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Letter from the Editor...

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Sincerely,

Christian B. Corrigan

Editor
Christian B. Corrigan

Administrative Law & Regulation

Bitcoin Taxation: Recommendations to Improve the Understanding and Treatment of Virtual Currency

By Erin M. Hawley & Joseph J. Colangelo***

Note from the Editor: *Any accounting, business, or tax advice contained in this article is not intended as a thorough analysis of specific issues or a substitute for a formal opinion. Further, any such advice is not intended to be used, and may not be used, to avoid tax-related penalties or to promote, market, or recommend any transaction or matter addressed herein.*

I. Executive Summary

A. Purpose

The purpose of this paper is to assess the Internal Revenue Service's (IRS) current tax guidance as it relates to virtual currency, highlighting both positive and negative aspects. Our goals are to provide policymakers with additional information regarding the tax responsibilities associated with bitcoin under this new guidance as well as provide options to aid the IRS in fulfilling its mission of helping America's taxpayers understand and meet their tax responsibilities while simultaneously encouraging innovation in the bitcoin and virtual currency ecosystem.

B. Assessment of Current IRS Guidance

In Notice 2014-21, the IRS classifies bitcoin as property rather than currency. This classification brings some clarity to a situation otherwise open to interpretation. Taxpayers now know that bitcoin gains may qualify for capital gains treatment in some circumstances. However, by declaring every individual bitcoin transaction to be a taxable event, the IRS guidance imposes a substantial accounting burden on taxpayers. Theoretically, each time that a taxpayer uses bitcoin, the taxpayer must calculate whether the transaction results in a gain or loss. This calculation involves knowing the price at which those bitcoins were initially purchased and the value of the product purchased. The taxpayer must also identify precisely the particular bitcoins involved in each transaction. These burdens are likely to discourage the use of bitcoin and the development of virtual currency infrastructure.

C. Recommendations

This paper briefly summarizes two methods by which the IRS can continue to classify bitcoin as property but can minimize the administrative burden on taxpayers. These proposals would allow the IRS to carry out its mission without discouraging innovation in digital currency.

First, the IRS might replicate the foreign currency exemptions currently contained in Section 988 of the Internal Revenue Code (Code).[1] Section 988 minimizes the burden on foreign travelers engaging in certain foreign currency transactions by exempting small gains from tax and reporting requirements.

Second, the IRS might create a de minimus safe harbor for bitcoin transactions. Applying de minimus exemptions to bitcoin transactions would allow taxpayers to engage in small transactions using bitcoin and other crypto-currency technologies without an overly burdensome accounting system. Such an approach could mirror the capitalization regulations under Section 263(a) of the Code. The Section 263(a) regulations authorize two non-statutory exemptions to the capitalization rules: (1) a de minimus safe harbor exemption in certain circumstances for property with a cost not exceeding $5,000; and (2) a deduction for the cost of property that would otherwise be capitalized if such property cost less than $500. This approach is unique in that it would not likely require a statutory mandate from Congress prior to its implementation.

II. An Analysis of Notice 2014-21's Treatment of Bitcoin

A. What is Bitcoin?

Bitcoin is a peer-to-peer system built in 2008 that allows for online payments without a trusted central authority. The technology has aspects of both currency and property and can be used for investment or trade. These aspects have made it unique among other assets when being classified using existing tax codes and regulatory frameworks.

Bitcoin is held by "addresses" that can be grouped into "wallets." The accounting system for bitcoin is unique in that the ledger that keeps track of which "addresses" own which bitcoins are completely public, as are all transactions. This open ledger is referred to as the "blockchain" and is part of what gets technologists excited about the potential for bitcoin to advance the ways in which money, property, and the Internet operate in the future.

Because the IRS in their guidance referred to "digital currency" rather than bitcoin specifically, we will refer to digital currency as a blanket term that covers both bitcoin as well as other cryptographically-based currencies.

B. Current IRS Guidance

In March 2014, the Internal Revenue Service (IRS) issued Notice 2014-21 (Notice)[2] describing how existing general tax principles should be applied to transactions using virtual currency, specifically bitcoin. In doing so, the IRS provided a measure of clarity to individuals who have been using virtual currencies as a method of payment for goods and services or have been holding virtual currencies as an investment. Taxpayers now know, for example, that certain bitcoin gains can qualify for capital gains treatment.

The IRS made two important clarifications in Notice 2014-21. First, the IRS declared that bitcoin is property, not currency. As a result, the tax principles generally applicable to property transactions apply to transactions using virtual currency. Second, the IRS declared that "the use of convertible

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virtual currency to pay for goods or services in a real-world economy transaction, has tax consequences that may result in a tax liability." In other words, every bitcoin transaction may give rise to a taxable event.

The IRS additionally clarified that the Notice applies to bitcoin as an investment (capital asset), bitcoin as a method of employer-employee payment, and bitcoin created through the efforts of bitcoin "miners." Bitcoin miners are individuals or organizations that devote computer processing power to processing bitcoin transactions and solve computer algorithms associated with bitcoin. These miners receive additional bitcoin as payment for their computer processing.

As a result of this clarification, however, the Notice created burdensome reporting and accounting requirements for taxpayers that are likely to inhibit the development of virtual currency-related applications and infrastructure. Given the treatment of bitcoin as property, each time that a taxpayer uses bitcoin, the taxpayer must calculate whether the transaction results in a gain or loss to ensure proper reporting for tax purposes. Additionally, the Notice indicates that this classification would be applied retroactively to transactions taking place prior to March 2014. This paper recommends that policy makers and the IRS consider means of ameliorating these burdens and thereby provide room for innovation within the virtual currency space.

C. Assessment of IRS Guidance

The stated mission of the IRS is to "provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.[3]" While Notice 2014-21 does clarify how taxpayers should treat bitcoin transactions, the Notice unnecessarily burdens the use of virtual currency as a means of exchange for goods or services. Additionally, the Notice leaves a number of questions about bitcoin tax treatment unanswered.

D. Unanswered Questions

Questions that remain open to interpretation after Notice 2014-21 include the following:

- *Share identification*: The Notice does not identify what type of accounting structure must be used with virtual currencies. As a result, some users may find it in their best interest to utilize first-in-first-out (FIFO) accounting, while other taxpayers may deem it best to use last-in-first-out (LIFO) accounting. A problem will arise, however, when specific-share identification is required as proof of consistent accounting. Specifically, the two difficulties unique to the virtual currency space are: (1) the lack of specific-share identification in the current incarnation of bitcoin exchanges; and (2) the current inability of virtual currency wallets to specifically identify individual units of virtual currency. Simply put, a bitcoin wallet that receives different bitcoin amounts at different prices will be unable to maintain accurate specific share identification.

