalFeeds International Corp*,[88] refused to enforce a mandatory arbitration clause and accompanying class action waiver where plaintiffs showed that they would incur prohibitively high costs sufficient to deprive them of effective vindication of their substantive rights under federal antitrust statutes.[89] In so doing, the court was careful to note that their decision "[did] not decide whether class action waiver provisions are either void or enforceable *per se*."[90] Revisiting this decision in 2012, the Second Circuit ruled in *AmEx II* that the Supreme Court's decisions in *Stolt-Nielsen* and *Concepcion* and did not change its reasoning.[91]

On July 30, 2012, American Express filed a petition for certiorari with the U.S. Supreme Court.[92] The Supreme Court granted certiorari on November 9, 2012.[93] Taking the opportunity to weigh in on the enforceability of class waivers in the antitrust context, the Court could issue a decision with reverberating effects in the employment context.

B. Using the Mitsubishi Motors-Green Tree *Framework*

Short of viewing the FLSA collective action as a substantive right in itself, the federal courts are scattered along a spectrum of views as to what makes a class waiver enforceable in the FLSA context. Case-by-case evaluation using the *Green Tree* standard is the dominant approach, with courts looking at whether the particular aspects (typically costs) of arbitration make it more or less amenable to the effective vindication of statutory rights. A court's own deference to the "uniqueness" of the FLSA collective action and/or the federal policy favoring arbitration inevitably informs this evaluation.

In *Kristian v. Comcast Corp.*,[94] for example, the First Circuit observed in the antitrust context that, while the class action (and class arbitration) is a "procedure for redressing claims," it has "substantive implications" which courts cannot ignore.[95] With this in mind, the court refused to enforce a class waiver where the large costs of arbitration effectively prevented plaintiffs from vindicating statutory rights on an individualized basis. Important to the court were the particularly high costs and complexity of antitrust litigation as opposed to other types of claims.[96] Turning to the employment context in 2007, the court upheld the striking of a class waiver in the FLSA context on state law unconscionability grounds, but stopped short of a wholesale condemnation of FLSA class waivers.[97] Reaching their decision "[b]ased on the particular facts of [the] case," the court expressly did "not reach the argument that waivers of class actions themselves violate either the FLSA or public policy." [98]

Adopting a decidedly pro-arbitration stance, the Fourth Circuit took the position early on that the burden of showing costs large enough to invalidate individualized arbitration is squarely on the plaintiff; while it is "certainly possible" that costs might preclude a plaintiff from effectively vindicating statutory rights, nothing in the text, legislative history, or purpose of the FLSA suggests that Congress "intended to confer a non-waivable right to a class action under [the] statute."[99] Conclusory allegations regarding costs will not suffice here. The Fourth Circuit refused to invalidate an arbitration clause and class action waiver where the plaintiffs failed to provide evidence of basic economic considerations, such as the specific financial status of each plaintiff, the money at stake, and an estimation of the fees and costs potentially incurred.[100]

Other circuits have adopted a similar approach. In 2005, the Eleventh Circuit refused to invalidate a class action waiver on state-law unconscionability grounds based on *Gilmer*, recognizing that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of an arbitration's ability to offer 'simplicity, informality, and expedition.'"[101] At least one district court has since recognized that "the law of the Eleventh Circuit upholds the enforcement of arbitration agreements waiving an individual's right to pursue collective claims under the FLSA."[102] In so doing, the court recognized its decision as squarely at odds with case law from the Second Circuit and the NLRB's *D.R. Horton* decision.[103]

The Fifth Circuit has also rejected the argument that the collective action is a substantive right under the FLSA—it affirmed individualized arbitration of FLSA overtime claims against consumer lender Countrywide.[104] At the same time, however, the court affirmed the district court's decision to sever a fee-shifting provision in the parties' arbitration agreement and impose all costs of arbitration on the defendant, acknowledging that prohibitive costs can invalidate individualized arbitration under *Green Tree.*[105] How the court will treat challenges based on the NLRA remains to be seen.[106]

And then there is the mix-up in the Second Circuit. As mentioned above, the district court granted motions to compel individualized arbitration in both *D'Antuono* and *Pomposi*, among others As with the split over *Raniere*, the Southern District of New York has reached different conclusions even where it has refused to endorse a wholesale condemnation of class waivers. In *Cohen v. UBS Financial Services, Inc.*[107] and *LaVoice v. UBS Financial Services, Inc.*,[108] for example, the district judge found that the respective plaintiffs had failed to meet their burden of showing costs so prohibitive as to make individualized arbitration unenforceable and went on to grant the defendant's motion to compel in both cases. In *Sutherland*

v. Ernst & Young, LLP, the district judge reached a different result.[109] Suggesting a bias towards the uniqueness of the FLSA collective action, and finding *Stolt-Nielsen* and *Concepcion* largely inapplicable, the judge in *Sutherland* refused to enforce individualized arbitration of FLSA claims against the accounting firm based on the Second Circuit's *AmEx* decisions and its belief that the plaintiff had met the *Mitsubishi Motors-Green Tree* burden. Ernst & Young had "ensur[ed] that fees and costs would be recoverable in arbitration to the same degree as in court."[110] The actual loss to the plaintiff totaled just over $1,800. Citing the *AmEx* decisions, the court found that the plaintiff had met her burden of showing costs significant enough to preclude vindication of her statutory rights.[111] An interlocutory appeal of the decision is pending.[112]

IV. Looking Ahead: The Federal Circuits and Employers' Search for a Permissible Waiver

Waivers may not spell the end of the FLSA collective action, but they certainly re-shape the collective action landscape. However, the fate of the class action waiver in the employment context is up in the air: In the Second Circuit, district courts are divided as to the status of the collective action as a substantive right under the FLSA and the circumstances, if any, under which the right to proceed collectively can be waived. While courts in the other federal circuits have largely accepted that the right to proceed collectively under the FLSA is waivable, they disagree as to what makes a permissible waiver and the stringency courts should apply in their review. The First Circuit and several district courts in the Second Circuit seem to favor a high hurdle for the employer. The Fourth, Fifth, Eleventh, and now Eighth Circuits, on the other hand, seem far more sympathetic to the notion that an employee can waive her right to proceed collectively, finding waivers permissible provided that there is protection for the employee against prohibitive costs, unreasonable limitations periods, and so forth.

For the time being, class/collective action waivers in employment arbitration provisions are an important tool for employers. Presently, the weight of authority is that the waivers are enforceable if drafted correctly. The cases offer some pointers for drafting, evaluating and contesting such agreements:

• Procedural Conscionability. State-law attacks on class action waivers may be largely in the past, but employers cannot run afoul of procedural conscionability in their drafting of arbitration clauses and waivers. Ambiguity in agreement language or waivers buried at the end of a document in small print are not likely to find sympathy with courts—nor will unilateral termination and/or modification provisions.

• Time Limitations. Even those courts that have upheld class action waivers in the FLSA context have frowned upon attempts to shorten limitations periods for employees and have suggested that such provisions might void an otherwise valid agreement.

• Damages/Recovery Restrictions. Restrictions or bars on damages or certain types of recovery, such as treble damages or otherwise, can increase the chance a waiver will be deemed unenforceable.

• Attorneys' Fees. Attorneys' fees and the provision for fee-shifting have been critical issues for the courts that have found class action waivers permissible. Since the FLSA provides for the recovery of attorney fees, preserving that in the arbitration agreement makes it more likely to be enforceable.

• Arbitration Costs. The lynchpin of most attacks on class waivers is that the costs of arbitration, and especially arbitration on an individual basis, are prohibitive. Cost-shifting provisions can help moot this concern, as can provisions for the shifting of attorneys' fees. Employers can even offer to pay all costs.

• Choice-of-Forum/Choice-of-Law Clauses. While it is not clear that a choice-of-forum or choice-of-law favorable to the plaintiff is necessary to a permissible arbitration agreement and class action waiver, clauses that impose a burden on plaintiffs will likely weigh against permissibility.

• "Extras." In *Concepcion*, AT&T secured the enforceability of its class action waiver in part due to its inclusion of features particularly favorable to plaintiffs, including a provision for a minimum award and double attorney's fees under certain circumstances. These features may not be necessary, but they further the argument that an agreement is permissible because it ensures that individual arbitration is as favorable as litigation.

• Severance Clause. To the extent an arbitration agreement includes an impermissible clause, a severance clause can help save the rest of the arbitration agreement.

Conclusion

There is no universal, definitive standard for a viable class/collective action waiver within an employment arbitration agreement, but, current case law offers tips on what may or may not make such a waiver more or less acceptable. For employers, the device offers protection from runaway collective action costs. For employees, the waiver need not be a negative so long as the employee protections discussed here are found in the agreement.

Endnotes

1 *See generally* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 375, 395 (2005).

2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1807 (3d ed.); *see also, e.g.*, Raniere v. Citigroup Inc., 827 F. Supp. 2d 294, 311 (S.D.N.Y. 2011) ("Collective actions under the FLSA are a unique animal.").

3 *See generally* William C. Martucci and Jennifer K. Oldvader, *Addressing the Wave of Dual-Failed Federal FLSA and State Law "Off-the-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform*, 19 Kan. J.L. & Pub. Pol'y 433, 433 (2010).

4 *See generally* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 Am. U. L. Rev. 515, 516–518 (2009) (discussing the "explosion" of dual-filed FLSA and state-law wage claims in recent years).

5 Statutory "collective actions" today include minimum-wage and overtime pay suits brought under the FLSA, equal-pay claims under the Equal Pay Act (EPA), and age-discrimination actions for non-federal employees under the

Age Discrimination in Employment Act (ADEA). The FLSA, however, is the source of enforcement powers, procedures, and remedies in collective action suits, and its provisions are incorporated by reference in statutes such as the ADEA.

6 Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069 (1938) (current version at 29 U.S.C. §§ 201–219 (2006)).

7 Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 173 (1989).

8 Arrington v. National Broadcasting Co., Inc., 531 F. Supp. 498, 500 (D.D.C. 1982).

9 *See generally Hoffman-La Roche*, 493 U.S. at 173. In its current form, § 216(b) of the FLSA provides that a suit "may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

10 Fed. R. Civ. P. 23, advisory committee notes (1966).

11 *See generally* Craig Becker and Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 Minn. L. Rev. 1317, 1322 (2008).

12 493 U.S. 165 (1989).

13 *Id.* at 169.

14 118 F.R.D. 351, 359 (D.N.J. 1987).

15 *Id; see also, e.g.*, Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567, 572 (E.D. La. 2008).

16 *See, e.g.*, Shushan v. Univ. of Colorado, 132 F.R.D. 263 (D. Colo. 1990).

17 *See, e.g.*, Creely v. HCR Manorcare, Inc., 789 F. Supp. 2d 819, 821 (N.D. Ohio 2011) (conditionally certifying nationwide class of more than 58,000 employees of defendant), *writ denied*, No. 11-3866, 2011 WL 7461073 (6th Cir. Sept. 28, 2011), *cert. denied*, 132 S. Ct. 1146 (Jan. 23, 2012).

18 *See* Basco v. Wal-Mart Stores, Inc., No. 00-3184, 2004 WL 1497709, at *6 (E.D. La. July 2, 2004); *see also* Martucci & Oldvader, *supra* note 3, at 436.

19 Alexander, *supra* note 4, at 541 (internal citations omitted) (observing that conditional certification opens the way for potentially many more claims and costly, class-wide discovery).

20 For a general summary of the arguments made on behalf of defendants in opposition to conditional certification, see Brief of Amicus Curiae in Support of Petitioners, *In Re* HCR Manorcare, Inc., No. 11-3866, 2011 WL 7461073 (6th Cir. Sept. 28, 2011).

21 131 S. Ct. 2541 (2011).

22 2011 WL 7461073.

23 Creely v. HCR Manorcare, Inc., 789 F. Supp. 2d 819.

24 Petition for Mandamus, at 1, *In re* HCR Manorcare, Inc., No. 11-3866, 2011 WL 7461073 (6th Cir. Sept. 28, 2011).

25 *In re HCR Manorcare*, 2011 WL 7461073.

26 HCR Manorcare, Inc. v. Zouhary, 132 S. Ct. 1146 (Jan. 23, 2012).

27 *See generally* Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 312 (6th Cir. 2000) (discussing historical progression towards mandatory arbitration of statutory rights).

28 *Id.*

29 500 U.S. 20 (1991).

30 *Id.* at 26 (internal citations omitted).

31 *Id.*

32 *Id.* at 26.

33 473 U.S. 614, 637 (1985).

34 *Id.*

35 *See generally* Gilles, *supra* note 1, at 399–408 (discussing what the author terms "first-wave" and "second-wave" challenges).

36 9 U.S.C. § 2 (2006).

37 *See generally* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010); *Gilles*, *supra* note 1, at 399.

38 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 26, 26 (1991).

39 *Gilles*, *supra* note 1, at 405–06

40 Ineffective vindication of statutory rights and/or congressional intent to preclude arbitration have also been analyzed together as part of a two-step, federal common law arbitrability doctrine. *See, e.g.*, D'Antuono v. Service Rd. Corp., 789 F. Supp. 2d 308, 331 (D. Conn. 2011). In such cases, congressional intent, as outlined above, is analyzed as a first step or basis for unenforceability and ineffective vindication of rights as a second step or basis. *See, e.g.*, *id.*

41 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

42 *Id.* at 637 n.19.

43 *See generally, e.g.*, *D'Antuono*, 789 F. Supp. 2d at 333 ("The United States Supreme Court's statement in the *Mitsubishi Motors* footnote does not specify whether the source of law that could permit a court to strike down such an agreement is state contract law—in that case, the Puerto Rico's contract law—or some federal law source. . . . In addition, it does not specify whether it sets forth a generally-applicable rule, or one whose application is limited to the antitrust context.") (internal citations omitted).

44 For example, *Mitsubishi Motors* involved the question of whether international choice-of-forum and choice-of-law clauses effectively prevented vindication of the statutory rights at issue.

45 531 U.S. 79 (2000).

46 *Id*. at 92.

47 *Id.*

48 *Id*. at 82.

49 *Id*. at 90.

50 *See generally* D'Antuono v. Service Rd. Corp., 789 F. Supp. 2d 308, 331, 334 (D. Conn. 2011) (collecting case law).

51 *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (finding arbitration of employment claims unconconscionable and thus unenforceable under California law where arbitration clause contained a fee-splitting provision, limited the remedies available, and limited the statute of limitations); Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1173 (N.D. Cal. 2002) (denying defendant's motion to compel arbitration on individual, non-aggregated basis); ACORN v. Household Int'l, Inc., 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002)(same); Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (finding waiver of class arbitration in consumer contract of adhesion unconscionable and unenforceable under California law). For a more recent analysis, *see also generally*, Steele v. Am. Mortg. Mgmt. Servs., No. 12-00085, 2012 WL 5349511, at *8 (E.D. Cal. Oct. 26, 2012) (using unconscionability doctrine to evaluate class waiver but ultimately finding agreement not so "permeated by unconscionability" as to warrant non-enforcement).

52 *Discover Bank*, 113 P.3d 1100.

53 131 S. Ct. 1740, 1744, 1748 (2011). Citing *Concepcion*, the Ninth Circuit issued a similar ruling in 2012 regarding a Washington state-law rule that effectively deemed class waivers substantively unconscionable. *See* Coneff v. AT&T Corp., 673 F.3d 1155 (9th Cir. 2012). The Court kicked the case back to the district court, however, on the question of procedural unconscionability, recognizing a carve-out of sorts in the *Concepcion* jurisprudence.

In California, state courts have struggled with the extent to which *Concepcion* affects class waivers in the state. Prior to *Concepcion*, the California Supreme Court in 2007 issued a ruling extending the *Discover Bank* rule and observing that, in the employment context, "class arbitration waivers should not be enforced if a trial court determines…that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." Gentry v. Superior Court, 165 P.3d 556, 559 (Cal. 2007). *Concepcion* threw doubt on the viability of this rule. In *Iskanian v. CLS Transp. of Los Angeles, LLC*, the appeals court found that *Concepcion* effectively overruled *Gentry*'s instruction. 142 Cal.Rptr.3d 372, 379 (Cal Ct. App. 2d 2012). The California Supreme Court subsequently granted review of the court's ruling, 147 Cal. Rptr. 3d 324 (Cal. Sept. 19, 2012), setting up a decision that could both determine the landscape for class waivers in California itself and have effects on the larger question of what role state-law doctrines will play in the class waiver jurisprudence generally.