- *The availability of Section 1031 Like-Kind Exchanges*: Section 1031 allows taxpayers to defer recognition of gains by exchanging property for other like-kind property. The typical case involves a taxpayer who sells one house only to purchase a second. If the taxpayer elects to use Section 1031, no gain is recognized upon the first sale (although this gain is potentially recognizable when the second home is sold). Section 1031 does not apply to the exchange of different currencies, but since the IRS has categorized bitcoin as property, a question exists as to whether bitcoin might be exchanged for a different crypto-currency also treated as property—arguably "like-kind" under Section 1031.

E. Burdensome Reporting

Notice 2014-21 comes with burdensome reporting and accounting requirements. The Notice declares that every transaction involving virtual currency, no matter how small, constitutes a taxable event where gain or loss must be calculated:

> If the fair market value of property received in exchange for virtual currency exceeds the taxpayer's adjusted basis of the virtual currency, the taxpayer has taxable gain. The taxpayer has a loss if the fair market value of the property received is less than the adjusted basis of the virtual currency.

Most users of virtual currency make hundreds of purchases and currency exchanges a year. If bitcoin users are required to keep track of the cost basis and current fair market value at time of exchange of each bitcoin they own, users may be less likely, if not completely unwilling, to use virtual currency to engage in commerce. Even if the burden could be alleviated by virtual currency technology that could eventually aid bitcoin users in tracking bitcoin transactions, the burden would remain on the taxpayer. The same would be true for foreign currency, and the IRS has recognized that the de minimus tax revenues that might be generated from small currency transactions do not merit taxpayer reporting and accounting (nor IRS auditing).

Improving IRS treatment of bitcoin will lead to greater usage of virtual currencies, in turn leading to the development of apps, protocols, and infrastructure that will allow for a more seamless accounting and tax reporting for users of virtual currency. For example, just five weeks after the IRS released the Notice, Coinbase (a leading bitcoin company) developed and provided an online tool for its users that completes basic cost-basis and gain calculations based on a FIFO accounting structure. While this tool does not yet perfectly allow users to track all necessary accounting related to virtual currency, the quick development of the tool provides an example of the type of automated system that is likely to be developed to aid bitcoin users in accounting and tax reporting. By encouraging the use of virtual currency, the IRS can simultaneously encourage virtual currency companies develop technologies to assist their users in properly reporting transactions as necessary, resulting in increased overall taxpayer compliance.

Conversely, the Catch-22 that results from guidance such as the latest Notice is that in the absence of an environment encourages users to engage in commerce with virtual currencies, the incentives for companies to develop reporting systems are lowered because fewer users will be willing to engage in

commerce using virtual currency. The growth of additional infrastructure and technology around the virtual currency is driven solely by the usage of that virtual currency, and guidance which makes the use of virtual currency unappealing to the average consumer may reduce the likelihood of further technological advancement.

F. Why Encourage Virtual Currency?

Virtual currencies have the potential to impact consumers and corporations in a wide variety of ways, starting with the immediate advantages of reducing transaction costs and permitting instant, safe execution of large transactions without needing a "middleman" bank or credit card company

Virtual currencies generally use a public ledger of transactions and balances to keep track of which accounts own which pieces of virtual currency. Many virtual currencies, including bitcoin, allow metadata to be attached to transactions. With additional technology, it is not difficult to envision a world in which virtual currency protocols are used to not just complete financial transactions, but contractual ones as well.

One technological innovation already being implemented is the "colored coin" concept, in which small bits of virtual currency are modified to represent real-world property. Once the modification has been completed, these representative coins can be traded more freely and accounted for on a peer-to-peer model. The peer-to-peer model replaces the current virtual currency setup, which relies on a centralized issuer who must keep track of the validity and ownership of every piece of property issued.

Multi-signature technology is another example of an innovation that can help both consumers and companies prevent fraud and lower costs. A typical bitcoin address (basically, an account or virtual wallet that controls bitcoin the currency) has only one entity that controls the funds held by that address. "Multi-signature" refers to a bitcoin address whose funds are controlled by a vote among multiple parties. As Jim Harper, general counsel for the Bitcoin Foundation, recently summarized:

> Consumers can have greater control over their "programmable" money even while it is held by a financial services provider. These innovations, and others to come, will tend to make consumer oversight of Bitcoin businesses easier — and government oversight a less important part of the mix. Consumers will be better positioned to do their own monitoring and, in the best case, to enjoy cryptographic proof that they are being properly served.[4]

One simple implementation of this technology is use as an escrow for purchasers of products. In this instance, a purchaser would control one vote of the escrow, a seller would control a second, and the third would be given to an arbiter who would perform the role of financial clearinghouses and credit card companies in the event of a fraud complaint.

The two technologies above are just examples of improvements that are already being developed as a result of the rise of virtual currencies whose ledgers are public and whose code is open-source. Additional potential improvements that can aid both consumers and businesses include allowing financial institutions to not only monitor but display publicly an ongoing or regular audit of assets, bringing financial services to the 10 million US citizens without bank accounts.[5]

By creating a disincentive to using virtual currency in Notice 2014-21, the IRS may deprive consumers of a budding technology that has the potential to save time and money, increase access to banking and liquidity, and reduce the rate of fraud and corporate insolvency.

III. Options to Minimize Overly Burdensome Reporting

A. The Foreign Currency Exemption

One alternative to the IRS' current guidance that would lessen the arduous nature of the reporting requirement outlined in the Notice is to create an exemption for small personal currency gains from virtual currency like the exemption that exists for foreign currency under Section 988. Under Section 988(e), personal currency gains of $200 or less are not taxable. The rationale behind this exclusion is the burdensome nature of reporting small personal currency gains as a result of traveling abroad.

In a like manner, personal gains from bitcoin transactions, *i.e.*, gains that are not associated with a trade or business, but rather ordinary consumer activity, could be exempt from taxation to the extent that such gain did not exceed $200. For example, suppose a consumer purchased a $450 microwave with bitcoin. If the consumer had a basis in the bitcoin of at least $250, no tax would be owed. Such a rule would allow consumers, like foreign travelers, to use bitcoin to routinely purchase small items without worrying about potential tax and reporting obligations. The rules that would otherwise apply to bitcoin purchases used for a trade or business and to personal bitcoin gain over $200 would not be modified by such a rule.

B. The Section 263 Safe Harbor Exemption

A second potential solution to the burdens imposed by Notice 2014-21 would be for the IRS to create a de minimus safe harbor for small bitcoin gains, similar to current capitalization exemptions which allow a business owner to expense (rather than capitalize) certain small purchases under Sections 263(a) and 162(a) of the Code.

Section 263(a) generally requires the capitalization of amounts paid to acquire, produce, or improve tangible property. Such treatment means that business owners may not immediately deduct the entire cost of certain purchased property. Section 162, on the other hand, allows a deduction for all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Such expenses include the costs of certain supplies, repairs, and maintenance.

The IRS has issued regulations providing criteria to distinguish between expenditures which must be capitalized and those which may fully be deducted in the taxable year in which they were incurred. In addition, the regulations contain two non-statutory de minimus exemptions from the capitalization requirements of Section 263.

First, a taxpayer who uses an applicable accounting system may rely on a "de minimis safe harbor" to expense or deduct immediately money spent on property which would otherwise be required to be capitalized under Section 263 if the amount paid for such property does not exceed $5,000. Second, a

taxpayer without an approved accounting system may expense or deduct an item (rather than capitalize) if the item costs less than $500. The final regulations also note that the IRS and the Department of the Treasury may "change the safe harbor amount through published guidance."

The IRS and Department of the Treasury could issue similar regulations for bitcoin, providing that—perhaps subject to certain accounting strictures—bitcoin users owe no tax on gains below a certain dollar amount and thus need not track and report every small transaction. *The history and existence of the Section 263 regulations, moreover, suggest that the IRS might implement the proposed exemption without statutory approval.*

IV. Conclusion

The IRS is in the difficult position of adapting the Code to new technologies and financial structures, and this paper seeks to aid in the process by identifying potential issues that may arise under Notice 2014-21. Of particular concern is the stifling effect on virtual currency technology that the Notice's burdensome reporting and accounting requirements may cause. A modified approach that would allow bitcoin commerce and innovation to flourish provides many potential benefits to U.S. businesses and consumers. This paper identifies two possible approaches that would allow bitcoin users to engage in small commercial transactions without incurring burdensome reporting obligations (with minimal tax revenue raised) all while allowing the IRS to capture gains from large business transactions and to collect capital gains taxes on bitcoin held for investment purposes.

Endnotes

1 References to the Code refer to the Internal Revenue Code of 1986, as amended.

2 Notice 2014-21, 2014-16 I.R.B. 938.

3 *The Agency, its Mission and Statutory Authority*, Internal Revenue Service, http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority.

4 Jim Harper, *Consumer Protection in the Bitcoin Era*, American Banker (May 14, 2014), http://www.americanbanker.com/bankthink/consumer-protection-in-the-bitcoin-era-1067434-1.html.

5 *2011 FDIC National Survey of Unbanked and Underbanked Households*, Federal Deposit Insurance Corporation (September 2012), https://www.fdic.gov/householdsurvey/.

Should Judges Judge?: The Affordable Care Act, Subsidies, and Judicial Engagement

*By William R. Maurer**

Note from the Editor:

This article is about D.C. Circuit's decision in *Halbig v. Burwell* and the U.S. Supreme Court's decision to grant review in similar case from the Fourth Circuit, *King v. Burwell*. 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 further discussion about statutory interpretation, judicial engagement, and the Affordable Care Act. To this end, we offer links below to other perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Jonathan Cohn, *The Legal Crusade to Undermind Obamacare—and Rewrite History*, The New Republic, Dec. 5, 2012: http://www.newrepublic.com/article/110770/legal-challenge-obamacare-insurance-exchanges-full-holes
- Robert Weiner, Symposium: *King v. Burwell*—getting it right (as in correct), SCOTUSblog (Nov. 10, 2014, 3:10 PM): http://www.scotusblog.com/2014/11/symposium-king-v-burwell-getting-it-right-as-in-correct/
- Samuel Bagnestos, *The (Legally) Nonsensical Rearguard Challenge to Obamacare*, Disability Law Blog (Nov. 26, 2012): http://disabilitylaw.blogspot.de/2012/11/the-legally-nonsensical-rearguard.html
- Timothy Jost, *Tax Credits in Federally Facilitated Exchanges Are Consistent With the Affordable Care Act's Language and History*, Health Affairs Blog (Jul. 18, 2012): http://healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history/
- David Ziff, *Halbig, Statutory Interpretation, and Lessons I Learned In Practice*, Ziff Blog (Jul. 29, 2014): https://ziffblog.wordpress.com/2014/07/29/halbig-statutory-interpretation-and-lessons-i-learned-in-practice/
- Abbe Gluck, Symposium: The grant in *King*—Obamacare subsidies as textualism's big test, SCOTUSblog (Nov. 7, 2014, 12:48 PM): http://www.scotusblog.com/2014/11/symposium-the-grant-in-king-obamacare-subsidies-as-textualisms-big-test/
- Jonathan Adler, Symposium: A welcome grant for a straightforward statutory case, SCOTUSblog (Nov. 9, 2014, 8:55 PM): http://www.scotusblog.com/2014/11/symposium-a-welcome-grant-for-a-straightforward-statutory-case-2/
- Patrick Wyrick, Symposium: *King v. Burwell*—a simple case, SCOTUSblog (Nov. 10, 2014, 10:51 AM): http://www.scotusblog.com/2014/11/symposium-king-v-burwell-a-simple-case/

It is rare that a Court of Appeals' decision about whether the Internal Revenue Service's interpretation[1] of a tax law was legal under the Administrative Procedure Act[2] earns critical review from *The New York Times*,[3] MSNBC,[4] and *The Daily Show*.[5] However, when that decision concerns the Patient Protection and Affordable Care Act (also known as the ACA or, more commonly, "Obamacare"),[6] the attention becomes understandable. The decision of the U.S. Court of Appeals for the D.C. Circuit in *Halbig* v. *Burwell*[7] is also notable because it represents a rare bird: a case in which the government lost despite the fact that the judiciary has crafted a set of rules, the application of which usually ensures that the government usually wins in cases involving statutory construction.

In response to the government's petition for rehearing, a majority of judges on the D.C. Circuit voted to vacate the panel decision and rehear the case en banc.[8] Then, on November 7, 2014, the Supreme Court dropped a bombshell. The Court granted review of *King v. Burwell*, a decision from the Fourth Circuit that came to the opposite conclusion as the panel decision in *Halbig*.[9] These cases now raise a national debate about the role of judges in reviewing federal statutes that concern significant issues of public policy.

Halbig and *King* concern the IRS's interpretation of a section of the ACA concerning tax credits for buying health insurance from an "Exchange."[10] Under the ACA, Exchanges are either governmental or nonprofit entities established to provide a marketplace for health insurance.[11] The ACA recognizes two types of Exchanges: those established by the states, and, if a state does not establish its own Exchange, those established by the federal government for the state.[12] The ACA subsidizes health insurance for healthy, but less well-off, people through tax credits. Under the ACA, these tax credits are available for insurance purchased on an "Exchange established by the State."[13] If a person purchased their insurance through the federally established Exchanges, arguably they do not get the tax credit.

The credit is important to the ACA because, besides purportedly driving down the cost of insurance, it also increases the number of people who would buy insurance under the ACA's individual and employer mandates.[14] These mandates require

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that individuals obtain, and large employers offer, insurance or face a tax penalty.[15] This penalty does not kick in, however, if the cost of insurance, minus any tax credits, is too high.[16] Thus, if tax credits are not available in states with only federal Exchanges—and only 14 states and the District of Columbia have established their own Exchanges—fewer people and employers are subject to the penalty. The tax credits thus extend the reach of the individual and employer mandates.