54 *Concepcion*, 131 S. Ct. at 1744.

55 *Concepcion*, 131 S.Ct. at 1747. *See also D'Antuono*, 789 F. Supp. 2d at 331 ("[T]his Court reads the *AT&T Mobility* decision as casting significant doubt on virtually any 'device [or] formula' which might be a vehicle for 'judicial hostility toward arbitration.'") (internal citation omitted).

56 827 F. Supp. 2d 294 (S.D.N.Y. 2011), *appeal docketed,* No. 11-5213 (2d Cir. Dec. 19, 2011).

57 *Raniere*, 827 F. Supp. 2d at 311–12.

58 *Id.* at 314.

59 *Id*. at 316–17.

60 *Id*. at 314.

61 827 F. Supp. 2d at 314.

62 785 F.Supp.2d 394 (S.D.N.Y. 2011), *reconsideration denied*, No. 10-6950, 2011 WL 2671813 (S.D.N.Y. July 07, 2011).

63 *Id*. at 397.

64 Parisi v. Goldman, Sachs & Co., a*ppeal docketed*, No. 11-5229 (2d Cir. Dec. 15, 2011).

65 Owen v. Bristol Care, Inc., No. 12-1719, 2013 WL 57874 (8th Cir. Jan. 7, 2013)

66 No. 11-04258, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012), *appeal docketed,* 12-1719 (8th Cir. March 27, 2012).

67 *Id*. at *5.

68 Owen, 2013 WL 57874, at *3-4.

69 357 NLRB No. 84, 2012 WL 36274 (Jan. 3, 2012). An appeal in the case is now pending before the 5th Circuit. D.R. Horton, Inc. v. NLRB, *appeal docketed*, 12-60031 (5th Cir. Jan. 13, 2012).

70 *Id.*

71 Owen, 2013 WL 57874, at *4.

72 *See, e.g.*, Cohen v. UBS Fin. Servs., Inc., No. 12-2147, 2012 WL 6041634, at *4 (S.D.N.Y. Dec. 4, 2012) (explicitly rejecting *Raniere* and its reasoning); LaVoice v. UBS Fin. Servs., Inc., No. 11-2308, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012).

73 *See, e.g.*, Cohen, 2012 WL 6041634, at *4

74 789 F. Supp. 2d 308 (D. Conn. 2011).

75 *Id.* at 317–18.

76 *Id.*

77 *Id.* at 327.

78 *Id*. at 332, 342–44.

79 *Id.* at 343.

80 *See, e.g., id.* at 331 ("[T]his Court reads the *AT&T Mobility* decision as casting significant doubt on virtually any 'device [or] formula' which might be a vehicle for 'judicial hostility for arbitration.'").

81 No. 11-2451 (2d Cir. Oct. 8, 2011).

82 No. 09-340, 2010 WL 147196 (D. Conn. Jan. 11, 2010).

83 554 F.3d 300 (2d Cir. 2009).

84 *Pomposi*, 2010 WL 147196.

85 *Id.* at *7.

86 554 F.3d 300.

87 667 F.3d 204 (2d Cir. 2012).

88 130 S.Ct. 1785 (2010). *Stolt-Nielsen* involved the question of whether parties could be subjected to class-wide arbitration where their agreement to arbitrate was silent as to class treatment. Observing that arbitration is a matter of contract and that parties are free to set the terms of arbitration, the Court ruled that class-wide arbitration cannot be imposed where parties do not expressly agree to it.

89 554 F.3d at 316.

90 *Id*. at 304.

91 667 F.3d 204.

92 Petition for Writ of Certiorari, American Express Co. v. Italian Colors Restaurant, *petition for cert. filed*, filed (July 30, 2012) (No. 12-133).

93 Am. Express Co. v. Italian Colors Restaurant, 133 S.Ct. 594 (2012).

94 446 F.3d 25 (1st Cir. 2006).

95 *Id.* at 54.

96 *Id.* at 58–59.

97 *Id*. at 51–52.

98 Skirchak v. Dynamics Research Corp., 508 F.3d 49, 51 (1st Cir. 2007).

99 Adkins v. Labor Ready, Inc., 303 F.3d 496, 502–03 (4th Cir. 2002).

100 *Id.* at 503.

101 Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 26, 31 (1991) (internal citations omitted)).

102 De'Oliveira v. Citicorp North America, Inc., No. 12-0251, 2012 WL 1831230 (M.D. Fla. May 18, 2012) (granting defendant's motion to compel individualized arbitration of FLSA claims).

103 *Id*. at *2 (citing *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012)). The district court in *Cohen* also explicitly rejected the National Labor Relations Board's decision and reasoning in *In re D.R. Horton, Inc. See* 2012 WL 6041634, at *4.

104 Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004).

105 *Id.* at 300.

106 *See supra* note 69 and accompanying text.

107 2012 WL 6041634.

108 2012 WL 124590.

109 847 F. Supp. 2d 528 (SDNY 2012).

110 *Id*. at 532.

111 *Id*. at 531-33.

112 Sutherland v. Ernst & Young, LLP, 847 F. Supp. 2d 528 (S.D.N.Y. 2012), *appeal docketed*, No. 12-304 (2d Cir. Jan. 24, 2012).

Union Organizing and the NLRB Under President Obama

*By Raymond J. LaJeunesse, Jr.**

Note from the Editor:

This paper analyzes union organizing and the NLRB under the Obama Administration. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the status of labor law and labor relations in the United States. To this end, we offer links below to various sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

- National Labor Relations Board, Employee Rights Notice Posting: http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf
- National Labor Relations Board, Boeing Complaint Fact Sheet: http://www.nlrb.gov/boeing-complaint-fact-sheet
- Editorial, *Boeing and the N.L.R.B.*, N.Y. Times, April 25, 2011: http://www.nytimes.com/2011/04/26/opinion/26tue2.html
- James J. Brudney, *Neutrality Agreements and Card Check Recognition*, Advance: The Journal of the American Constitution Society (February 2007): http://www.acslaw.org/files/Brudney-Neutrality%20Agreements-Feb%202007-Advance%20Vol%201.pdf
- National Labor Relations Board, Board Decisions: http://www.nlrb.gov/cases-decisions/board-decisions

Introduction

After the 2008 election of President Barack Obama and Democrat majorities in both houses of Congress, labor organizations were confident that the "Employee Free Choice Act" (EFCA)—popularly called the "Card-Check Bill"—would be enacted. EFCA would have made union organizing easier, by among other things, requiring employers to recognize unions without a secret-ballot election supervised by the National Labor Relations Board (NLRB or Board) if a union obtained signatures on union-authorization cards or a petition of a majority of the employees in an appropriate bargaining unit. However, despite President Obama's support for EFCA, for a number of reasons organized labor was unable to overcome a threatened Senate filibuster in 2009 and 2010, and EFCA became a "dead letter" when Republicans took the House and made significant gains in the Senate in the 2010 elections.

Nonetheless, the Obama Administration has done much to try to ease union organizing through the President's appointments after the 2010 elections of majorities on the NLRB and an Acting General Counsel. From March 27, 2010 to August 27, 2011, the Obama-appointed majority consisted of three former union attorneys, then Chairman Wilma Liebman and Members Mark Pearce and Craig Becker, the latter a recess appointee. When Liebman's term expired on August 27, 2011, Pearce and Becker had a 2-1 majority until Becker's recess appointment expired on January 3, 2012, with the beginning of a new Congress. On January 4, 2012, President Obama announced controversial recess appointments of three new Board Members: Richard Griffin, former General Counsel of the Operating Engineers union; Sharon Block, former staffer for Senator Edward (Ted) Kennedy and assistant to Obama Secretary of Labor Hilda Solis; and former Republican Senate staffer Terrence Flynn, who has since resigned. These appointments have been challenged in court by, among others, workers represented by National Right to Work Legal Defense Foundation attorneys, because, they argue, the Senate was actually not in recess on January 4, but conducting pro forma sessions every three days.[1]

Lafe Solomon, a career NLRB attorney, was named Acting General Counsel by President Obama effective June 21, 2010.

The NLRB's attempted regulatory establishment of what opponents have labeled "EFCA-lite" has been accomplished by Board rulemaking, General Counsel actions, and Board case decisions.

I. NLRB Rulemaking

A. Notice-Posting Mandate

On August 30, 2011, with the then-one Republican Member dissenting, the Board promulgated a Final Rule entitled "Notification of Employee Rights under the National Labor Relations Act ['NLRA']."[2] This rule would have required for the first time that all private employers in the country post a notice advising employees in detail of their statutory rights to unionize and engage in union activities, with no detail about their rights to refrain from union activity. Employers who fail to post the notice would be guilty of a new, Board-created unfair labor practice, could lose the protection of the Act's six-month statute of limitations, and could have that failure be considered as evidence against them in cases involving other

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unfair labor practices.

The posting requirement was originally intended to have been effective November 14, 2011, but is not yet effective due to litigation brought against the Board by a few employers, including the National Right to Work Legal Defense Foundation, and several employer associations challenging the Board's authority to promulgate this rule.

In the cases brought by the National Association of Manufacturers, the Foundation, and others, the United States District Court for the District of Columbia effectively upheld the entire rule. It held that the Board has the authority to require all employers to post the notice. It struck down the unfair labor practice penalty for not posting only to the extent "that the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice." The court specifically ruled that nothing in its "decision prevents the Board from finding that a failure to post constitutes an unfair labor practice in any individual case." It similarly held that the NLRB could consider an employer's failure to post the notice as stopping the running of the statute of limitations "in individual cases" and "as evidence of an employer's unlawful motive" in individual cases alleging an unfair labor practice other than failure to post.[3]

However, soon thereafter, in a case brought by the U.S. Chamber of Commerce, the United States District Court for the District of South Carolina held that the Board lacked statutory authority to promulgate the rule requiring all employers to post notices informing employees of their rights under the NLRA.[4] In the meantime, the plaintiffs in the *NAM* cases had filed notices of appeal to the U.S. Court of Appeals for D.C. Circuit and a motion for injunction against enforcement of the notice-posting rule pending appeal. The D.C. Circuit granted that injunction on April 17, 2012, and ordered expedited briefing and oral argument. On April 27, 2012, the Board filed notice of its appeal from the D.C. district court's ruling that the Board could not make failure to post the notice a per se unfair labor practice. Argument in the D.C. Circuit was heard on September 11, 2012. The Board also filed notice of its appeal to the Fourth Circuit from the South Carolina district court's decision on June 15, 2012. The Fourth Circuit will hear oral argument on March 19, 2013.

B. Expedited Representation Election Procedures

On December 22, 2011, the NLRB published a Final Rule amending its procedures for conducting elections to determine whether a majority of employees in a bargaining unit wish to be represented by a union for purposes of collective bargaining.[5] Under the amended rules, elections would be conducted in about ten to twenty-one days, as compared to the recent median time frame of thirty-eight days from the filing of a petition for an election. Those opposing unionization assert that the shortened time-frame for elections would ease union organizing by reducing the period within which employers could make the case against unionization, individual employees could fully consider any potential disadvantages of union representation, and employees opposed to union representation could organize themselves and campaign in opposition to unions. In addition, under the amended rules, decisions concerning who is eligible to vote in an election would be made by Regional Directors only after the election has taken place, with no appeal of right to the Board itself. Consequently, employees would be required to vote without knowing which of their fellow employees actually are in the bargaining unit.

The U.S. Chamber of Commerce and Coalition for a Democratic Workplace, an umbrella association of trade associations originally formed to lobby against EFCA, immediately sued the Board challenging the expedited election rules. Their complaint, filed in the U.S. District Court for the District of Columbia, asserted that the final rule violates the NLRA, exceeds the Board's statutory authority, and is contrary to the First and Fifth Amendments' guarantees of the rights to free speech and due process. In addition, the complaint alleged that by issuing a final rule on the signature of just two NLRB members, the Board's actions were "arbitrary, capricious, and an abuse of discretion," in violation of the Administrative Procedure Act. The complaint also alleged that the Board members violated the Regulatory Flexibility Act by failing to provide an "adequate factual basis" for concluding that the rule will not have a significant impact on a substantial number of small entities, and by failing to consider the economic impact on small businesses of speeding up the election process.

The amended election procedures briefly took effect on April 30, 2012. However, on May 14, 2012, the district court granted the Chamber and CDW summary judgment, deciding that, "because no quorum ever existed for the pivotal vote" on promulgating the final rule, "the Court must hold that the challenged rule is invalid."[6] The NLRA requires a quorum of three members for the NLRB to do business.[7] The court found that only two members "participated in the decision to adopt the final rule, and two is simply not enough"; that Member Brian Hayes had voted in opposition to "earlier decisions relating to the drafting of the rule does not suffice." The next day the Board suspended implementation of the amendments to the representation election rules. On June 11, 2012, the moved for reconsideration. The motion for reconsideration was denied by the district court on July 27, and the Board filed notice of its appeal to the D.C. Circuit on August 7, 2012. That court will hear oral argument on April 4, 2013.

II. Actions of the Acting General Counsel

A. Complaint Against Boeing for Locating New Plant in a Right-to-Work State

In October 2009, Boeing decided to open a new production line for its 787 Dreamliner at a plant in North Charleston, South Carolina, that it had earlier purchased from Vought Aircraft. This decision was made after extensive negotiations with the International Association of Machinists (IAM) and its District Lodge 751, which represent many of Boeing's workers at its Washington State facilities. The collective-bargaining agreement did not require Boeing to negotiate with the union over where work is placed. The new production line did not displace any existing work in Washington, where Boeing hired some 2000 new employees.

The public statements of Boeing officials indicated that one factor in deciding to open the second Dreamliner line in South Carolina, a right-to-work state, was repeated strikes the union had conducted in Washington, a non-right-to-work state, and the IAM's refusal to add a no-strike clause to the collective-bargaining agreement. Boeing officials also said that financial incentives from South Carolina, supply-chain considerations, and geographic diversity played critical roles in their decision.

When Boeing bought the North Charleston plant, Machinists Local Lodge 787 represented the workers there. However, in September 2009, before Boeing decided to put the second Dreamliner line in North Charleston, the employees there voted 199 to 68 to decertify the IAM. For many employees the prime motivation for decertifying the union was to make their facility more attractive to Boeing in deciding where to build Dreamliners.

In March 2010, Machinists District Lodge 751 filed an unfair-labor-practice charge against Boeing in the Seattle NLRB Regional Office (Case 19-CA-32431). The charge asserted that Boeing's decision to place the second production line in a nonunion facility constituted unlawful retaliation for past strikes, and was intended to "chill" future strike activity, by its unionized Washington employees. On April 20, 2011, Acting General Counsel Lafe Solomon issued a complaint against Boeing through the Washington Regional Director.

The complaint was called "unprecedented" by former NLRB Chairman Peter Schaumber and some other labor-law experts. Its thrust was that Boeing's decision to create new jobs in South Carolina was motivated by "anti-union animus" and, therefore, violated the NLRA. The complaint alleged that Boeing "transferred" work from Washington to South Carolina, though, as mentioned above, the new line did not displace any existing work. Among other relief, the complaint requested an order mandating that Boeing "operate" the second Dreamliner assembly line in Washington.

On June 20, 2011, the Board granted three nonunion South Carolina Boeing employees represented by National Right to Work Legal Defense Foundation attorneys "limited intervention solely for the purpose of filing a post-hearing brief with the administrative law judge" who was hearing the case. However, the opportunity to file that brief never occurred because, before the case went to trial, Boeing and Machinists District Lodge 751 entered into a new collective-bargaining agreement in which Boeing made several financial concessions to the union and agreed to build its new 737 MAX aircraft in the Seattle area.

The new agreement was ratified on December 7, 2011. Within days, with the ALJ's and General Counsel's blessings, the complaint against Boeing was dismissed, the union's charges against it were withdrawn, and the case was closed. The agreement removed the potential negative impact on the South Carolina workers' jobs because there no longer was a danger that the NLRB would order that the 787 Dreamliner production line be moved to Washington State. However, the Acting General Counsel's pursuit of the case against Boeing enabled the union to use the threat of continued costly litigation and a potentially adverse NLRB order to persuade Boeing to make financial concessions and agree that it would not locate other work in right-to-work states, which it had been considering, rather than in non-right-to-work states where organizing by the union would be easier.

B. Memoranda Instructing Regional Offices

One way to change an interpretation of the NLRA is through a General Counsel Memorandum instructing the Board's Regional Offices on how to apply the statute. Acting General Counsel Lafe Solomon has issued several GC Memoranda that have the effect of making it easier for unions to conduct organizing campaigns. The following two memoranda are the most significant of these:

1. Increased and Expedited 10(j) Injunctions in Organizing Campaigns

NLRA Section 10(j) authorizes the Board, when a complaint has been issued alleging that an employer or union has committed an unfair labor practice, to petition a United States district court "for appropriate temporary relief or restraining order."[8] GC Memo 10-07 (Sept. 30, 2010) instructs Regional Offices to consider filing Section 10(j) petitions in any case where employees are "unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplace." When employees have been discharged in such cases, the relief sought from the court is immediate reinstatement of the discharged employees even though the employer has not yet been adjudicated by an Administrative Law Judge to have committed an unfair labor practice. GC Memo 10-07 directs the Regional Offices to expedite 10(j) proceedings.

2. Extreme Remedies to Be Sought in Organizing Campaigns

GC Memo 11-01 (Dec. 20, 2010) instructs Regional Offices regarding what remedies they should seek for "serious unfair labor practices" occurring during organizing campaigns, such as "threats, solicitation of grievances, promises or grants of benefits, interrogation and surveillance." Because these are essentially all of the possible unfair labor practices that can occur during an organizing campaign, employers may be concerned that Regional Directors who encounter what might be considered "routine" unfair labor practices to seek what in the past were extraordinary remedies utilized only for employers who flagrantly and repeatedly violate the Act.

The remedies that can be sought under GC Memo 11-01 and 10-07 include:

- interim reinstatement of any employee who claims that the discharge was unlawful;
- in addition to posting of a notice about the violations, a "public reading" of the notice by a responsible company official;
- union access to company bulletin boards to post organizing information; and,
- giving union organizers employees' names and addresses before the union has filed a representation petition.

In addition, if a Region concludes that those remedies would be insufficient to permit a fair election, under GC Memo 11-01 it can ask the Division of Advice in Washington, D.C. to authorize seeking these additional remedies for "hallmark violations":

- union organizers' access to the company's non-work areas during employees' non-work time;
- if the company speaks to employees about union representation, equal time and facilities for union organizers; and,
- even if the company does not address employees about unionization, time and facilities for the union to speak on company property before a Board election.

The Memo's list of "hallmark violations" includes not only threats of discharge and plant closure, but violations such as solicitation of grievances, surveillance or impression of surveillance, and certain interrogations of employees.

C. Amicus in Litigation Challenging "Neutrality and Card-Check" Agreements

Mardi Gras Gaming Corp. operates a racetrack in Florida. It entered into an organizing agreement with UNITE HERE Local 355 in exchange for the union's agreement to conduct a $100,000 political campaign in support of a ballot initiative legalizing casino gambling at racetracks. Among other things, Mardi Gras agreed to provide UNITE with personal information about Mardi Gras's nonunion employees, use of its property for organizing, and a gag-clause on any speech by Mardi Gras that states or implies opposition to the union. In addition, Mardi Gras agreed to recognize Local 355 as its employees' "exclusive representative" if the union collected authorization cards from a majority of employees and guaranteed Local 355 a collective-bargaining agreement after unionization.

On November 3, 2008, a National Right to Work Legal Defense Foundation staff attorney filed suit for Mardi Gras employee Martin Mulhall against Local 355 and Mardi Gras in the U.S. District Court for the Southern District of Florida, alleging violations of Section 302 of the Taft-Hartley Act.[9] That section prohibits employers from giving any "thing of value" to a union seeking to represent its employees and prohibits unions from demanding and accepting such things. The legal theory is that the organizing assistance that Local 355 demands from Mardi Gras's employees—personal information, use of Mardi Gras's property, and the gag-clause—are "thing[s] of value," the exchange of which is prohibited under Section 302.

On September 10, 2010, the U.S. Court of Appeals for the Eleventh Circuit, reversing the district court's dismissal of the case for lack of standing, held that Mulhall has standing because he has an interest in whether he is unionized by UNITE and that the harm to Mulhall's associational interests is not speculative under the organizing agreement.[10]

On remand, the district court again dismissed the case. This time it ruled that the organizing assistance that the union demanded from Mardi Gras was not a "thing of value" prohibited under Section 302, despite the allegations of the complaint—which must be considered true on a motion to dismiss—that the organizing assistance has monetary value and that the union claimed as much in arbitration proceedings to enforce the organizing agreement.

On January 18, 2012, the Eleventh Circuit issued its second decision favorable to the employee in the case, this time with one judge dissenting. The majority held "that organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302." The majority reasoned that "ground rules for an organizing campaign . . . can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer."[11]

On February 8, Local 355 petitioned for panel rehearing and rehearing en banc, arguing that the "panel decision . . . calls into question the use of organizing agreements as a means of voluntary recognition of unions." An amicus curiae brief in support of the petition for rehearing was subsequently filed by Acting NLRB General Counsel Solomon and other Obama Administration officials. The court denied rehearing on April 25, with none of its regular active judges requesting a poll as to whether to grant rehearing en banc.

The union then filed a petition for certiorari with the U.S. Supreme Court on July 20. Mulhall's response argued that the Eleventh Circuit's judgment was correct, but agreed that the Supreme Court should grant review because of the importance of the issue. The employer did not file a response. Mulhall's attorney also filed a conditional cross-petition for certiorari questioning the narrowness of the Eleventh Circuit's reasoning, asking that the cross-petition be granted if the Court grants the union's petition.

In October, the Court asked both the union and employer to respond to the cross-petition; and the employer to respond to the union's petition. Mardi Gras's response opposed both petitions, arguing that the case is moot because the organizing agreement expired on December 31, 2011. The union's response to the cross-petition agreed that the cross-petition should be granted if its own petition is granted. Mulhall's and the union's replies to Mardi Gras's opposition both contend that the case is not moot, because the union is still trying to enforce the organizing agreement in a separate lawsuit in federal court against the employer. On January 14, 2013, the Court asked the U.S. Solicitor General to file a brief stating the government's position on the issues presented by the case..

III. NLRB Decisions

A. "Card Check" Recognition Protected from Employee Challenges

In two cases in which National Right to Work Legal Defense Foundation attorneys represented decertification petitioners, the NLRB in 2007 significantly increased the ability of workers to challenge union representation dictated by "card checks." A three-Member majority of the five-Member Board modified the "recognition-bar doctrine." The majority held that decertification elections would be conducted where an employer recognized a union by card check if thirty percent or more of the unit employees filed a valid petition requesting an election within forty-five days of the employer's posting in the

workplace of a notice prepared by a Regional Office that the union had been recognized and that the workers had a right to an election. Moreover, the majority modified "contract-bar" rules so that a collective-bargaining agreement executed on or after voluntary recognition did not bar a decertification petition "unless notice of recognition has been given and 45 days have passed without a valid petition being filed." The prior rule was that any agreement reached after voluntary recognition would bar decertification for up to three years of the contract's term.

The majority ruled as it did because "the immediate post-recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective-bargaining representation," which "is better realized by a secret election than a card check." The majority noted that "card signings are public actions, susceptible to group pressure exerted at the moment of choice," and that "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options."[12]

In the almost-four years that followed, 1333 *Dana* notices were requested, 102 election petitions were subsequently filed, and the Board conducted 62 *Dana* decertification elections. In 17 (or 25%) of those elections, the union that had been recognized by the employer based on union-authorization cards without a secret-ballot election was rejected by the employees.

One case in which a *Dana* notice was requested is *Lamons Gasket Co.*, in which a Foundation attorney represented worker Michael Lopez. Pursuant to a neutrality and card-check agreement, Lamons Gasket recognized the Steel Workers Union as monopoly-bargaining representative for approximately 165 production, warehouse, and maintenance employees at its Houston, Texas facility. Lopez filed a timely *Dana* decertification petition, and the election was held. However, the ballots were impounded and not counted because in the interim the union had requested that the Board review the Regional Director's decision ordering the election. The request for review argued that *Dana* was wrongly decided and should be overruled. After that request for review was filed, Regional Directors impounded the ballots in most if not all *Dana* elections conducted.

The Board, three to two, granted the request for review and solicited amicus briefs on the issue of whether *Dana* should be overruled.[13] The majority said that "we choose to review the briefs and consider the actual experiences of employees, unions, and employers under *Dana Corp*., before arriving at any conclusion." One of the majority was Member Craig Becker, who had earlier denied a motion that he recuse himself in another case involving the same issue because he had signed a brief in *Dana* arguing that the Board should not permit decertification elections after card-check recognitions.

Members Schaumber and Hayes charged in their dissenting opinion that the grant of review "is but a prelude to what will most likely result in the overruling of *Dana*, in derogation of employees' . . . free choice rights." They argued that *Dana* was based "on well-established legal principles" and "did no more than level the playing field by providing an electoral option similar to that already available to employees whose employer relied on a petition signed by a majority of unit employees to withdraw recognition from an incumbent union."

On August 26, 2011, the day before Chairman Wilma Liebman's term on the Board expired, the Board issued a three-to-one decision overruling *Dana*.[14] Member Becker again did not recuse himself. The majority argued that, although voluntarily recognized unions were rejected in 25% of the *Dana* elections, the statistics concerning *Dana*'s implementation "demonstrate that . . . the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee sentiment." The majority also asserted that *Dana*'s ruling that employees should have a limited opportunity for secret-ballot elections "undermined employees' free choice by subjecting it to official question and by refusing to honor it for a significant period of time, without sound justification."

Although *Dana* had been applied only prospectively, the Board majority applied its new rule retroactively to all pending cases other than those in which *Dana* election ballots had already been counted. As a consequence, ballots that were impounded in several *Dana* elections were never counted, and several pending petitions for *Dana* elections were dismissed.

Member Hayes vigorously dissented in *Lamons Gasket*. He accused the majority of making "a purely ideological policy choice, lacking any real empirical support and uninformed by agency expertise," that, like its actions in other cases and rule making, "conveys a pronounced ideological agency bias disfavoring the statutory right of employees to refrain from supporting collective bargaining" and favoring unionization. Hayes suggested that the majority's "holdings are not entitled to deference and should be put to strict scrutiny upon judicial review." However, there is no judicial review of Board decisions in representation cases, so the *Lamons Gasket* case is now closed. The Board is unlikely to revisit the issue until its membership changes.

B. "Successor Bar" Strengthened

In *UGL-UNICCO Service Co.*,[15] the majority of Chairman Liebman and Members Becker and Pearce issued another decision that makes it more difficult for workers subject to an unwanted union to obtain a secret-ballot election. The issue is whether employees should have an opportunity to reject an incumbent union and choose either no union or another union when a "successor employer" purchases a unionized employer. The Board-created "successor bar" doctrine says "no," that the employer and incumbent union must bargain for "a reasonable period of time" before employees may challenge the incumbent's majority status.

In 2002, the Board had discarded what had become an automatic "successor bar," returning "to the previously well-established doctrine that an incumbent union in a successorship situation is entitled to—and only to—a rebuttable presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status."[16] *UGL-UNICCO* overruled *MTV Transportation* and reinstated a "conclusive presumption" of continuing majority support.

Moreover, *UGL-UNICCO* established defined "reasonable periods of bargaining" during which the successor bar holds. If the successor employer adopts the existing contract as a starting point, the "successor bar" lasts only six months. A greater obstacle for employees opposed to a union is that if the successor recognizes the union, but unilaterally establishes initial terms and conditions of employment before beginning to bargain, the bar is effective for at least six months and up to one year.

The Board majority reasoned that strengthening the successor bar "promote[s] a primary goal of the National Labor Relations Act by stabilizing labor-management relationships and so promoting collective bargaining." Member Hayes, dissenting, accused the majority of again "protecting labor unions, not labor relations stability or employee free choice."

C. Pre-Recognition Bargaining by Minority Unions Permitted

NLRA Section 8(a)(2)[17] makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization." In *Majestic Weaving Co.*,[18] the Board held that bargaining future terms of a collective-bargaining agreement with a union that has not yet obtained majority support violates Section 8(a)(2) even if the agreement is conditioned on the union later obtaining majority support.

Dana Corporation signed a neutrality and card-check agreement with the United Auto Workers that gave the union access to company facilities, employees' home addresses, and "captive audience" speeches. It also included a confidentiality clause and substantive provisions favorable to Dana concerning health benefits and other matters to be incorporated in any future collective-bargaining agreement. The UAW had been attempting for years, unsuccessfully, to organize Dana's plant in St. Johns, Michigan. After the St. Johns employees learned about the neutrality agreement, a majority signed and delivered to Dana and the UAW a petition opposing the union and asking Dana to cease giving that agreement effect. Nonetheless, Dana and the union conducted captive-audience speeches, Dana gave the union the employees' home addresses and did not allow its supervisors to talk negatively about the union, and UAW organizers conducted home visits.

National Right to Work Legal Defense Foundation attorneys filed unfair-labor-practice charges for three Dana St. Johns employees against both Dana and the union. In 2004, the then-General Counsel issued complaints against both alleging that they violated the NLRA by entering into an agreement "that sets forth terms and conditions of employment to be negotiated in a collective bargaining agreement should Respondent Union obtain majority status," when the union did not represent a majority of the St. Johns employees. The complaints asked that the neutrality agreement be voided as applied to that facility and that the union be ordered to return to employees any authorization cards obtained after the agreement was executed.

Member Becker recused himself when the case reached the Board on exceptions from an administrative law judge's decision against the workers because he had co-authored a brief for the UAW and AFL-CIO opposing the exceptions. On December 6, 2010, a two-member Board majority (Members Liebman and Pearce) dismissed the complaints.[19] It held that, *Majestic Weaving* notwithstanding, finding pre-recognition bargaining unlawful would contravene the NLRA's fundamental purposes, which they asserted are to encourage voluntary recognition of unions and collective bargaining. Member Hayes' dissent argued that the majority decision will "facilitate the preemptive practice of top-down organizing of employers by unions, thereby subordinating the statutory rights of employees to the commercial self-interests of the contracting" unions and employers.

The U.S. Court of Appeals for the Sixth Circuit affirmed the Board's decision on August 23, 2012.[20] The court weighed what it described as the "thoughtful majority and dissenting opinions of the Board members." It affirmed the Board majority's ruling "not because we find one position more persuasive than the other," but because "reasonable minds could differ as to how the NLRA should be interpreted to further the underlying purposes of the NLRA in the context of employer negotiations with unions that do not have majority status," and because the courts must defer to the Board's interpretation of the Act if it is "reasonable."

D. Defenses to Charges of Unlawful Solicitation of Grievances Vitiated

One of the "serious violations" that GC Memo 11-01 states can justify extreme remedies is an employer's solicitation of employee grievances during an organizing campaign. The Board views such solicitation as impliedly promising to remedy grievances without union intervention. The current Board has expanded the standard of what constitutes such a violation. One employer defense to a charge of improper solicitation has been that the employer had a previous practice of similarly soliciting grievances before the organizing campaign began. However, in *Mandalay Bay Resort & Casino*,[21] the Board held that the employer had improperly solicited grievances, even though it had a previous practice of conducting "focus groups" and pre-shift meetings in which employee issues were discussed and employee complaints aired. The Board found that there was a change in practice, because during the campaign the "focus groups" were convened by higher-level managers than those who had previously conducted those meetings.