In other words, if one were to read the ACA as it is written and have the tax credits available only for those purchasing through state Exchanges, the law's reach would be significantly diminished.

There is considerable evidence that the government intended this to be the result, including statements by the private-sector "architect" of Obamacare, Jonathan Gruber, and others with inside knowledge.[17] Under this view, Congress wanted to incentivize the states into establishing their own Exchanges by withholding the tax credits to residents of states that refused to do so. If that was what Congress was trying to do, however, Congress guessed wrong—very few states were persuaded by the efforts to create their own Exchanges by providing credits to their residents.

The strongest evidence that this was the result that Congress intended, though, was that Congress wrote the statute to operate this way. The law says the tax credits go only to people to purchase insurance on an "Exchange established by the State."[18] The legislative history simply does not support the assertion that this was nothing more than a "scrivener's error," as some of the law's proponents have argued, but a deliberate decision made by the bill's drafters sometime in the process.[19] Nor does reading the statute this way make other sections of the law absurd, as others claim.[20] The statute still functions, just not as broadly as the government later decided it should.[21]

When the IRS issued its interpretation of the statute,[22] it decided that Congress did not mean what it said. Instead of extending tax credits to only those people purchasing insurance through an "Exchange established by the State," the IRS extended the credit to people who purchased insurance through the federal Exchange.[23] Congress's bad bet was now forgiven.

Many believe that the IRS was completely justified in interpreting the law this way, including the dissenting judge in the panel decision in *Halbig* and the Fourth Circuit panel in *King*. For instance, writing in *Slate*, the well-respected academic Professor Richard Hasen of U.C. Irvine Law School, argued that the courts should defer to the IRS's rewriting of the statute because courts have an obligation to "make the law work."[24] According to Hasen, because Congress itself "is barely working," Congress is much less likely to fix a law with mistakes in it and the courts therefore have an obligation to get the laws to "work for the people."[25]

The critique of reading the ACA as it is written is ultimately directed to an interpretive theory called "textualism." This approach, championed most notably by Justice Antonin Scalia, can be generally summed up by simply saying, "read the text."[26] If the law says "X," a judge should not rewrite the law to make it read "Not X" in order to achieve results the judge likes better. According to the dissenting judge in *Halbig*, the judges on the Fourth Circuit in *King*, and scholars like Hasen, statutes should be read to fulfill their purpose or to achieve the "big picture" and minimize "human costs" (as Hasen puts it).[27]

Under this approach, it does not matter much whether Congress deliberately tried to induce state cooperation with the stick-and-carrot of tax credits, nor does it matter that Congress guessed wrong in doing so. What matters is that the reach of the ACA could be significantly limited by interpreting the law according to its literal language. Courts have an obligation to relieve Congress of either its poor draftsmanship (if the tax-credit restriction was unintended) or the consequences of its bad bet (if the restriction was intended) in order to end up with a statute that those in power prefer.

The "contextual" approach to statute-reading urged by the ACA's supporters is fairly common.[28] But this is just a mechanism courts can use to have the government win when someone sues it, leading inexorably to a larger government with fewer constraints. The courts have created myriad doctrines to help the government win court cases, including things like abstention and justiciability.[29] Anti-textualism can then become a fallback argument when those rules do not hand the government a victory.

But the critics of textualism are unclear as to what benefits come from permitting the courts to rewrite laws except that policy preferences they like remain in effect. The concurring judge in *King*, for instance, faulted those who challenged the law as seeking to "deny to millions of Americans desperately-needed health insurance."[30] But this approach will likely result in more poorly written laws that are unread and unreadable, and it is unclear how this would be a good result "for the people" who have to comply with them.

Congress is perfectly capable of writing a law that extends tax credits to people who purchase insurance on a federal Exchange. If Congress intended to do that but did not, then perhaps it should stop writing laws that are so complex the drafters cannot get the wording right. If Congress cannot fix its drafting error in this instance—if an error it was—then perhaps it should live with the consequences. Call it the "Knowing-What's-In-A-Law-Before-It's-Passed" principle of statutory interpretation.[31] Letting Congress off the hook for drafting a law of unusual complexity and pushing it through before many even had time to read it will simply encourage Congress to pass opaque and poorly-thought-out laws in the future.

This raises the question of why should the courts step in to rewrite a law to fix a mistake in favor of one litigant, especially when, in other legal contexts, like contracts, drafting mistakes work against the drafter?[32] If the answer is, "courts need to make laws work for people," why is that simply not a value judgment whose end result is that one litigant (the government) consistently wins and the other (the individual) consistently loses? Putting aside the fact that the law does not "work" for the plaintiffs in these cases or else they would not have challenged it, the idea that the courts should operate on a "needs of the many outweigh the needs of the few" means that we are not really a country of laws. Instead, we are a country where all the branches of the government work in tandem to achieve policy outcomes, instead of checking one another to protect

individual rights. Besides violating the separation of powers, this approach raises serious issues about whether litigants before the courts are receiving the process that is due to them under the Constitution.

Many of those unhappy with the textualist approach to reviewing the ACA believe that Obamacare is so important that judges should close their eyes to what is written in plain English. Under their view, it is perfectly fine for the Legislature to write laws that say one thing but intend to do another and the Executive to rewrite the law to reflect the prevailing view of what the law should say. The role of the courts is to pretend that this is somehow acceptable so the government will win. That is not judging. That is judicial abdication.

What the panel majority in *Halbig* did was real judging, not, as E.J. Dionne suggested, "judicial activism."[33] It held a co-equal branch of government to account and insisted that the law be read to comply with the policy choices manifested in the law itself (as opposed to what the government says the law means now). Now the Supreme Court must decide whether it will ignore what the law says and simply accept the government's latest explanation of what it meant to do. If they do, then they are doing what we think judges are supposed to do: engage in the facts of every case and require the government to abide by the same standards applicable to other litigants in court.[34] It is "activism" to instead rewrite the law to conform to what the government wishes the law to be, not to what it actually is.

If the Supreme Court affirms the decision in *King*, that will be a victory for Obamacare, but will give Congress the green light to write incomprehensible, unread and sloppily drafted laws, safe in the knowledge that the judiciary will relieve them of the consequences of their errors. That result could help Obamacare limp along for a few more years, but that victory will come at the cost of endangering individual rights, respect for the rule of law and due process.

Endnotes

1 26 U.S.C. § 36(B)(c)(2)(A)(i).

2 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521.

3 Robert Pear, *New Questions on Health Law as Rulings on Subsidies Differ*, New York Times (July 22, 2014), http://www.nytimes.com/2014/07/23/us/court-rules-against-obamacare-exchange-subsidies.html.

4 Steve Benen, *The Speaker, The ACA and The 'Be Careful What You Wish For' Adage*, MSNBC (July 23, 2014), http://www.msnbc.com/rachel-maddow-show/the-speaker-the-aca-and-the-be-careful-what-you-wish-adage.

5 *See* Catherine Thompson, *Jon Steward Tackles Obamacare Subsidy 'Chaos,'* TPM Livewire (July 24, 2014), http://talkingpointsmemo.com/livewire/jon-stewart-obamacare-subsidy-chaos.

6 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

7 No. 14-5018, (D.C. Cir. July 22, 2014).

8 Halbig v. Burwell, 2014 U.S. App. LEXIS 17099 (Sept. 4, 2014).

9 King v. Burwell, 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 2014 U.S. LEXIS 7428 (November 7, 2014) (No. 14-114).

10 42 U.S.C. § 18031(b)(1) ("Each State shall . . . establish an American Health Benefit Exchange.").

11 *Id.* § 18031(d)(1) ("An Exchange shall be a governmental agency or nonprofit entity that is established by a State").

12 *See Id.* § 18031(c)(1).

13 *See Halbig*, No. 14-5018, WL 3579745 at *7 (D.C. Cir. July 22, 2014) ("In other words, the tax credit is available only to subsidize the purchase of insurance on an 'Exchange established by the State . . . .'").

14 *Id.*, at 8.

15 *See generally* 26 U.S.C. § 4980H(a).

16 *Id.* § 4980H(a)(2); *see also id.* § 4980H(b).

17 Felice J. Freyer, *Health Care Law Debate Heats Up*, Boston Globe (July 25, 2014), http://www.bostonglobe.com/lifestyle/health-wellness/2014/07/25/mit-gruber-obamacare-architect-calls-his-statements-video-mistake/q1kkjC9zpQXLJuxhlY2HbJ/story.html. (. . . [I]f you're a state and you don't set up an exchange, that means your citizens don't get their tax credits.").

18 42 U.S.C. § 18031(b)(1) ("Each State shall . . . establish an American Health Benefit Exchange.").

19 *See Halbig*, No. 14-5018, WL 3579745, at *7 ("In other words, the tax credit is available only to subside the purchase of insurance on an 'Exchange established by the State . . . .'").

20 *King*, 759 F.3d at 378 (Davis, J., concurring).

21 *See Halbig*, No. 14-5018, WL 3579745, at *41.

22 26 C.F.R. § 1.36B-2(a)(1).

23 *Id.*

24 Richard L. Hasen, *Bad Readers*, Slate (July 23, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/d_c_circuit_and_4th_circuit_obamacare_rulings_the_perils_of_following_scalia.html.

25 *Id.*

26 *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012).

27 Richard L. Hasen, *Bad Readers*, Slate (July 23, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/d_c_circuit_and_4th_circuit_obamacare_rulings_the_perils_of_following_scalia.html.

28 *See, e.g.*, *id.*

29 Abstention provides courts with a doctrinal means to decline to hear certain cases. For example, "federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass on them." *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). There are many other permutations of abstention doctrine. Justiciability offers courts another way to pass on a case. Specifically, courts may only hear issues involving an actual "case or controversy." Courts may interpret this term liberally in declining certain cases. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

30 *King*, 759 F.3d at 379 (Davis, J., concurring).

31 Recall the now-infamous Nancy Pelosi quote: "We have to pass the bill so you can find out what is in it . . . ." Tommy Christopher, *The Context Behind Nancy Pelosi's Famous 'We have to Pass the Bill' Quote*, Mediaite (November 17, 2013), http://www.mediaite.com/tv/the-context-behind-nancy-pelosis-famous-we-have-to-pass-the-bill-quote/.

32 *See* 11 Williston on Contracts § 32:12 (4th ed.) ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.").

33 E.J. Dionne Jr. *A Conservative Judiciary Run Amok*, Washington Post (July, 23 2014), http://www.washingtonpost.com/opinions/ej-dionne-affordable-care-act-falls-prey-to-extreme-judicial-activism/2014/07/23/4a06dec0-129f-11e4-8936-26932bcfd6ed_story.html.

34 *See* Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the constitution's Promise of Limited Government (1st ed. 2013).

Criminal Law & Procedure

Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law

*By Ronald A. Cass**

Introduction

Criminal law is the biggest, scariest tool in the arsenal of governmental powers: it can result in loss of property, loss of freedom, and even loss of life. That theme is repeated through history and literature, as readers of *Crime and Punishment*,[1] *The Count of Monte Cristo*,[2] *The Gulag Archipelago*,[3] or countless other works from countries around the world understand. Criminal law is the means by which government's coercive power over those within its domain ultimately is effected—either through the direct imposition of criminal punishments or the threat of their imposition.[4] It is also a power that is brought to bear through retrospective action; the application of criminal punishments inevitably depends on determinations of fact respecting past conduct and of the fit between facts and legal rules. Rules governing the criminal law are announced in advance, but their enforcement depends on decisions made after the conduct occurred, determining whether the conduct will be a basis for criminal prosecution, on what terms, with what energy, and ultimately whether the conduct violates the law and what punishment will be assessed.

Because it poses the gravest threat to individuals' lives, liberty, and property, criminal law traditionally has been circumscribed in special ways. The essence of the rule of law is the reduction of official discretion to the point that exercises of official power are predictable in advance—independent of the particular official wielding that power—by those to whom the law's power is directed.[5] The development of law in nations that adhere strongly to the rule of law very largely has been built on the foundation stone formed by an accretion of rules constraining criminal power—precisely because it is the power that is essential to tyranny.[6]

The same appreciation is evidenced in the construction of government in the United States. The background understanding is illustrated in the justification offered by Alexander Hamilton for the special protection of trial by jury in criminal cases. Although Hamilton's purpose in writing the essay that appeared as *Federalist No. 83* was to combat assertions that the proposed Constitution abolished rights to civil trial by jury, his essay also underscored the difference those in the Framing generation saw between civil and criminal law:

> I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings.[7]

With that difference in mind, governments in the United States have adopted special rules that restrict the ways in which criminal sanctions can be announced, tailored, and applied. Prohibitions on *ex post facto* law-making (attaching criminal punishments to conduct not unlawful at the time)[8] and on bills of attainder (creating special punishments for specific, identified or readily identifiable individuals),[9] acceptance of special rules of procedure and burdens of proof and persuasion (for example, the presumption of innocence, protections against coerced testimony, requirements of unanimity for criminal conviction, safeguards against double jeopardy)[10]—all of these are devices for protecting citizens against the unchained and unchecked criminal law power of the state. So, too, is the long-standing requirement that laws be reasonably knowable in advance, either because they deal with matters of such basic morality that every sentient being can be presumed to understand the nature of the law's prohibition (*e.g.*, unprovoked killing, theft, assault) or because the person against whom the law is being enforced had every opportunity and incentive to know the law.[11]

More recently, however, both practical and doctrinal changes have significantly reduced the degree to which criminal punishment fits rule-of-law ideals. Although far from the only cause, the expansion of criminal sanctions as a by-product of an extraordinary explosion in administrative rulemaking that is backed by criminal liability has helped propel this change. While there are reasons to support criminal enforcement of administrative decision-making, the ways in which administrative rules are adopted, applied, and enforced and the scale of governmental law-making (including administrative rule-making) that has provided the grounds for potential criminal penalties have produced a massive increase in government power that risks serious erosion of individual liberty. This change cries out for immediate attention—and for changes to the law.