E. Definition of Unlawful Surveillance Expanded

In *DHL Express, Inc.*,[22] the Board extended the definition of "surveillance," ordering a second election where a union had lost a representation election by an eighty-two-vote margin. The employer's security guards had called the police to investigate the presence of non-employee union organizers among employees hand-billing for the union on or near the employer's property. The security guards stood among or near the organizers while the police investigated. The Board majority held that the guards' presence was unlawful surveillance of the employees' protected union activity because it was "unusual, out of the ordinary, and unconnected with the [employer's] concerns." Member Schaumber dissented, because the guards did nothing to interfere with the hand-billing, often patrolled the area in question for security purposes, and had called the police and left the area once the police concluded their investigation.

F. "Bannering" Held Not to Be Unlawful Secondary Pressure

Section 8(b)(4)(ii)(B) of the NLRA[23] makes it an unfair labor practice for unions or their agents "to threaten, coerce, or restrain" persons or industries engaged in commerce with an objective of "forcing or requiring any person to . . . cease doing business with any other person." Consequently, it has long been unlawful for a union to picket a "neutral" (secondary) employer to put pressure on it to stop doing business with a primary employer that the union is attempting to organize.

In recent years, unions have adopted the tactic of "bannering," in which a union displays very near to a neutral employer's property, but usually on public property, huge banners that typically say "SHAME ON [the neutral employer]" for dealing with the primary employer, which is generally accused of not providing "area standard" wages and benefits. To the general public, it thus appears that the union's dispute is with the neutral employer, which would be what section 8(b)(4)(ii)(B) prohibits.

However, in *Carpenters Local 1506 (Eliason & Knuth)*,[24] the Board majority ruled that such a display was not unlawful because it "constituted neither picketing nor otherwise coercive non-picketing conduct." Moreover, the majority reasoned that the Supreme Court's doctrine of avoiding constitutional questions through statutory construction supported that conclusion, because peaceful bannering raised "serious constitutional free speech issues." Members Hayes and Schaumber dissented, arguing that the display of banners is the "confrontational equivalent of picketing" and therefore constitutes coercive secondary activity.

In *Sheet Metal Workers Local 15 (Brandon Regional Hosp.)*,[25] the Board held three to one that, under *Carpenters Local 1506*, a union did not violate Section 8(b)(4)(ii)(B) by displaying a large inflatable rat on public property in front of a hospital to protest its hiring of nonunion contractors. And, in *Southwest Regional Council of Carpenters (New Star Gen. Contractors)*,[26] the Board majority also extended its "free speech" bannering logic to find lawful union banners displayed outside gates reserved for neutral contractors at a "common situs" construction project.

G. Union Organizers' Access to Company Premises

Roundy's Inc.[27] is the first of a series of cases in which the NLRB communicated that it intends to loosen restrictions on union organizers' ability to obtain access to employers' premises to solicit support for unionization. Roundy's is a grocer that has both leased and company-owned stores. It attempted to ban non-employee union agents from hand-billing in front of all of its stores. The Board held that Roundy's violated the law in denying union organizers access at the leased sites because it did not have a sufficient property interest there. The Board also reserved consideration, and invited amicus briefs, as to whether Roundy's ban is an unfair labor practice at the company-owned stores, where it has a sufficient property interest, because Roundy's allows charitable solicitations. That issue is still pending before the Board.

In *New York, New York Hotel & Casino*,[28] the Board again found in favor of greater union access. There the Board held that a Las Vegas casino violated the NLRA by prohibiting off-duty employees of two contractor-owned restaurants from distributing union-organizing hand-bills at the casino's main entrance and at the entrances of the target restaurants inside the casino. The Board majority found that the off-duty restaurant employees' rights were so closely aligned with those of the casino's own employees, rather than those of non-employee union organizers, that they should be accorded the same rights as off-duty casino employees. Member Hayes dissented from this part of the decision.

In *Simon DeBartelo Group*,[29] the Board held that DeBartelo unlawfully prohibited employees of its janitorial-maintenance contractor from hand-billing at two of its shopping centers. Citing *New York, New York*, the Board ruled that the janitorial employees who worked regularly at the malls had the same rights as DeBartelo's own employees, because the mall owner had not proved that the hand-billing significantly interfered with its own use of the property. Member Hayes dissented again.

The majority went further in *Reliant Energy*.[30] In *Reliant*, a contractor's employee, while on duty, solicited the primary employer's employees to join a union. The majority held that it was an unfair labor practice for the primary employer to demand that the contractor remove its employee from the job site. Member Hayes' dissent criticized the majority's balancing of private-property and union-organizing rights: "My colleagues once again ride a contractor's Trojan Horse to further breach the legal barrier of Supreme Court precedent that generally proscribes individuals who are not employed by a property owner from engaging in [union activities] on that property."

H. Harassment of Employees Opposed to Unionization

In *Boulder City Hospital, Inc.*,[31] employees had complained to their employer during an organizing campaign about harassment by union sympathizers. In response, the hospital posted a notice reminding employees about its policy prohibiting harassment and threats. The validity of the policy was not challenged, but the Board majority held that the notice was unlawful because it did not merely recite the policy, but stated zero tolerance for "harassment . . . in any degree," because persistent union solicitation is protected by the NLRA even if it is annoying. The majority also found fault with a sentence in the notice stating that employees who felt that they were "being harassed or threatened in any way . . . have the right to talk with Human Resources regarding [that] treatment." The majority reasoned that this sentence could be interpreted as an invitation to report on the union activities of others, an unlawful form of interrogation.

More recently, in *Fresenius USA Manufacturing, Inc.*,[32] an employee who supported retaining a union in an upcoming decertification election at a warehouse "anonymously scribbled vulgar, offensive, and . . . possibly threatening statements on several union newsletters left in an employee breakroom." Female employees complained. After an investigation, the employer discharged the perpetrator for making the statements and for falsely denying that he had done so. The NLRB, Member Hayes dissenting, found that the discharge was an unfair labor

practice, because the employee's "comments encourag[ing] warehouse employees to support the Union" were protected concerted activity and not "so egregious as to cause him to lose the protection of the Act." Moreover, the Board majority held that the perpetrator had a statutory "right not to respond truthfully" to the employer's questions.

I. "Micro" Units: Bargaining Units Based on the Extent of Union Organizing

NLRA Section 9(c)(5) provides that in "determining whether a unit is appropriate for the purposes [of collective bargaining] the extent to which the employees have organized *shall not be controlling*."[33] Consequently, the Board's longstanding practice has been to avoid the proliferation of bargaining units within a single facility or business by applying a "community of interest" test. However, in *Specialty Healthcare & Rehabilitation Center of Mobile*,[34] the Liebman, Becker, and Pearce majority revoked this traditional practice.

In *Specialty Healthcare*, the majority determined that the appropriate bargaining unit was a single job classification of fifty-three certified nonprofessional nursing assistants (CNAs) requested by a union at a non-acute nursing-home facility. They rejected the employer's argument that the appropriate unit should include numerous other non-professionals who worked closely with the CNAs and their patients and, thus, were within a single community of interest. The majority adopted a test stating that where an employer contends that a bargaining unit proposed by union organizers is inappropriate because it excludes certain employees, "the employer must show that the excluded employees share an 'overwhelming community of interest' with the petitioned-for employees."

The *Specialty Healthcare* majority claimed that their "decision adheres to well-established principles of bargaining-unit determination, reflected in the language of the Act and decades of Board and judicial precedent." However, the majority's test puts primary emphasis on the extent of union organizing. Consequently, employers argue that the scales of the traditional community of interest balancing test are tilted in favor of unions and will logically result in the proliferation of bargaining units at a single employer. Union organizers could "cherry pick" units in which they know that they have enough support to win an election, possibly imposing unwanted representation on a minority of workers in the "micro" unit who would be in a majority rejecting representation in a traditional "wall-to-wall" unit.

Micro units could allow union organizers to get inside an employer's doors to organize and seek recognition as the representative of its other employees. Union officials with monopoly bargaining powers over a micro-unit might also have an incentive to offer concessions of employees' interests in return for the company's organizing assistance in unionizing a larger unit. The possibility of expanding representation may create uncertainty for employees, who may be forced to make a decision about unionization without knowing the true make-up of the ultimate bargaining unit. Moreover, it is possible that multiple competing unions representing small units will create conflict between and among represented groups within a single company.

Although *Specialty Healthcare* concerned only a non-acute health-care facility, the majority's holding was not explicitly limited to health-care bargaining-unit determinations. Member Hayes consequently predicted in his dissent, "Today's decision fundamentally changes the standard for determining whether a petitioned for unit is appropriate in any industry subject to the Board's jurisdiction."

That prediction has proven true in several cases. For example:

In *DTG Operations, Inc.*,[35] a two-to-one Board majority, relying on *Speciality Healthcare*, reversed a Regional Director's decision that the 109 employees at a car-rental agency was the appropriate "wall-to-wall" unit. The Board ruled that a Teamster union-requested unit of thirty-one rental and lead-rental sales agents was appropriate, despite frequent interchange, interaction, common supervision, and shared terms and conditions of employment among the larger group.

In *Northrup Grumman Shipbuilding, Inc.*,[36] the Board, aain two-to-one and relying on *Specialty Healthcare*, certified the union's petitioned-for unit of a small subset of technicians working in a Radiological Control Department, excluding all other technical employees at the same facility. Member Hayes, in dissent, wrote that the majority's decision demonstrates that its "newly-fashioned *Specialty Healthcare* standard . . . gives the petitioner's views on unit scope nearly dispositive weight, thereby abnegating the role Congress envisioned for the Board in determining appropriate bargaining units."

The Board's determinations in these representation cases are not appealable. Judicial review of the Obama majority's *Specialty Healthcare* doctrine can occur only if and when the Board finds an employer guilty of an unfair labor practice for refusing to bargain with a union certified as monopoly-bargaining agent in a "micro-unit." That has happened in *Specialty Healthcare* itself,[37] *Northrup Grumman*,[38] and *Nestle Dreyer's Ice Cream Co.*[39]

J. Board Jurisdiction Extended to Previously Excluded Types of Workers

Independent contractors cannot be unionized under the NLRA because they are expressly excluded from its definition of "employees."[40] The Board majority in *Lancaster Symphony Orchestra*[41] ruled that orchestra musicians were "statutory employees," not "independent contractors," though the orchestra had no permanent musicians. The musicians were skilled artists who provided their own instruments and attire, could perform with other entities on- or off-season, and were paid per program or concert when they accepted an offer to perform. Nonetheless, the Board majority held that they were statutory employees because "the Orchestra possesses the right to control the manner and means by which the performances are accomplished," and the musicians' "service is part of the Orchestra's regular business; and they are paid on a modified hourly basis."

Supervisors and managerial employees also are expressly excluded from unionization under the NLRA.[42] In *NLRB v. Yeshiva University*,[43] the Supreme Court held that a private university's full-time faculty members exercised supervisory and

managerial functions and were, therefore, excluded from the category of employees entitled to engage in collective bargaining under the NLRA. The Court relied on the unique nature of a university, which it found does not fit neatly into the NLRA's industrial model, and the fact that faculty exercised absolute authority in academic matters.

Yeshiva notwithstanding, the Board appears to be poised to hold that the faculty members of a different university are statutory "employees," not managers. In *Point Park University v. NLRB*,[44] the Board had ruled that the university committed an unfair labor practice by not bargaining with the union certified as its faculty members' "exclusive representative." The D.C. Circuit reversed, finding that the Board had "failed to adequately explain why the faculty's role at the University is not managerial." On May 22, 2012, the Board, three to two, issued a notice inviting the parties and any interested amici to file briefs as to whether the Board should distinguish *Yeshiva*, suggesting that the majority is likely to expand the class of university faculty that it will treat as subject to union organizing and monopoly representation.[45]

Similar expansions of union organizing opportunities are possible in *New York University II*[46] and *Polytechnic Institute of New York University*.[47] For about fifty years after the NLRA's enactment, the Board did not recognize private-college teaching assistants as covered employees. However, the Board reversed course in 2000 in *New York University I*,[48] holding that graduate teaching assistants are "employees" under the Act. After a membership change, a new Board majority held in 2004 in *Brown University* that graduate teaching assistants are students and cannot be organized because "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process."[49] On June 22, 2012, the current Board, Member Hayes dissenting, granted review of two Regional Directors' decisions denying representation elections based on *Brown University*. It also invited briefs from the parties and interested amici as to whether it should overrule *Brown University* and hold that graduate-student assistants, including those engaged in research funded by external grants, are statutory employees.

Endnotes

1 The United States Court of Appeals for the Seventh Circuit did not reach the merits of the appointment issue in the Foundation's direct challenge, dismissing that appeal on standing grounds. Richards v. NLRB, 194 L.R.R.M. (BNA) 2897, 2012 WL 6684764 (7th Cir. Dec. 26, 2012). However, in a second case, in which the Foundation filed an amicus brief, the D.C. Circuit held that the recess appointments were unconstitutional because they were not made during a recess between Congressional sessions. Noel Canning v. NLRB, No. 12-1115, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).

2 76 Fed. Reg. 54,006 (Aug. 30, 2011).

3 National Ass'n of Mfrs. v. NLRB, 2012 WL 691535 (D.D.C. Mar. 2, 2012).

4 Chamber of Commerce of the U.S. v. NLRB, 856 F. Supp. 2d 778 (D.S.C. 2012), *petition for review docketed*, No. 12-1757 (4th Cir. June 18, 2012).

5 76 Fed. Reg. 80,138 (Dec. 22, 2011).

6 Chamber of Commerce of the U.S. v. NLRB, 2012 WL 1664028 (D.D.C. May 14, 2012).

7 29 U.S.C. § 152(b); *see* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010) (Board may not decide cases without three members).

8 29 U.S.C. § 160(j).

9 29 U.S.C. § 186.

10 Mulhall v. UNITE HERE Local 355, 618 F.3d 1279 (11th Cir. 2010).

11 Mulhall v. UNITE HERE, 667 F.3d 1211 (11th Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3066 (U.S. July 20, 2012) (No. 12-99), *cross-petition for cert. filed*, 81 U.S.L.W. 3128 (U.S. Aug. 22, 2012) (No. 12-312)..

12 Dana Corp., 351 N.L.R.B. No. 28 (Sept. 29, 2007).

13 Rite Aid Store #6473, 355 N.L.R.B. No. 157 (Aug. 27, 2010).

14 Lamons Gasket Co., 357 N.L.R.B. No. 72.

15 357 N.L.R.B. No. 76 (Aug. 26, 2011)

16 MTV Transp., 337 N.L.R.B. 770 (2002).

17 29 U.S.C. § 158(a)(2).

18 147 N.L.R.B. 859 (1964).

19 Dana Corp., 356 N.L.R.B. No. 49 (Dec. 6, 2010).

20 Montague v. NLRB, 698 F.3d 307 (6th Cir.2012).

21 355 N.L.R.B. No. 92 (Aug. 17, 2010).

22 355 N.L.R.B. No. 144 (Aug. 27, 2010).

23 29 U.S.C. § 158(b)(4)(ii)(B).

24 355 N.L.R.B. No. 159 (Aug. 27, 2010).

25 356 N.L.R.B. No. 162 (May 26, 2011).

26 356 N.L.R.B. No. 88 (Feb. 3, 2011).

27 356 N.L.R.B. No. 27 (Nov. 12, 2010).

28 356 N.L.R.B. No. 119 (Mar. 25, 2011), *petition for review denied*, 676 F.3d 193 (D.C. Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3220 (U.S. Oct. 4, 2012) (No. 12-451)..

29 357 N.L.R.B. No. 157 (Dec. 30, 2011).

30 357 N.L.R.B. No. 172 (Dec. 30, 2011).

31 355 N.L.R.B. No. 203 (Sept. 30, 2010).

32 358 N.L.R.B. No. 138 (Sept. 19, 2012), *petition for review filed*, No. 12-1387 (D.C. Cir. docketed Sept. 28, 2012).

33 29 U.S.C. § 159(c)(5) (emphasis added).

34 357 N.L.R.B. No. 83 (Aug. 26, 2011).

35 357 N.L.R.B. No. 175 (Dec. 30, 2011).

36 357 N.L.R.B. No. 163 (Dec. 30, 2011).

37 357 N.L.RB. No. 174 (Dec. 30, 2011), *petition for review filed sub nom.* Kindred Nursing Centers East, LLC, No. 12-1027 (6th Cir. docketed Jan. 11, 2012). The Sixth Circuit heard oral argument on January 23, 2013.

38 *Huntington Ingalls Inc.*, 358 N.L.R.B. No. 100 (Aug. 14, 2012), *petition for review filed*, No. 12-2000 (4th Cir. docketed Aug. 16, 2012).

39 358 N.L.R.B. No. 45 (May 18, 2012) (unit of maintenance employees only), *petition for review filed*, No. 12-1684 (4th Cir. docketed May 24, 2012). The employers in *Huntington Ingalls* and *Dreyer's Ice Cream* are also challenging President Obama's "recess appointments" of three NLRB members while the U.S. Senate was conducting pro forma sessions. That issue is outside the scope of this paper. However, if the appointments were unconstitutional, as the D.C. Circuit held in *Noel Canning*, *see supra* note 1, then the Board did not have a quorum of three validly appointed members and could not decide the *Huntington Ingalls* and *Dreyer's Ice Cream* unfair-labor-practice cases when it did. *See* New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010).

40 29 U.S.C. § 152(3).

41 357 N.L.R.B. No. 152 (Dec. 27, 2011).

42 29 U.S.C. § 152(3), (11).

43 444 U.S. 672 (1980).

44 457 F.3d 42 (D.C. Cir. 2006).

45 No. 6-RC-12276 (NLRB May 22, 2012).

46 No. 02-RC-023481 (NLRB June 22, 2012).

47 No. 29-RC-012054 (NLRB June 22, 2012).

48 332 N.L.R.B. 1205 (2000).

49 Brown University, 342 N.L.R.B. 483 (2004).

Telecommunications & Electronic Media

A U.N. Regulated Internet? The Case for Defending Against Persistent Intergovernmental Threats to Internet Freedom

*By Robert M. McDowell**

Note from the Editor:

The author has adapted this paper from testimony before the U.S. House of Representatives Committee on Energy and Commerce's Subcommittee on Communications and Technology. The hearing, entitled "International Proposals to Regulate the Internet," took place on May 31, 2012. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about this issue. To this end, we offer links to additional testimony from this committee hearing and invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Additional Testimony:

- Phillip Verveer, Deputy Assistant Secretary of State: http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CT/20120531/HHRG-112-IF16-WState-VerveerP-20120531.pdf
- Ambassador David A. Gross, Former U.S. Coordinator for International Communications and Information Policy: http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CT/20120531/HHRG-112-IF16-WState-GrossD-20120531.pdf
- Sally Shipman Wentworth, Senior Manager of Public Policy for the Internet Society: http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CT/20120531/HHRG-112-IF16-WState-WentworthS-20120531.pdf
- Vinton Cerf, Vice President and Chief Internet Evangelist, Google Inc.: http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CT/20120531/HHRG-112-IF16-WState-CerfV-20120531.pdf

One of the most important communications policy battles affecting freedom and prosperity in the digital era is not unfolding in Congress, the White House, the Federal Communications Commission or anywhere else in Washington. The struggle is global and has been underway for at least a decade, albeit unnoticed until this year. The next battlefield in the fight to maintain Internet freedom will be a diplomatic conference this December in the United Arab Emirates, where 193 countries will convene to renegotiate the International Telecommunications Regulations (ITRs), decades-old treaty-based rules originally designed to govern the international exchange of old-fashioned voice telephone services.

As you read this, scores of countries, including China, Russia, and India, are pushing hard to turn the ITRs into tools for intergovernmental control over Internet governance.[1] While we have been focused on other important political and economic issues here in the United States, the effort to radically reverse the long-standing international consensus to keep governments from regulating core functions of the Internet's ecosystem has been gaining momentum. The reach, scope, and seriousness of this effort are nothing short of massive. But don't take my word for it. As then-Russian Prime Minister Vladimir Putin said last year, the goal of this effort is to establish "international control over the Internet using the monitoring and supervisory capabilities of the International Telecommunications Union (ITU)."[2] In short, the Internet's fate is once again at a crossroads. This article outlines the threat posed by international regulation of the Internet and urges policymakers, here and abroad, to work together to preserve the existing bottom-up non-governmental Internet governance structure and to avoid any expansion of intergovernmental powers over the Net.

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I. The Net Has Been Successful Precisely Because It Has Not Been Regulated

The near-ubiquity of today's Internet, at least in the developed world, may lull some into thinking that its success was inevitable. It wasn't. Rather, the Internet, that dynamic global network of networks, has become one of the world's most quickly adopted technologies precisely because the international consensus has been for governments to keep their hands off of it. In other words, the Internet is the greatest deregulatory success story of all time.

By way of background, the 146-year-old ITU is a treaty-based organization under the auspices of the United Nations.

Although the origin of the ITU's regulations date back to the 19th Century, the most recent version of the ITRs was adopted in 1988, when delegates from 114 countries gathered in Australia to agree to a treaty that set the stage for dramatic liberalization of international telecommunications. As a result, the 1988 ITRs insulated the Internet from economic and technical regulation, allowing the new medium to flourish.

Globally, as governmental barriers around the Internet melted away in the mid-1990s, Internet usage skyrocketed—from only 16 million worldwide users in 1995 (shortly after the Net was privatized) to over 2.3 billion today,[3] with upwards of 500,000 people become first-time Internet users each day.[4] In short, the absence of top-down government control of the Internet sparked a powerful explosion of entrepreneurial brilliance which has not abated.

As always, but especially with the world economy in such a weakened and precarious position, governments should resist the temptation to regulate unnecessarily, get out of the way of the Internet and allow it to continue to spread prosperity and freedom across the globe. Internet connectivity, especially through mobile devices, is improving the human condition like no other innovation in world history.

Take for example the profound effect the mobile Internet has had on the lives of Ali Morrison and Isaac Assan.[5] Ali and Isaac operate a small pineapple farm in Central Ghana. In the past, all too often they had no choice but to sell their pineapples well below market value due to a lack of accurate pricing information. Today, however, through a new mobile application, Ali, Isaac and countless farmers just like them, can instantly find the prevailing value of pineapples in surrounding markets and price their product accordingly. What was previously impossible to accomplish is now easy and quick, not to mention incredibly empowering. Earning more money from this new Web-powered knowledge enables Ali and Isaac to own more property and increase their standard of living—all while raising their expectations in both an economic and political sense. In short, the mobile Internet empowers the sovereignty of the individual while growing economies and fundamentally improving lives around the world. That could soon change, however.

II. The Current Threat to Internet Freedom Is in Plain View

Building upon failed attempts to expand the ITU's powers over the Net, some ITU Member States, as well as a few independent groups, have broadened their base of support and are energetically rushing toward the treaty negotiation in Dubai starting on December 3. According to some private estimates, over 90 countries may support expanded intergovernmental regulation of the Internet – close to a majority of the ITU's 193 Member States. Several proposals are seemingly small or innocuous while others are conspicuously large and radical.[6] We should be especially aware of incremental changes to the ITRs. With the potential to grow larger quite rapidly, proposed ITR amendments that appear tiny today can be the most insidious and lethal to the spread of prosperity and freedom tomorrow.

A. Member State Proposals for Internet Regulation Are Real

Member State official proposals before the ITU to regulate the Internet are quite real, explicit, and concrete. They are not the product of caricatures or distortion, as a few pro-regulation proponents and some ITU leaders have alleged.[7] The proposals speak for themselves—and even a partial list of what might be codified into international law this December is chilling. So in the absence of rhetoric and hyperbole, here is an outline of a few of them:

> • Subject cyber security and data privacy to international control.
>
> • Allow foreign phone companies to charge fees for "international" Internet traffic, perhaps even on a "per-click" basis for certain Web destinations, with the goal of generating revenue for state-owned phone companies and government treasuries across the globe.
>
> • Impose unprecedented economic regulations on the Internet's global backbone.
>
> • Establish for the first time ITU dominion over important functions of multi-stakeholder Internet governance entities such as the Internet Corporation for Assigned Names and Numbers ("ICANN"), the non-profit entity that coordinates the .com and .org Web addresses of the world.
>
> • Subsume under intergovernmental control many functions of the Internet Engineering Task Force, the Internet Society, and other "bottom-up," non-governmental, multi-stakeholder groups which establish the engineering and technical standards that allow the Internet to work.
>
> • Regulate international mobile roaming rates and practices.[8]

It's hard to see how there could be any hyperbole involved in simply quoting Vladimir Putin's proposal—made directly to the Secretary General of the ITU—that Member States should use the ITU to establish "international control over the Internet."[9] And true to Mr. Putin's word, the Russian Federation subsequently put forth formal proposals that would expand the jurisdiction of the ITU into the Internet sphere simply by changing the definition of "telecommunications" to include "processing" and "data."[10] At first glance, this proposed change seems small, but it is tectonic in scope. (The submission by the Arab States is almost identical, by the way.[11]) The Russian proposal also would explicitly give the ITU jurisdiction over IP addresses, one of the most important components of the inner workings of the Net.[12] Control of IP addresses is control of the Internet itself.

Although the Russian Federation claims to support "unrestricted use" of the Internet, its submission calls for making a number of revealing *exceptions*, such as "in cases where international telecommunication services are used for the purpose

of interfering in the internal affairs or undermining the sovereignty, national security, territorial integrity and public safety of other States, or to divulge information of a sensitive nature."[13] In short, the exceptions created by the Russian Federation's proposal would allow for unlimited intergovernmental control over the Internet's affairs, in keeping with Mr. Putin's vision. Similarly, Egypt's submission calls for unprecedented economic regulation of Internet traffic through the ITU.[14]

B. Patient Incrementalism Is Internet Freedom's Most Powerful Enemy

A few proposals have been offered in fora other than the ITU, and each gives us a sense of where some ITU Member States would like to go with intergovernmental Internet regulation. For instance, proposals made directly to the U.N. General Assembly by China, Russia, Tajikistan, and Uzbekistan call for intergovernmental regulation of Internet content and applications.[15] And, last year, India introduced a resolution at the U.N. calling for a completely new U.N. body to oversee the Internet.[16]

Although proponents of Internet freedom may be on the lookout for large and obvious assaults against freedom, some Member States are just as likely to plant small seeds of regulation under the guise of an innocuous or unrelated initiative. As a matter of process and substance, patient and persistent incrementalism is the Internet's most dangerous enemy – and it is the hallmark of many countries that are pushing the pro-regulation agenda. Specifically, some ITU officials and Member States have been discussing an alleged worldwide phone numbering "crisis." It seems that the world may be running out of phone numbers, over which the ITU does have some jurisdiction.

Today, many phone numbers are used for voice-over-Internet protocol ("VoIP") services such as Skype or Google Voice. To function properly, the software supporting these services translate traditional phone numbers into IP - or Internet Protocol - addresses. The Russian Federation has proposed that the ITU be given jurisdiction over IP addresses to remedy the phone number shortage.[17] What is left unsaid, however, is that potential ITU jurisdiction over IP addresses would enable it to regulate Internet services and devices with abandon. IP addresses are a fundamental and essential component to the inner workings of the Net. Taking their administration away from the bottom up, non-governmental, multi-stakeholder model and placing it into the hands of international bureaucrats would be a grave mistake.

In addition to the pro-regulation proposals emanating from Member States, a few non-governmental groups have put forth their own ideas for expanded Net regulation as well. This is not entirely surprising. I have learned during my six years at the FCC that the most common request we receive from industry is "Please regulate my rival." Essentially, this request translates into "My rival is running too fast, and I want government to slow him or her down to my level." Industry players that have long operated under legacy regulations are the most susceptible to this affliction.

Perhaps the same could be said of the recent proposal by the European Telecommunications Network Operators' Association ("ETNO").[18] ETNO's membes include Europe's incumbent telecommunications companies such as Deutche Telekom, Telecom Italia and others that are either partially owned by their home governments and/or are heavily regulated by them. ETNO would like IP interconnection agreements to be brought under the ITRs for the first time with a new "sending party network pays" construct.[19] To be effective, the ETNO proposal would have to require an international dispute resolution forum with enforcement powers, as well as an intrusive new mechanism for recording Internet traffic flows on the basis of the value of traffic delivery, an economic calculation presumably determined by the ITU. Such expanded "monitoring capabilities" for the ITU fit perfectly into Mr. Putin's vision of the Internet of the future.

In short, the ETNO proposal would upend the economics of the Internet by replacing market forces with international regulations that would create tremendous uncertainty, increase costs for all market players, especially consumers, and ultimately undermine the rapid proliferation of Internet connectivity throughout the globe. The developing world—the home of people like Ali Morrison and Isaac Assan, the pineapple farmers from Ghana—would be disproportionately harmed by this upheaval. The upward trajectory of living standards for billions of people like them could be put in jeopardy.

The ETNO proposals may not technically be a part of the WCIT negotiations because, to date, they have not been endorsed by European governments, but they give a sense of where some of the ITU's Member States would like to go. In short, whether submitted to the U.N. or the ITU, these proposals are about much more than conventional Internet governance. Without exception, each proposal would radically restructure the economics of Internet for the worse.

* * *

Furthermore, while influential ITU Member States have put forth proposals calling for overt legal expansions of United Nations or ITU authority over the Internet, ITU officials have publicly declared that the ITU does not intend to regulate Internet governance while also saying that any regulations should be of the "light-touch" variety.[20] But which is it? It is not possible to insulate the Internet from new rules while also establishing a new "light touch" regulatory regime. Either a new regulatory paradigm will emerge in December or it won't. The choice is binary. We should look with great skepticism on vehement claims that no proposals to regulate the Internet are before the ITU or the U.N.[21]

III. Avoid The Siren Call of Regulating Your Business Rivals

We frequently hear talk of "market failure," but we rarely see analyses of "regulatory failure." Perhaps that is why, in the words of Professor Adam Thierer, "regulation *always* spreads."[22] As world economies contract and government debt mounts, repeating the same government actions of regulating more and spending more of the public's money will only produce the same results: shrinking economies, growing debt, reduced incentives to invest and higher unemployment. It is time to reverse these trends, but doing so will require tremendous

political courage.

It is difficult to imagine why network operators would consciously surrender their autonomy to negotiate commercial agreements to an international regulator as ETNO proposes—unless, of course, they suffer from the "please regulate my rival" malady of an industry that has been regulated too much and for too long. History is replete with such scenarios, and the desire for more regulation for competitors *always* ends badly for the incumbent regulated industry in the form of unintended and harmful consequences.

Take, for example, the American railroads of the early 20th century. Having been heavily regulated since the 1880s,[23] the railroads feared competition from a new and nimble competitor, the trucking industry. Anxious not to let a less-regulated upstart eat their lunch, instead of convincing the U.S. Congress to deregulate rail to be on an even footing with trucking, the railroads asked lawmakers to *regulate their rivals*. The New Deal Congress, which was enamored with regulation (thus likely prolonging the Great Depression, but that's a topic for a different speech) was more than happy to oblige in 1935.[24]

What was the unintended consequence of regulating rivals in the transportation context? With transportation rates cemented at artificially high levels by the regulator, manufacturers and distributors of goods that required shipping found it cheaper to deploy their own trucking fleets.[25] Trucks that operated privately and not as common carriers were exempt from federal economic regulation. Of course, investment and revenue flowed to the least regulated option, private trucking. Congress, the regulators and the railroads did not foresee this entirely predictable consequence. As a result, the regulated railroads lost market share and income for decades. Rail's share of the surface freight market had fallen from 65 percent at the end of World War II to only 35 percent by the 1970s.[26]

Finally, by the mid-1970s, railroad and trucking executives alike saw the light and pled with Congress to *deregulate* them to give them the freedom to invest and compete in an unfettered market. After enactment of deregulatory laws in 1976 and 1980,[27] the rail and trucking industries respectively began to grow and prosper. Consumers were immediate beneficiaries of deregulation with rates falling by 20 percent[28] and transit time reduced by at least 20 percent by 1988.[29]

But what about profitability? Don't falling prices equate to reduced profits? Isn't jumping from the certainty of price regulation into the unknown chaos of an unregulated competitive market sure to put downward pressure on net revenue? Aren't industries, and even individual companies, really better off in the shelter of command and control regulatory regimes? Doesn't investment in infrastructure increase under the certainty of rate regulation? The answer to all of these questions is: no.