Admittedly, discussion of overcriminalization, like discussion of "tax loopholes," to some extent is a matter of perspective. Many commentators have noted that a loophole is a deduction the speaker dislikes (even if those who benefit from the deduction loudly applaud it). In the same vein, any list of criminal penalties (specifically or generically) that make for the excessive use of criminal law—in other words, what constitutes the "over" in overcriminalization—certainly is debatable.[12] And

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some scholars believe that focusing on the growing array of statutory and administrative provisions that can give rise to criminal punishment misleads in comparison to the set of cases for which charges actually are brought.[13] But what should not be debatable is the understanding that a problem now exists and that its continuation threatens the rule of law.[14] No matter which provisions and doctrines seem beneficial in particular settings, concern over the current state of the law—and even more, its direction—should be common ground.

This paper begins with a brief review of the contrasting approaches of criminal law and administrative law—the traditional rules of criminal law and process that provide protections against misuse of government power and the basic predicates animating delegation of authority to administrative decision-makers, circumscribing their exercise of authority, but also generally facilitating administrative exercise of authority. The paper then discusses experience with statutory and administrative rule generation and application, explaining how differences between administrative law and criminal law play out in these contexts.

Special attention is given to tensions between the bodies of law (on paper and in practice) and discretion-limiting principles associated with the rule of law. While accommodations for both administrative law and criminal law have been worked out that have been generally satisfactory—that have gained broad acceptance in the United States and other law-bound nations—modern realities increasingly have allowed exercises of power that strain the limits of the rule of law. This is particularly evident in the expansion of criminal penalties (driven in substantial part by administrative rulemaking) and of the discretionary power exercised by officials entrusted with enforcement of criminal laws. Debate focused on the frequency of prosecutions misses the point that even relatively rare applications of criminal enforcement powers can have significant effects, given the common trade-off between frequency of enforcement and magnitude not only of penalties but also of officials' discretionary power respecting enforcement choices. Changes both to laws and judicially-constructed doctrines are needed to protect against potential abuse of government power.

I. Criminal Law and Administrative Law: A Tale of Two Cities

An enduring metaphor in American political discourse is that of the "city on the hill." Its original use in America by John Winthrop, first Governor of the Massachusetts Bay Colony, as well as its Biblical antecedent, denotes a place of special visibility where flaws cannot be hidden and where, hence, there is special reason for charity, compassion, and cooperation. In a similar vein, the "cities" represented by our criminal and our administrative processes, as provinces of especially important applications of government power, should be especially subject to scrutiny and, ideally, should embody the citizenry's highest ideals for the exercise of government power. The bodies of law that undergird these two cities, however, are not the same—they address different needs, start with different predicates, and have been subject to different stresses and distortions. It is helpful to begin with the basic assumptions framing these bodies of law.

A. Predicates for Criminal Law

The primary principles that describe criminal law can be captured in a very limited set of restraints on the substance of criminal prohibitions and a relatively expansive set of limitations on the application of criminal laws.

1. Substantive Limits

Substantive constraints include proscriptions on singling out specific individuals for special punishment—the passage of bills of attainder, which the Constitution makes unlawful for the states as well as for the national government[15]—on imposing retroactive punishments (also constitutionally prohibited for state and national government),[16] on cruel and unusual punishments,[17] on vaguely defined crimes,[18] and on penalties that are overbroad because they attach to constitutionally protected conduct as well as to conduct legitimately subject to criminal punishment.[19] These limits on substantive criminal law essentially boil down to two basic concerns that share a single root: notice and generality.[20]

2. Notice

First, constitutional rules restrain uses of the criminal law that can't be predicted by those subject to the law, who then are deprived of meaningful opportunity to conform their conduct to the law's requirements. That is the burden of prohibitions on *ex post facto* laws, on vague laws, and to a large degree on overbroad laws as well, where the boundary between the permitted and prohibited cannot readily be known in advance. These are ancient requirements for criminal punishment and quintessential protections against tyranny; they were known before the time of the Roman emperors, though circumvented by Emperor Caligula's reported practice of having his new laws written in small characters and posted high up where they were difficult to read.[21] The fact that this was seen as a radical departure from accepted requirements for the law underscores the importance of notice to the legitimacy of criminal punishment. The notice concern also accounts for the recently reinvigorated rule of lenity, requiring that rules subject to criminal penalties should be construed narrowly and any ambiguity should be resolved in favor of the individual or entity charged under the law.[22]

3. Generality

Second, constitutional rules also restrain deployment of the criminal law in ways that either expressly place special punishments on particular individuals or are particularly likely to facilitate such special, targeted punishments. The prohibition on bills of attainder is clearly aimed at this sort of manipulation of criminal sanctions to punish those who are enemies of the officials wielding government powers. So, too, however, are restrictions on overbroad laws (where the application of the law almost certainly will be selective) and on cruel and unusual punishments (a provision that notably requires the penalty to be not only especially harsh but also uncommon).[23] As with notice requirements, generality requirements are important protections against tyranny: when sauce for the goose also is sauce for the gander, ganders are far less inclined to be throwing geese in the pot.[24]

4. Process Limits

In addition to the nature of the laws themselves, the process of applying the criminal law traditionally has been subject

to a substantial number of rules designed to prevent wrongful convictions and to restrain abuses of discretion by those charged with enforcing the law.

5. Combatting Wrongful Convictions

One of the elementary observations every first-year law student hears is that society views the risks of wrongful convictions and wrongful acquittals as asymmetrical, with conviction of the innocent carrying greater social weight. This asymmetry explains a great many special rules of criminal procedure. A non-exhaustive list would include the following: criminal convictions, unlike civil jury verdicts, require unanimity; defendants are presumed to be innocent, so the prosecution bears the burden of persuasion and the burden of proof; defendants have the right to decline to provide testamentary evidence; potentially prejudicial information (respecting matters such as a defendant's prior convictions) is kept from jurors. In all these respects, the playing field in criminal processes is tilted in favor of the accused.