History teaches us that profitability and investment tend to *increase* once the weight of regulation is lifted from the collective chest of industry. For example, rail's profitability gained steam after deregulation with its return on investment (ROI) nearly doubling.[30] Better yet, return on equity (ROE), or profit earned on shareholder investment, more than tripled in the early years after deregulation.[31] And investment was stoked by deregulation – railroads invested U.S. $480 billion into network upgrades, or 40 percent of revenue, between 1980 and 2010.[32] All of this was achieved even though the U.S. railroad industry's rates are half of Europe's and are the lowest in the world.[33]

My use of therailroad and trucking example isn't a matter of cherry-picking the most useful scenarios. Deregulation in other networked industries benefited all involved as well. For instance, American airline deregulation that encouraged competition and allowed pricing freedom produced similar results: fares declined, revenues increased, consumers enjoyed more choices and were able to fly more.[34] Similarly, after the partial deregulation of the American telecom sector in 1996, markets witnessed lower prices, increased investment, more powerful innovation, and skyrocketing consumer adoption of new offerings.[35] Success has been especially robust in the American wireless sector because it has been lightly regulated since its inception.[36]

Examples of the benefits of deregulatory phenomena are by no means limited to American success stories. Europe has also benefited from deregulation. Since the introduction of competition, the European freight rail market has enjoyed healthier growth and investment just as the European postal system did in the 17th century![37]

Hopefully, the point of these analogies is obvious. "Regulating my rival" is a seductive notion for many, but it only lures its victims to rocky shores before revealing itself as a perilous siren call. Telecom companies should not look to regulate their "rivals," internet content and applications companies, down to their level—especially not through an intergovernmental body.

Instead, network operators should seek deregulation by their home governments to allow them full flexibility to produce and price freely in competitive markets. In fact, as history shows us, attempting to regulate rivals will only produce unintended consequences that will harm the companies advocating regulation. More importantly, consumers end up losing the most. In short, the opposite of what is desired will occur, something called "regulatory failure." No government, let alone an intergovernmental body, can make economic and engineering decisions in lightning fast Internet time. Nor can any government mandate innovation. But new rules can undermine investment, innovation, and job creation all too easily.

One potential outcome that could develop if pro-regulation nations are successful in granting the ITU authority over Internet governance would be a partitioned Internet. In particular, the globe could be divided between countries that will choose to continue to live under the current successful model and those Member States who decide to opt out to place themselves under an intergovernmental regulatory regime. A balkanized Internet would undermine global free trade and rising living standards as engineering and business decisions would become politicized and paralyzed within an intergovernmental political body. At a minimum, it would create extreme uncertainty and raise costs for *all* users across the globe by rendering an engineering, operational and economic morass.

IV. Conclusion: Protecting the Internet from Intergovernmental Encroachment Will Promote Global Freedom and Prosperity

As always, but especially with the world economy in such

a weakened and precarious position, governments should resist the temptation to regulate unnecessarily. Internet connectivity, especially through mobile devices, is improving the human condition like no other innovation within our lifetimes. Nations that value freedom and prosperity should draw a line in the sand against new regulations, while welcoming reform that could include a non-regulatory role for the ITU. Constructive reform of the ITRs, which may be needed, should be limited to traditional telecommunications services and not expanded to include information services or any form of Internet services, applications or content. Modification of the current non-governmental multi-stakeholder Internet governance model may be necessary as well, but those who cherish freedom should all work together to ensure no intergovernmental regulatory overlays are placed into this sphere.

On the other hand, dragging rivals down to the lowest common denominator of overly regulated international telecom companies will enshrine mediocrity at best. More ominously, at worst, it would snuff out incentives to take risks and reap the resulting rewards, thereby killing opportunities to revitalize moribund economies and improve the human condition. Instead, revolutionizing public policy through a fundamental modernization of legacy laws to clear away unnecessary regulatory obstructions will uncork the flow of investment capital, spark innovation, drive economic growth, and propel job creation. Couldn't today's world economy benefit from such positive and constructive change?

Even if freedom prevails at the December conference in Dubai, we must remain forever vigilant because the patient and persistent incrementalists who favor international regulation of the Net will never give up their quest. Nor should we.

Endnotes

1 *See, e.g.*, *Further Directions for Revision of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 40 (Geneva, 2011), *available at* http://www.itu.int/md/T09-CWG.WCIT12-C-0040/en.; Dushyant Singh, Member of Parliament, Statement on Agenda Item 16 - Information and Communication Technologies for Development, 66th Session of the United Nations General Assembly (Oct. 26, 2011), *available at* http://www.un.int/india/2011/ind1945.pdf (last visited Sept. 18, 2012); Information Office of the State Council, *The Internet in China*, (rel. June 2010), *available at* http://english.gov.cn/2010-06/08/content_1622956.htm.

2 Prime Minister Vladimir Putin meets with Secretary General of the International Telecommunication Union Hamadoun Toure, Gov't of the Russian Fed'n, http://government.ru/eng/docs/15601/print/ (last visited Sept. 18, 2012).

3 *See* Internet Growth Statistics, Internet World Stats, http://www.internetworldstats.com/emarketing.htm (last visited June 19, 2012). The estimated number of new users per day, as calculated by determining the change in the number of Internet users over a year divided by 365, has varied greatly over the last 5 years. Between March 2011 and March 2012, the estimated number of new online users was 506,849 per day. Over the past 5 years, however, the average daily increase in online users was approximately 630,685. *Id.*

4 *Id.*

5 *See* Ken Banks, *In African Agriculture, Information is Power,* Nat'l Geographic (Sept. 5, 2011), http://newswatch.nationalgeographic.com/2011/09/05/in-african-agriculture-information-is-power/.

6 *See, e.g.*, *Proposals for Revision of the International Telecommunication Regulations*, ITU Member States Belonging to the Regional Commonwealth in the Field of Communications (RCC), at 6 (Apr. 17, 2012) ("Member States shall ensure that administrations/operating agencies cooperate within the framework of these Regulations to provide, by mutual agreement, a wide range of international telecommunication services of any type, including . . . services for carrying Internet traffic and data transmission.").

7 *See, e.g.*, Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Opening Remarks to Council Working Group – WCIT-12 (June 20, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-20.aspx; Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Remarks to ITU Staff on World Conference on International Telecommunications (WCIT-12) (June 6, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-06-2.aspx; Hamadoun I. Touré, Secretary-General, International Telecommunication Union, Opening Welcome Speech at the World Telecommunication Policy Forum (WTPF), Meeting of the Informal Experts Group (IEG) (June 5, 2012), http://www.itu.int/en/osg/speeches/Pages/2012-06-05.aspx; Eric Pfanner, Debunking Rumors of an Internet Takeover, N.Y. Times (June 11, 2012), http://www.nytimes.com/2012/06/11/technology/debunking-rumors-of-an-internet-takeover.html?pagewanted=all.

8 *See Draft Compilation of Proposals*, CWG-WCIT12/TD – 43 (Geneva, 2011); *See also Further Directions for Revision of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 40 (Geneva, 2011); *Contribution from Iran*, The Islamic Republic of Iran, CWG-WCIT12 Contribution 48, Attachment 2 (Geneva, 2011); Internet Society Background Paper, *International Telecommunications Regulations*, *available at* http://www.isoc.org/pubpolpillar/docs/itr-background_201108.pdf (last visited Sept. 18, 2012); *Add New Articles on Network and Information Security to ITRs,* People's Republic of China, CWG-WCIT12 Contribution 59 (Geneva, 2011).

9 Prime Minister Vladimir Putin meets with Secretary General of the International Telecommunication Union Hamadoun Toure, Gov't of the Russian Fed'n, http://government.ru/eng/docs/15601/print/ (last visited Sept. 18, 2012).

10 *Proposed Revisions to Individual Articles of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 95, at 2 (Apr. 13, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0095/en ("*Russian Federation Contribution 95*") (defining telecommunication as "[a]ny transmission, emission, processing or reception of signs, signals, writing, images and sounds or data of any nature by wire, radio, optical or other electromagnetic system").

11 *Proposed Revisions*, Arab States, CWG-WCIT12 Contribution 67, at 3 (Feb. 1, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0067/en (defining telecommunication as "[a]ny transmission, emission, reception or processing of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic system"); *Proposal on Third Draft of the Future ITRs*, Arab States, CWG-WCIT12 Contribution 103, at 5 (June 4, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0103/en ("*Arab States Contribution 103*"). Further, Iran argues that the current definition already includes the Internet. *Contribution from Iran*, The Islamic Republic of Iran, CWG-WCIT12 Contribution 48, Attachment 2 (Sept. 12, 2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0048/en.

12 *Further Directions for Revision of the ITRs*, Russian Federation, CWG-WCIT12 Contribution 40, at 3 (2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0040/en ("To oblige ITU to allocate/distribute some part of IPv6 addresses (as same way/principle as for telephone numbering, simultaneously existing of many operators/numbers distributors inside unified numbers space for both fixed and mobile phone services) and determination of necessary requirements"). *See also Arab States Contribution 103* at 9 ("Member States shall, if they so elect, be able to control all naming, numbering, addressing and identification resources used within their territories for international telecommunications/ICTs.").

13 *Russian Federation Contribution* 95 at 3; *Comments on Document CWG-WCIT12/TD-64*, Russian Federation, CWG-WCIT12 Contribution 112, at 54 (June 6, 2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0112/en.

14 *Africa Region's Proposals to the Review of the ITRs*, Africa Region, CWG-WCIT12 Contribution 116, at 20 (2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0116/en ("Member States shall [take measures to] ensure that fair compensation is received for carried traffic (e.g. interconnection or termination)."). *See also Proposal on International Telecommunications Connectivity (Based on Contribution CWG-WCIT12/C-84)*, Paraguay, CWG-

WCIT12 Contribution 113, at 5 (June 6, 2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0113/en (proposing that parties that enter into Internet connection agreements "take into account the possible need for compensation . . . for the value of elements such as traffic flow, number of routes, and cost of international transmission, and the possible application of network externalities, amongst others."); *Arab States Contribution 103*, at 9 (proposing an amendment containing language similar to Paraguay's proposal).

15 Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan, and Uzbekistan to the United Nations addressed to the Secretary-General, Item 93 of the provisional agenda - Developments in the field of information and telecommunications in the context of international security, 66th Session of the United Nations General Assembly, Annex (Sep. 14, 2011), http://www.cs.brown.edu/courses/csci1800/sources/2012_UN_Russia_and_China_Code_o_Conduct.pdf.

16 Dushyant Singh, Member of Parliament, Statement on Agenda Item 16 - Information and Communication Technologies for Development, 66th Session of the United Nations General Assembly (Oct. 26, 2011), http://www.un.int/india/2011/ind1945.pdf (proposing "the establishment of a new institutional mechanism in the United Nations for global internet-related policies."). *See also* Commission on Science and Technology for Development, Summary Report of the Chair: Briefing on the Open Consultation on Enhanced Cooperation on Public Policy Issues Related to the Internet (May 18, 2012), http://unctad.org/meetings/en/SessionalDocuments/ecn162012crp2_en.pdf ("Some delegates called for the establishment of an intergovernmental mechanism for enhanced cooperation within the United Nations structure, which would enable governments, on an equal footing, to carry out their roles and responsibilities in international public policy issues pertaining to the Internet.").

17 Further Directions for Revision of the ITRs, Russian Federation, CWG-WCIT12 Contribution 40, at 3 (2011), http://www.itu.int/md/T09-CWG.WCIT12-C-0040/en (last visited May 29, 2012) ("To oblige ITU to allocate/distribute some part of IPv6 addresses (as same way/principle as for telephone numbering, simultaneously existing of many operators/numbers distributors inside unified numbers space for both fixed and mobile phone services) and determination of necessary requirements").

18 *Revisions of the International Telecommunications Regulations – Proposals for High Level Principles to be Introduced in the ITRs*, ETNO, CWG-WCIT12 Contribution 109, at 2 (2012), http://www.itu.int/md/T09-CWG.WCIT12-C-0109/en.

19 *Id*. at 2.

20 Speech by ITU Secretary-General Touré, The Challenges of Extending the Benefits of Mobile (May 1,

2012), http://www.itu.int/en/osg/speeches/Pages/2012-05-01.aspx (last visited Sept. 18, 2012).

21 *See supra* note 7.

22 Berin Szoka & Adam Thierer, *Net Neutrality, Slippery Slopes & High-Tech Mutually Assured Destruction*, Tech. Liberation Front (Oct. 23, 2009), http://techliberation.com/2009/10/23/net-neutrality-slippery-slopes-high-tech-mutually-assured-destruction/ ("The reality is that regulation *always* spreads. The march of regulation can sometimes be glacial, but it is, sadly, almost inevitable: Regulatory regimes grow but almost never contract.").

23 Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887). I thank Clifford Winston, a senior fellow at the Brookings Institution's Economic Studies program, for lending his expertise with transportation and industrial organization research and Dominique Lazanski, the Head of Digital Policy at the TaxPayers' Alliance, for her assistance with research regarding the regulation of the European postal system in the 17th century. I also would like to thank Tyler Cox, Emilie de Lozier, Emanuel Gawrieh and Sarah Leggin for their research contributions.

24 Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543 (1935).

25 Clifford Winston et al., The Economic Effects of Surface Freight Deregulation 4 (1990).

26 Robert E. Gallamore, *Regulation and Innovation: Lessons from the American Railroad Industry in* Essays in Transportation Economics and Policy: A Handbook in Honor of John R. Meyer 493, 493 (José Gómez-Ibáñez, William B. Tye & Clifford Winston, eds., 1999).

27 Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

28 Clifford Winston, *The Success of the Staggers Rail Act of 1980,* 8-9 (AEI-Brookings Joint Center, Oct. 2005), *available at* http://www.brookings.edu/research/papers/2005/10/railact-winston.

29 Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. Econ. Persp. 89, 101 (1998).

30 Railroad's ROI averaged 4.9 percent from 1971 through 1980, compared with a 2.5 percent average between 1970 and 1979. U.S. Gen. Accounting Office, GAO/RCED-90-80, Railroad Regulation: Economic and Financial Impacts of the Staggers Rail Act of 1980 34 (1990).

31 Railroad's ROE, which averaged only 2.3 percent in the 1970s, climbed to 9 percent between 1971 and 1980. *Id.* at 35.

32 Ass'n of Am. Railroads, Rail Earnings Today Pay For Capacity and Service Improvements for Tomorrow 1 (2011), *available at* http://www.aar.org/~/media/aar/Background-Papers/Rail-Earnings-Today.ashx.

33 Ass'n of Am. Railroads, The Cost Effectiveness of America's Freight Railroads 2 (2012), *available at* http://www.aar.org/~/media/aar/Background-Papers/The-Cost-Effectiveness-of-Freight.ashx.