6. Restraining Discretion

The other leg of limits on criminal law enforcement targets abuse of discretion. Safeguards such as the prophylactic *Miranda* rule specifying particular sorts of warnings to suspects (restricting the way police can gather evidence),[25] the *Brady* requirement that prosecutors share exculpatory evidence (which limits discretion in the characterization of available evidence),[26] the prohibition on double jeopardy (which prevents strategic decisions on what evidence to utilize and restricts game-playing in trials),[27] and the guarantee of a speedy and public trial (which constrains manipulation of the timing and conduct of trials)[28] can be seen as efforts to restrict possible abuses of law enforcers' discretionary choices. If everyone receives the same warnings, the same evidence, and the same protections against manipulative re-trials, the range of opportunities for abuses of law enforcement discretion is reduced.

The system does not, of course, eliminate discretion. Indeed, one of the central attributes of the criminal law system as traditionally conceived is the assignment to law enforcement officials of discretion not to pursue particular suspects, not to arrest or charge them, and not to prosecute. The law does not incorporate a requirement that all crimes are investigated, all suspects are pursued, or all persons who seem likely to have committed crimes are prosecuted. No one would want to require prosecution or arrest of individuals who, after inquiry, seem not to have committed a crime, or seem not to have had the requisite state of mind to satisfy elements of the crime, or whose circumstances make the crime less blameworthy (for example, the 96-year-old great-grandmother who shoplifts a can of tuna).

Prosecutorial discretion is defended principally on two grounds. The first is pragmatic: law enforcement resources are invariably finite and, in any society with more than a very small number of crimes choices must be made respecting the way to use those resources.[29] The second justification for prosecutorial discretion is grounded in the concept of legality.[30] Officials charged with investigation and prosecution are separated from those charged with evaluating the case against an accused; conduct of law enforcement officials in deciding which cases to bring (especially which *not* to bring) is checked by their supervisors or by the public that selects officials who are ultimately responsible, while the decision to bring charges is checked by the requirement that prosecutions must pass scrutiny from officials (and private citizens) who are not subject to the same personal or political imperatives. In other words, bring a bad case, you lose, and you may also lose favor with your bosses or the public for wasting public resources.

In the end, law enforcement discretion is retained as essential to the functioning of a system where complex judgments are needed, but the whole thrust of the system (at least at the level of legal doctrine) is to constrain, channel, and check discretion to guard against the sorts of serious problems that can arise where personal liberty, property and even life are at risk.[31]

B. Predicates for Administrative Law: The Basics

The basic predicates for administrative law look very different from those underlying criminal law: in contrast to the more "target sensitive" character of criminal law predicated on concerns about potential misuse of government power, administrative law places greater emphasis on providing leeway for agencies to implement laws within their purview in ways the implementing officials think best. If criminal law leans toward restraining conduct that expands the chances for punishments that respond to particular officials' inclinations regarding individual enforcement targets or that are less readily anticipated by those subject to the law, administrative law leans toward providing scope for official judgments within a broad legal framework.

Administrative law is not concerned in the main with extraordinary impositions on individual citizens. Instead, its domain is the set of procedures appropriate to the functioning of government agencies with broad mandates to facilitate conduct that is seen as publicly beneficial (encouraging conservation efforts or public health initiatives or promoting innovation through award of patents, for example), to move resources more directly toward uses that are desirable (supporting labor training programs or infrastructure building or repair or providing direct assistance to specific beneficiaries, as with programs such as Social Security, Medicare, or various programs for military veterans), or to regulate activities that can conflict with public interests (an endless list of mandates for the "alphabet" agencies: the CPSC, FCC, FERC, FTC, ITC, SEC).

The difference between the two fields follows from the difference in their focus. The fundamental character of one body of law is mostly restraining, the other mostly enabling.

This does not mean that administrators are free simply to do as they like. As with criminal law, administrative law imposes a variety of constraints on official action, both substantive and procedural. Agency action must be authorized by particular statutes, and the first constraint on administrative officials is found in the terms of the laws that set the limits around specific administrative action.

Apart from specific enabling legislation, the law contains numerous generally applicable rules for proper performance of administrative functions—including, for example, mandated separation of certain functions,[32] procedural requirements

for making administrative rules and for adjudicating disputes within an agency's purview,[33] and provisions for making information held by an agency publicly available (through open meetings or *ex post* disclosures).[34] Much significant agency action follows from rulemaking proceedings that are designed to resemble legislative processes or from adjudicative proceedings that are more or less similar—at times, quite similar—to those followed in courts. And most administrative action also is subject to scrutiny both within the agency and, if it is significant, by others through the executive review process (run through the White House's Office of Information and Regulatory Affairs), various mechanisms for inter-agency coordination (which can perform roles similar to, though not formally constituting, review), and judicial review.[35]

1. Imaginary Limits on Real Power

Procedural requirements and review can provide powerful constraints on official power. But the constraints only work to the extent that they in fact provide effective limits on agency actions. While some of the ways in which official authority is restricted provide meaningful checks, and in select instances have been very important sources of limitation, more often the obstacles to untoward exercises of official discretion have proved speed bumps instead of stone walls.

2. Nondelegation

One of the potentially most important restraints on official discretion is the "nondelegation doctrine." The doctrine sensibly states as "a principle universally recognized as vital to the integrity and maintenance of the system of government constrained by the Constitution" that "Congress cannot delegate legislative power."[36] This straight-forward interpretation of Article I, Section 1's declaration that " legislative power" granted by the Constitution "shall be vested in a Congress" makes perfect sense, but has made little difference to the scope of authority given to other officials. The case that gave the classic formulation to the doctrine, *Field v. Clark*, approved a law giving the President the power to impose duties on a variety of imported goods "for such as time as he shall deem just" if and when he decided that the nations exporting those goods treated imports from the U.S. in a "reciprocally unequal and unreasonable" manner—hardly a precise or constraining directive.[37]

The Supreme Court also has approved numerous other delegations of authority on the ground that the assignments were not of legislative power but of administrative authority, even if they give extraordinary scope for policy choices by administrators, such as the instruction for the FCC to hand out licenses to spectrum users "as the public convenience, interest or necessity requires."[38] The test is whether the Court divines in the governing law "an intelligible principle to which the person or body authorized to [act] is directed to conform."[39] As the Court's decisions over the past century make clear, "intelligible" does not mean that Congress has done the hard work of deciding what competing public interests should be taken into account, much less the harder work of resolving the inevitable differences among them.[40]

3. No Delegation

Similarly, courts might constrain administrative discretion by narrowly construing the ambit of authority granted to the agencies. In particular, courts might insist on very clear delegations of authority to an agency to act in respect of a particular matter—to assert general authority to address a given topic, to direct its actions to a given set of enterprises or activities, to embark on a particular course of regulation (rate-setting, for example)—even if the lack of a meaningful nondelegation doctrine does little to put bounds around the actual terms of the authorization Congress gives the agency. This occurs on occasion.[41] But courts also have allowed agencies to assert authority over matters when there was no express grant of authority, even confirming agency authority so unclear that the agency had denied it had that authority and had sought unsuccessfully to attain express congressional authorization before changing course and asserting that the authority had existed all along.[42]