34 From 1976 to 1982 alone, real fares fell by more than 9 percent. *Compare* U.S. Bureau of the Census, Statistical Abstract of the United States 1978 671, table 1134 (99th ed. 1978) *with* U.S. Bureau of the Census, Statistical Abstract of the United States 1984 633, table 1099 (104th ed. 1983); *See also* Robert Crandall and Jerry Ellig, *Economic Deregulation and Customer Choice: Lessons for the Electric Industry*, at 2 (1997), *available at* http://mercatus.org/sites/default/files/publication/MC_RSP_RP-Dregulation_970101.pdf. The trend continued as research showed real fares fell 40% by 1998 when compared to fares before deregulation. *See* Adam D. Thierer, *20th Anniversary of Airline Deregulation: Cause for Celebration, Not Re-regulation*, at 6 (1998), *available at* http://www.heritage.org/research/reports/1998/04/20th-anniversary-of-airline-deregulation. These figures are even more impressive considering real fuel costs increased by 88 percent over the same period. *See* U.S. Bureau of the Census, Statistical Abstract of the United States 1984 636, table 1103 (104th ed. 1983); *see also* Dermot Gately, *Taking Off: The U.S. Demand For Air Travel and Jet Fuel* (C.V. Starr Center for Applied Econ. R.R. # 87-22), *available at* http://econ.as.nyu.edu/docs/IO/9396/RR87-22revised.pdf. Moreover, passenger traffic and, with it, industry revenues, have expanded. Specifically, total operating revenues grew from 12,020 million in 1975 to 37,629 million in 1985. *See* U.S. Dep't of Transp., Research & Innovative Tech. Admin., National Transportation Statistics table 3-22 (2011), *available at* http://www.bts.gov/publications/national_transportation _statistics/pdf/entire.pdf (total operating revenues in 1975 to 37,629 million in 1985. Additionally, the number of air carriers, both passenger and freight, approximately tripled between 1976 and 1983. Thomas Gale Moore, *U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor*, 29 J.L. & Econ. 1, 5 (1986) (citing thirty-three certificated carriers in 1976, compared with ninety-eight in 1982). Many new entrants have made their presence known by operating as "low-cost" or "independent," like Southwest Airlines or ValuJet (now known as AirTran). *See* Winston, *supra* note 29, at 93–94.

35 For instance, local service providers doubled their revenues the year after the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), was passed. *See* Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Local Competition at 1 (Dec. 1998), http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcomp98.pdf ("Local Competition Report"). And, between 1996 and 2001, investment by telecommunications firms skyrocketed and capital stock increased at a rate that far exceeded the period before the passage of the 1996 Act. *See id*. at 3–4; Lawrence J. Spiwack, *The Truth About Telecommunications Investment After the Telecommunications Act of 1996,* Phoenix Center Policy Bulletin No. 4, at 3–4 (2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503364. Additionally, the 1996 Act resulted in lowered prices and increased innovation. *See, e.g.,* Reed Hundt, *Ten Years Under the 1996 Telecommunications Act*, 58 Fed. Comm. L.J. 399, 402 (2006); The Telecommunications Act of 1996, NTIA (Feb. 4, 1999), *available at* http://www.ntia.doc.gov/legacy/otiahome/

top/publicationmedia/newsltr/telcom_act.htm#LOCAL (citing Economic Report of the President, Annual Report of the Council of Economic Advisers, U.S. Gov't Printing Office (1999), *available at* http://www.gpo.gov/fdsys/pkg/ERP-1999/pdf/ERP-1999.pdf).

36 Today, the U.S. wireless industry directly or indirectly provides more than 2.4 million jobs and its economic contribution has grown more than five times faster than the overall economy (16 percent versus 3 percent). *See* CTIA-The Wireless Assoc., Semi-Annual 2011 Top-Line Survey Results 10 (2012), http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf ("CTIA Semi-Annual 2011 Survey Results"); *National Framework*, CTIA – The Wireless Assoc., http://www.ctia.org/advocacy/position_papers/index.cfm/AID/12062 (last visited June 20, 2012) ("CTIA National Framework"). Since the 1996 Act, estimated connections in the wireless industry have increased from 44 million in 1996 to over 331 million in 2011, while average local monthly bills have decreased. Also, in 2011 alone, over $25 billion was invested in United States' wireless infrastructure. *See* CTIA-The Wireless Assoc., CTIA Semi-Annual Wireless Industry Survey (2012), http://www.ctia.org/advocacy/research/index.cfm/AID/10316 (last visited June 19, 2012); CTIA Semi-Annual 2011 Survey Results at 2, 10. According to the most recent FCC statistics, approximately nine out of ten American consumers have a choice of at least *five* wireless service providers. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9669 (2011). As a result, American consumers enjoy low prices –$0.049 cents per minute – and high mobile usage rates. *See* Roger Entner, *The Wireless Industry: The Essential Engine of U.S. Economic Growth*, Recon Analytics, at 1 (May 2012), http://reconanalytics.com/wp-content/uploads/2012/04/Wireless-The-Ubiquitous-Engine-by-Recon-Analytics-1.pdf).

37 *Communication from the Commission to the Council and the European Parliament on Monitoring Development of the Rail Market*, at 6, COM (2007) 609 final (Oct. 18, 2007), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0609:FIN:EN:PDF (reporting that, between 2000 and 2005, the Member States with non-incumbent railways witnessed a significant increase in freight rail performance than Member States in which the market was still dominated by a monopoly); *see also* Oliver Stehmann & Hans Zenger, *The Competitive Effects of Rail Freight Mergers in the Context of European Liberalization*, 7 J. Competition L. & Econ. 455, 462 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1833323. Member States that liberalized early recorded the biggest increases in freight rail volume between 1995 and 2004: the U.K. (70 percent),Netherlands (67 percent), Austria (36 percent), and Germany (24 percent). By contrast, output declined in Member States like France that shielded their incumbents from competition. *See Annexes to the Communication on the Implementation of the Railway Infrastructure Package Directives ('First Railway Package')*, at 64, COM (2006) 189 final (May 3, 2006), *available at* http://ec.europa.eu/transport/rail/doc/communication_implementation_1st_rail_pack_annexes.pdf.

Furthermore, during the 30 Years' War (1618-1648), the decentralization of government undermined the previously monopolistic postal system. Where state monopolies were not enforced, wide diversity existed. For example, in 1695, postal customers in the Free City of Hamburg could choose among local postal entities affiliated with at least eight different regions and various private delivery services. Competition drove down costs. In 1712, a postal order was issued reiterating the governmental monopoly and reversing private post in Prussia. By the 1720s, other European states proposed the establishment of cooperative postal arrangements which would bypass Prussia, but serve the Danzig to Petersburg line. The other European states signed a treaty in 1723, which divided the routes amongst the states and included a promise to suppress independent postal carriers, returning postal carriage to a monopolistic state. *See* Eli Noam, Telecommunications in Europe 8–13 (Oxford University Press, 1992) (for broader economic themes, see all of chapter 2).

The Telecommunications Act of 1996 in the Twenty-first Century

*By Howard W. Waltzman**

I. Introduction

Prior to 1996, local telephony was perceived to be a natural monopoly, subjecting such service to strict pricing, entry and exit, and even investment regulation. At that time, the Federal Communications Commission (the Commission) had only recently introduced competition in the long-distance market after the advent of microwave technology made such competition possible. And cable operators received exclusive franchises to provide cable service, though Congress introduced competition from Direct Broadcast Satellite (DBS) providers.

The telecommunications industry hailed Congressional enactment of the Telecommunication Act of 1996 ('96 Act).[1] The Communications Act of 1934,[2] which the '96 Act amended, had not been materially changed, at least with respect to telecommunications services, since its passage. The '96 Act obliterated the legal boundaries between the local telephone and long-distance markets, permitting AT&T, MCI, and Sprint to enter the former, and the Baby Bells to enter the latter. The '96 Act also formally terminated the AT&T consent decree.[3]

But that was then, and this is now. More than sixteen years after its enactment, the '96 Act is a statute that has been overtaken by technological and market developments, especially the convergence of voice, video, and data services emanating from the Internet revolution. While almost any statute would need at least some modifications two decades later, the dramatic changes in the delivery and consumption of voice, data, and video services precipitated by the Internet and Internet Protocol (IP) technology has left the Commission in the unenviable position of applying twentieth century law to twenty-first century technology. This task is increasingly analogous to fitting the proverbial square peg in a round hole.

In addition, the '96 Act is perceived as including a number of ambiguous provisions that have resulted in a significant amount of litigation and caused uncertainty within the communications sector regarding statutory requirements and the scope of the Commission's authority. U.S. Supreme Court Justice Scalia opined shortly after the enactment of the '96 Act that "[i]t would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction."[4]

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II. The '96 Act

The '96 Act focused primarily on local and long-distance telephone competition. Section 251 of the '96 Act requires incumbent local exchange carriers (ILECs) to permit interconnection at "any technically feasible point within the [ILEC's] network,"[5] provide "nondiscriminatory access to network elements on an unbundled basis,"[6] and resell services to CLECs at wholesale rates.[7] These detailed obligations on ILECs were intended to facilitate local telephone competition.

Section 271 established the requirements under which the Bell Operating Companies (BOCs) would be permitted to offer long-distance service in their home markets. These requirements included a fourteen-point "competitive checklist" intended to ensure that a BOC opened its local market to competition before being permitted to offer long-distance services.

The legislation also formalized a federal universal service system for subsidizing access to "advanced telecommunications and information services" throughout the United States and to "advanced telecommunications services" by schools, health care providers, and libraries.[8] Creating an explicit system for subsidizing services in high-cost and low-income areas was important because, in a monopoly environment, companies utilized implicit mechanisms to cross-subsidize within their own customer base.

While the '96 Act primarily focused on telephony competition, the legislation also modified cable service regulation. The '96 Act sunsetted the regulation of upper-tier cable services, and created a mechanism for cable companies to avoid even basic-tier regulation when they face "effective competition."[9]

Section 706 of the '96 Act was a somewhat obscure, but now highly debated, provision of the law. Section 706(a) provides that the Commission and State Public Utility Commissions must "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[10] Section 706(b) requires the Commission to conduct regular inquiries into "the availability of advanced telecommunications capability to all Americans."[11] If the Commission determines that such capability is not being deployed to all Americans "in a reasonable and timely fashion," the Commission is required to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[12]

III. How the Industry Has Changed Since 1996

The changes in consumer use of communications services

since 1996 are staggering. When Congress enacted the '96 Act, the Internet was in its infancy, the vast majority of multi-channel video programming distributor (MVPD) customers were cable subscribers, there were no cable-telephone or interconnected VoIP subscribers and only 44 million wireless subscribers, and no wireless Internet connections. Today, the United States has more than 26 million cable-telephone customers,[13] 34 million total interconnected Voice over Internet Protocol (VoIP) subscriptions,[14] more than 330 million wireless connections,[15] and more than 245 million Internet users, [16] including approximately 120 million wireless data connections.[17] Non-cable MVPDs now account for more than 40 percent of MVPD subscribers.[18]

As these statistics demonstrate, the industry has changed dramatically since 1996. ILEC-provided wireline subscriptions are declining,[19] whereas cable-telephone, VoIP, and wireless subscriptions have grown exponentially. Wireless service is increasingly a full substitute for wireline service, with more than 40 percent of consumers identifying their mobile device as their primary or exclusive means of communication.[20] Cable operators face significant competition in many parts of the country from at least three other facilities-based video providers, in addition to a burgeoning industry of "over-the-top" Internet video providers. Not only is the Internet a dominant presence in consumers' lives, but wireless Internet connections are basically on par with wireline connections as consumers' means of accessing the Internet. In fact, the ability of ILECs, competitive local exchange carriers (CLECs), wireless carriers, and cable operators to utilize IP technology to deliver voice, data, and video services over their platforms means that the barriers to entry in all of these markets have largely been demolished. Convergence has replaced the monopoly provision of services as the dominant characteristic of the communications sector.

The dramatic evolution of technology, innovation developed by the communications sector, and unceasing consumer demand for "anytime, anywhere" services have resulted in new challenges for the Commission. This evolution has called into question whether ILECs should remain classified as dominant in the voice business, cable operators as dominant in the video business, or whether *any* technology platform could dominate the data market. So the traditional regulatory models created or solidified by the '96 Act seem archaic in today's dynamic marketplace.

More importantly, there is the fundamental question regarding whether the '96 Act empowers the Commission to determine the regulatory (or deregulatory) framework for IP services and facilities, or even merely to resolve disputes involving the provision of Internet services. The clash over the Commission's authority to adopt its Open Internet Rules[21] illustrates the tension between the scope of the Commission's authority under the '96 Act and Commission's *ability* to establish firm ground rules for today's Internet marketplace.

IV. Section 706 and the Commission's Authority to Regulate **Internet Services**

In its brief defending the Open Internet Rules, the Commission asserts that "[i]n the Telecommunications Act of 1996, Congress granted the FCC a central role in making and implementing federal policy regarding the Internet."[22] The Commission further argues that "Congress assigned the FCC—in which it vested policy-making authority over all communication by wire and radio—a central role in protecting Internet openness and the resulting investment in broadband facilities."[23] Yet the Commission primarily points to Section 706 in making this argument: "Section 706 plainly envisions an FCC role in broadband policy."[24]

The Commission's argument is premised on the notion that Congress empowered the agency to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[25] However, the statute also states that the tools available to the Commission to encourage such deployment only include "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,"[26] many of which seem rather outdated in today's Internet marketplace. For example, price cap regulation is a vestige of a telecommunications market characterized by a dominant provider. Additionally, "promot[ing] competition in the local telecommunications market" as a means of incentivizing broadband deployment appears unnecessary given the dwindling base of ILEC-provided local service and the rapid growth of cable-telephone and VoIP subscriptions, as well as the increasing rates of "cord-cutting" wireless substitution.

As set forth in its brief, the Commission argues that "Section 706(b) authorizes—indeed requires—the Commission to accelerate the deployment of broadband and promote competition in telecommunications markets."[27] However, the '96 Act in general (and Section 706 in particular) does not provide the Commission with explicit authority over the prices, terms, or conditions of *broadband services*,[28] or to intercede in disputes between providers of broadband services and Internet applications. The '96 Act created a prescriptive regulatory regime for telecommunications services and preserved such a regime for cable services, though the legislation also provided the Commission with the explicit authority to deregulate when competition rendered regulation unnecessary. In contrast, the '96 Act merely provides ambiguous authority to encourage the deployment of "advanced telecommunications capability," rather than any specific authority to regulate broadband services.

The question today is: Did Congress, through the language set forth in Section 706, give the Commission the authority to regulate the manner in which broadband providers manage Internet traffic by granting the agency the ability to adopt "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment" as the agency argues in its brief? The Commission cites this language to support its Open Internet Rules by asserting that such rules "protect the creation of new services. The resulting consumer demand for more, faster, and

better Internet connections drives access provider investment in infrastructure to satisfy that demand, thus serving the goals that the Commission must further under Section 706(a) and (b)."[29] Under this theory, the Open Internet Rules are based upon the presumption that, if broadband providers block or degrade Internet applications, there will be less incentive to create new applications, which will undermine consumer interest in the Internet and give broadband providers less of a reason to invest in newer, faster networks.

V. Congress Needs to Establish a Clearer Framework for Internet Services

For now, it appears that the courts will decide the scope of the Commission's authority under Section 706, and whether the statutory language permits the Commission to impose regulatory obligations on broadband providers, and to police broadband network management practices. But, if nothing else, the complexity and fluidity of the Internet market demonstrates that Section 706 is an unsustainable framework for this rapidly changing market. Congress needs to provide clearer guidance to the Commission beyond simply prodding the agency to incentivize infrastructure investment. Rather than simply telling the Commission that there needs to be more broadband network deployment, Congress should establish a clear framework regarding the Commission's authority (or lack thereof) over broadband services and infrastructure; the relationship between broadband network providers and applications providers; and what, if any, rules apply to the transmission of applications over the Internet. Twenty-first century technology and services warrant a twenty -first century framework.

There will be differences of opinion regarding whether Congress should grant the Commission explicit authority over broadband services, and, if so, the extent of that authority. But the ability to use the Internet and IP technology to deliver voice, video, and data services undermines many of the assumptions underlying the '96 Act, and further exacerbates the ambiguity inherent in the statute.

Today, the Commission must rely upon a statutory provision that did not, and could not, envision the vast majority of the innovations in the delivery and use of IP technology to serve as the primary source of the Commission's authority over broadband services. In reality, however, Section 706 is inadequate guidance for an agency that must navigate through the continued evolution of the communications industry. The impetus for Congressional action is clear, even if the outcome of the legislative process is not.

Endnotes

1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *available at* http://library.clerk.house.gov/reference-files/PPL_104_104_Telecommunications_1996.pdf.

2 *See* 47 U.S.C §§ 151–621 (2011).

3 Pub. L. No. 104-104, § 601 (codified as amended at 47 U.S.C. § 152(a)(1) nt.).

4 AT&T Corp. v. Iowa Utilities Board, 525 US 366, 397 (1999).

5 47 U.S.C. § 251(c)(2) (2011).

6 47 U.S.C. § 251(c)(3) (2011).

7 47 U.S.C. § 251(c)(4) (2011).

8 *See* 47 U.S.C. § 254(b)(2) and (6) (2011).

9 47 U.S.C. § 202(i) (2011).

10 47 U.S.C. § 1302(a) (2011).

11 47 U.S.C. § 1302(b) (2011).

12 *Id.*

13 Data, *Operating Metrics*, National Cable and Telecommunication Association, http://www.ncta.com/StatsGroup/OperatingMetric.aspx (last visited Dec. 4, 2012).

14 FCC report by the Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service (2010). The report can be downloaded from the Wireline Competition Bureau Statistical Reports Internet site at http://transition.fcc.gov/wcb/iatd/trends.html.

15 Background on CTIA's Semi-Annual Wireless Industry Survey, *CTIA's Wireless Industry Indices: 1985-2011*, CTIA—The Wireless Association (last visited Dec. 4, 2012).

16 Usage and Population Statistic, Internet World Stats, http://www.internetworldstats.com/dsl.htm.

17 Wireline Competition Bureau, FCC report by the Industry Analysis and Technology Division, Internet Access Services: Status as of June 30, 2011 (2012). The report can be downloaded from the Wireline Competition Bureau Statistical Reports Internet site at http://www.fcc.gov/wcb/stats .

18 In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 27 FCC Rcd. 8581 (2012).

19 Wireline Competition Bureau, FCC report by the Industry Analysis and Technology Division, Local Telephone Competition: Status as of June 30, 2010 12 (2011). The report can be downloaded from the Wireline Competition Bureau Statistical Reports Internet site at http://www.fcc.gov/wcb/stats.

20 Stephen J. Blumberg et al., Wireless Substitution: State-level Estimates From the National Health Interview Survey, 2010-2011 (National Health Statistics Reports No. 61) (2012), *available at* http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf.

21 *Preserving the Open Internet*, *Report and Order*, 25 FCC Rcd 17905 (2010).

22 Brief for Appellee/Respondents at 6, Verizon v. FCC, No. 11-1355 (D.C. Cir. Sept. 10, 2012).

23 *Id.* at 18.

24 *Id.* at 36.

25 47 U.S.C. § 1302(a) (2011).

26 *Id.*

27 Brief for Appellee/Respondents, *supra* note 22, at 28.

28 The Commission has classified broadband service as an information service rather than a telecommunications or cable service, a finding upheld by the U.S. Supreme Court. *See* NCTA v. Brand X Internet Services, 545 U.S. 967 (2005).

29 Brief for Appellee/Respondents, *supra* note 22, at 38.

Book Reviews

Kill or Capture: The War on Terror and the Soul of the Obama Presidency

By Daniel Klaidman

*Reviewed by Matthew Heiman**

Kill or Capture provides a fast-moving, highly readable insider account of the formulation and execution of President Obama's counterterrorism program through early 2012. Klaidman's access to high-level White House and national security sources is the primary quality of the book. In his book, Klaidman summarizes the effort to try Khalid Sheikh Mohammed in Manhattan, the arrest of the "underwear bomber," and the killing of Anwar al-Awlaki and Usama Bin Laden, among others. But readers hoping for a substantive discussion of the merits of these policies will not find it in this volume.

It is clear that the Administration's preferred strategy is kill over capture—or at least over capture and detain. If media reports are accurate (always something to question in the area of national security), when President Obama inherited the drone program, it had been used only forty-four times and was restricted to Pakistan. As of July 2012, drones had been used in more than 250 strikes in Pakistan, Afghanistan, Yemen, and Somalia. Klaidman's account of the hunt for Saleh Ali Saleh Nabhan illustrates that the Administration's preference for kill over capture is driven by operational realities and the absence of a post capture strategy.

Nabhan was a long-time CIA and military target because of his role as a "critical link between al-Qaeda and its Somalia-based affiliate, the Shabab." Nabhan was also a suspect in the U.S. embassy bombings in Kenya and Tanzania. As Klaidman notes, "[t]aking him out would have been a major victory in the war on terror. But capturing him would have been an even bigger coup, a potentially huge intelligence windfall that could have helped counterterrorism officials understand the connections between al-Qaeda and its offshoots."

After months of surveillance, an opportunity to act arose when Nabhan would be traveling along a remote coastal road in southern Somalia. According to Klaidman, the Administration considered three options to eliminate him as a threat: 1) a missile strike; 2) a helicopter-borne assault on Nabhan's convoy; or 3) an attempt to take Nabhan alive. A missile strike was dismissed because the military recalled a similar scenario when a missile was fired seemingly on target, and the terrorist survived the attack. Of the remaining two options, the "snatch and grab" from a tactical perspective "was the most attractive alternative. Intelligence from high-value targets was the coin of the realm in the terror wars. But it was also the riskiest option, requiring significant boots on the ground." This risk, combined with memories of events in 1993 in Somalia that became known as Black Hawk Down, weighed upon many of the military and intelligence decision makers. Moreover, there was the question of what to do with Nabhan once captured.

As noted by Klaidman, "nine months into its own war on al-Qaeda, the Obama Administration had no detention policy for terrorists captured outside established war zones like Afghanistan or Iraq." The Administration had boxed itself in. Obama had campaigned on a promise to close the Guantánamo Bay detention facility, and it was the Administration's policy to reduce the number of Guantánamo detainees, so Nabhan could not be taken there. An executive order ended the use of CIA "black sites" where interrogations took place, so that was off the table. The White House also opposed sending Nabhan to the U.S. air base in Bagram, Afghanistan for fear of it becoming a new Guantánamo, and bringing him to the United States for detention and prosecution was politically unacceptable. During the discussions about Nabhan, General James "Hoss" Cartwright, the Vice-Chairman of the Joint Chiefs of Staff, told President Obama, "[w]e do not have a plausible capture strategy." The President was given a kill or capture option, but "as everyone left the meeting that evening, it was clear that the only viable plan was the lethal one." Obama signed off on a mission that would involve the use of helicopters to attack Nabhan's convoy. The next morning, Nabhan and three other militants were dead.

The absence of a capture strategy is the product of an Administration that views counterterrorism through a different lens than that of its predecessor. George W. Bush believed that America was at war against al-Qaeda and its affiliates. The Bush Administration believed that the power of the Commander-in-Chief during wartime coupled with Congress' Authorization for Use of Military Force passed shortly after the attacks of September 11, 2001 justified the Administration's approach to its prosecution of the war on terror, including the use of long-term detention facilities. In his campaign for the Presidency and his subsequent Administration, Obama rejected long-term detention and repeatedly pledged to close Guantánamo. In fact, President Obama considered ways to contract the authority he had available. Early in his Administration, Obama met with several human rights activists and civil libertarians, including leadership of Human Rights Watch and the American Civil Liberties Union. According to Klaidman's sources, the President "told the group that he wanted to create a series of institutions and laws that would limit the scope of presidential action in the global fight against terrorism – a framework that would be binding not just for himself but for future presidents." Obama worried that such a precedent, in the words of Justice Robert H. Jackson's dissent in the *Korematsu* case that upheld Franklin Roosevelt's internment of Japanese Americans during World War II, "lies around like a loaded weapon ready for the hands of any authority that can bring forward a plausible claim." The reader is left to wonder

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Daniel Klaidman's Kill or Caputure: The War on Terror and the Soul of the Obama Presidency *is published by Houghton Mifflin Harcourt.*

whether the internment of innocent Japanese Americans is equivalent to the internment of terrorists removed from the theaters of war. Klaidman offers no view, and if he asked his sources to make the comparison, it is not mentioned in his book.

Drawing from the narrative, Klaidman's second recurring theme flows from the first, and it focuses on whether terrorists should be treated as criminals subject to civilian courts or as enemy combatants that are governed by the law of war. In its public pronouncements and initial instincts, the Obama Administration favored a law enforcement approach. In 2009, Attorney General Eric Holder announced that Khalid Sheikh Mohammed would be tried in a federal civil court in Manhattan. Mohammed admitted responsibility for the September 11, 2001 attacks on the World Trade Center that killed three-thousand Americans and confessed to the 2002 beheading of *Wall Street Journal* Reporter Daniel Pearl. As the author notes, the Bush Administration had rejected civilian trials for Mohammed and his co-conspirators because the United States was at war. Klaidman summarizes Holder's differing point of view:

> Holder liked to think that his decision on the 9/11 cases reflected the beliefs of a hard-nosed prosecutor. And there was no doubt that he was driven in part by pragmatic, tactical considerations. But the KSM decision also amounted to a test of his principles. It was an opportunity to show that the speeches he'd given criticizing the Bush [A]dministration—"We owe the American people a reckoning," he'd said in a June 2008 address—amount to more than just political rhetoric.

President Obama supported the decision of his Attorney General. Klaidman writes, "[t]he government's willingness to try Mohammed in a civilian court would send a resounding message to the rest of the world that America was rededicating itself to the rule of law." Other Administration officials such as Harold Koh, the State Department's top lawyer, shared this view. In a meeting with the President, Koh said that terrorists had been successfully tried in civilian courts without security problems. Koh believed that trying Mohammed would be a "redemptive act" and would "show confidence in our [civil justice] system." Koh contended that to try Mohammed in a military commission would give Mohammed want he wants, the stature of a great military leader when he is "just a common criminal."

The decision to try Mohammed in a Manhattan court room was not universally supported within the White House. Rahm Emanuel, then the White House Chief of Staff, opposed the plan on political grounds. When Holder announced his decision, he was criticized by House and Senate Republicans, as Emanuel predicted. When testifying before the Senate Judiciary Committee, Holder stumbled in response to the question of what would the Administration do if Mohammed was acquitted. First, Holder said, "failure is not an option," then he argued that even if acquitted, Mohammed could be held preventively under the laws of war. As Klaidman rightly observes, this "argument undercut the reasons for using Article III courts in the first place."

One of chief critics of the decision was Senator Lindsey Graham who supported the use of military commissions. While Obama told Graham that he supported Holder's call, this would soon change. On Christmas Day 2009, Umar Farouk Abdulmutallab boarded a flight from Amsterdam to Detroit with explosive chemicals sewn into his underwear. Trained by the Yemeni-based al Qaeda in the Arabian Peninsula (AQAP), an al-Qaeda affiliate, he tried to ignite the explosive in flight but was subdued by fellow passengers. After being taken into custody, federal agents gave Abdulmutallab his *Miranda* warning. This decision was raised in advance in a videoconference with John Brennan, the Assistant to the President for Homeland Security and Counterterrorism, and members of Homeland Security, the FBI, and the DNI. No one objected. Once he was read his rights, Abdulmutallab stopped speaking and requested a lawyer. This was viewed by Administration critics as a significant blunder, as Abdulmutallab was then off-limits as an intelligence source.

Klaidman writes that the change in climate after the Abdulmutallab arrest was reflected in Mayor Bloomberg's public announcement that trying Mohammed in Manhattan would be too costly and disruptive for the city. Congressional Republican opposition had manifested itself in the 2011 National Defense Authorization Act (NDAA). In addition to funding for troops in Afghanistan and Iraq, the law prohibited the trial of Mohammed and the other 9/11 defendants in civilian courts and barred the transfer of Guantánamo detainees into the United States. In May 2010, the Attorney General capitulated with the President's support and announced that Mohammed would be tried by a military commission. Obama signed the NDAA.

As Klaidman moves his narrative forward, the reader can see the Obama Administration muddling its way forward from one counterterrorism event to the next. One does not get a sense of a coherent strategy. This is seen in the case of Ahmed Adulkadir Warsame, a Somali who was considered to be the principal liaison between the Shabab and AQAP. He was viewed as an intelligence treasure trove, and on April 19, 2010, he and an associate were captured in open waters by United States Navy SEAL Team six commandos. He was transported to the brig of the USS *Boxer* and was held there for interrogation for an extended period before he was read his *Miranda* rights. Meanwhile, the Administration debated how he should be tried. Koh again argued for a civilian trial in New York City on the grounds of its redemptive quality, particularly in the wake of the Mohammed decision, and this time his argument carried the day.

Klaidman writes that the handling of Warsame outraged civil libertarians for creating a floating Guantánamo and upset Republicans who opposed bringing a terrorist into the country. In Klaidman's view, anger from both sides proves that Obama got it right:

> It was perfectly Obamaesque resolution, pragmatic and rational. It vindicated the principle that in the war on terror there were no one-size-fits-all solutions. The Obama Doctrine on counterterrorism was a hybrid approach

> to asymmetric war. Sometimes a military model made the most sense. Other times a law-enforcement model was the way to go. And in the case of Warsame, the two approaches worked together in tandem.

However, as Klaidman notes a few lines later, the capture of Warsame did not lead to a new wave of captures over kills. Klaidman attributes this to the absence of a political environment that would allow for a more pragmatic approach.

The author acknowledges that Warsame demonstrated the potential value of captures. Intelligence gained from Warsame was one of key elements that led to the CIA's killing of Anwar al-Awlaki, AQAP's chief of external operations. Awlaki, a U.S. citizen, planned Abdulmutallab's Christmas Day plot. He put improvised bombs in printer toner cartridges that were bound for the United States but were intercepted by Saudi Arabian intelligence. According to Klaidman, it was this killing that most enraged civil libertarians, yet Awlaki's U.S. citizenship was "immaterial" to President Obama.

Kill or Capture's strength lies in its storytelling. Klaidman gives you a sense of who said what to whom, who was in the room when a critical decision was made, and who was sidelined. Along the way, Klaidman reveals himself to be sympathetic to the Administration, though not completely uncritical. The book's weakness is the paucity of any real discussion of the consequences of the Obama Administration's counterterrorism program.

The most striking example is the genuine disconnect between the Administration's rhetoric on civil liberties and its actions. The Administration is opposed to additional terrorists being subjected to long-term detention at facilities like Guantánamo, and it understands that bringing every terrorist through the criminal justice system is politically impossible. Aside from doing nothing or releasing terrorists it detains, the only other option becomes death from above. But, if a drone attack is the only reliable tool you have, then do more terrorists look like candidates for the kill rather than capture option? Klaidman does not directly address this question, but it is hard to avoid such thoughts in light of General Cartwright's recognition that there is no viable capture policy. The Administration has proposed no alternative path out of the policy cul-de-sac. Even if Klaidman and the Administration view a more robust military commission process or special national security court as unacceptable options, it would have been edifying to hear the decision makers' reasoning and for them to explain why death, the ultimate deprivation of civil liberties, or capture and release, with the attendant risk of recidivism, is superior to incarceration at Guantánamo.

It should also be noted that the book's obvious appeal, Klaidman's access to the internal conversations and processes of military, intelligence, and political operators, is also a source of concern. Publicizing CIA success was well understood by Rahm Emanuel as a political tool to demonstrate the Administration's toughness on terrorism. But, with the publication of each detail of our tactics and strategies, their effectiveness is degraded and our enemies are educated. In the wake of media publications of multiple leaks and the publication of this book, along with David Sanger's *Confront and Conceal*, Holder was forced in June 2012 to appoint two United States Attorneys to investigate. While the investigation was initiated after publication of this book, Klaidman's sources are silent as to the potential repercussions of using intelligence details to further a political agenda. Without sanction for such conduct, it is unlikely that reporters and political operators will ignore their respective interests in leaking and publishing sensitive material.