For instance, for many years the FCC denied it had authority to regulate cable television, which fit neither within the grant of authority over telephone and telegraph wire common carrier functions nor within the grant of authority over allocation of spectrum use by radio, television, and other over-the-air services. When the FCC failed to get Congress to grant authority over the burgeoning cable TV industry, it discovered that the authority existed anyway under an administrative analogy to the Constitution's "necessary and proper" clause—no matter how unnecessary or improper the actual regulations. The Supreme Court approved the assertion of authority under a very questionable rationale, an approval that has encouraged further efforts to extend FCC authority ever since.[43]

Just as the current version of the nondelegation doctrine grants Congress substantial room to assign scope for discretionary policy choices to administrators, courts commonly allow leeway for agencies to exercise discretion in determining the scope of their assignments.[44]

4. Deference

Perhaps the clearest example of the leeway given to administrative officials generally is encapsulated in the *Chevron* doctrine.[45] *Chevron* declares that, when agency action is challenged as inconsistent with its statutory instruction, courts ask first if Congress has "directly spoken to the precise question at issue." If so, that is binding; if not, courts are directed to defer to any reasonable agency interpretation of the law.[46] The assumption behind *Chevron* deference is that courts would have to defer to administrative policy choices if Congress expressly gave authority to make such choices to the agency; by analogy, the Court stated that Congressional failure to specify a precise answer to a policy question can constitute an implicit delegation of authority.[47] Judicial failure to defer to reasonable agency interpretations of law in such settings would overstep judicial bounds.[48]

The Supreme Court has argued endlessly over details of the *Chevron* test and its application, and it has referred in some cases to older tests for deference as well.[49] Scholars have argued over whether *Chevron* has raised even further the traditionally high degree of deference given to administrative decisions and whether the costs of litigating (and anticipating) applications of the *Chevron* rule are worth whatever is gained in administrative efficiency or fidelity to law.[50] But the bottom line is that under

any of the iterations of the deference canon, judges generally have been supportive of administrative exercises of discretion even on questions that are so close to the law-interpreting role assigned to courts as to be virtually indistinguishable.

II. Law-Making, Administration, and Prosecution

Differences between the two bodies of legal doctrine described above respond to different expectations about the critical function to be served by each. The divergence in expected orientation of criminal and administrative law—between focusing on specific conduct so outside the realm of the acceptable as to be criminal and focusing on handing out benefits to large numbers of recipients, processing patent applications or tax returns, licensing pipelines or television stations, regulating food and drug offerings, and the like—is reflected in different expectations about rule-generation. Differences in the visibility and frequency of rule-generation also have important implications for the acceptable means of giving rules effect, of the sorts of mechanisms appropriate to assure compliance with them. Use of the criminal law, as shown below, to enforce an expanding array of administrative rules has unfortunate consequences.

A. Rule-Generation

1. Law-Making and Rule-Making

The initial difference so far as rule generation goes is that rules setting out the basis for criminal sanctions traditionally have been products of legislative enactments.[51] Administrative rules, on the other hand, have dealt with all sorts of specifications of what those subject to the particular agency's jurisdiction must do or not do, how the agency will conduct its business, what its interpretation of its governing mandate is, or how it balances policy considerations urged as relevant to resolution of a specific problem.

The two sources are not equally suited to quick or prolific rule-generation. Despite recent complaints about "gridlock" and the fact that the Framers self-consciously designed the U.S. Constitution to be more amenable to decisive action by the national government within its allotted sphere, the Constitution also was very much devised as a governance regime whose combination of checks and balances were calculated to inhibit action that did not have strong support across a variety of political sources and regions. In other words, it was intended to delay action until it had been carefully considered, to frustrate tyranny of the majority as well as of smaller factions.[52] The default position was, thus, for the national government to take *no* action.

In contrast, administrative rule-making is designed to be relatively expeditious, with "some action" instead of "no action" as the norm. There are relatively few procedural requirements, and these mainly were conceived as modest prods to fair and effective government rather than as high hurdles that agencies would surmount only with considerable difficulty.[53] The public pronouncement initially required of agencies proposing rules was not an elaborate advance explanation and lengthy marshaling of evidence but a simple notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[54] Similarly, the rule itself did not need a full explication of its operation but only "a concise, general statement of [the rule's] basis and purpose."[55]

As the subjects committed to agency rule-making have expanded and the magnitude of the effects from agency rule-making have increased, additional requirements—judicial, legislative, and executive—have been layered on top of the initial ones, leading some commentators to complain that federal rule-making had become "ossified" and unworkable.[56] Undeniably some new and significant requirements have been added to what agencies must do in rulemaking, including those imposed by the Paperwork Reduction Act, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act.[57] But other, much discussed demands on the agencies are not formally necessary to rulemaking. For example, courts at times have asked for more complete explanation of the basis for a new rule when reasons given in support of the rule did not counter objections that were supported by substantial information in court filings.[58] In other words, these were not general requirements for *making* rules but evidentiary requirements for *justifying* rules once the initial burden on the party challenging the rule was met.

For rules of major economic or political importance, the difference may be slight in practice, as there is apt to be a challenge backed by substantial information about the weaknesses of such rules in virtually every case, but that does not affect the vast majority of rules—and it isn't terribly unreasonable to expect that when rules have a major economic impact, the officials adopting them should be able to explain the rules' basis in something other than conclusory terms. However, for government agencies imposing burdens on others than can run to billions of dollars annually, it seems entirely sensible to expect something more than the equivalent of "because I'm your mother and I say so!"

2. Laws, Rules, and Crimes

Despite the increased justification required for rules, at least in some settings, there has not been a real rulemaking deficit. In fact, rules have been pouring out of federal agencies for decades. Federal agencies issue between 3,000 and 5,000 new rules in a typical year, covering between 20,000 and 40,000 pages annually in the Federal Register.[59] In comparison, Congress typically passes between 200 and 400 laws each year, though outliers have varied significantly on either side of those figures.[60]

This disparity in rule-creation poses special problems in connection with criminal law, dramatically exacerbating the issues associated with large numbers of federal crimes. The exact numbers are disputed—and almost certainly unknowable with any degree of precision—but it is clear that the number of provisions that carry criminal punishment has grown dramatically over the past 50 years, and especially over the past 25 years.[61] The increase has come partly from increasing resort to criminal penalties in statutes. Estimates of the number of federal laws containing criminal sanctions generally place the figure in the range of 4,000-5,000.[62] The (primarily political) reasons behind the increasing use of criminal penalties have been explored by others;[63] for present purposes, it suffices that the pressures for criminalizing a range of activities—including considerable conduct about which views on *propriety*, much less *criminality*, differ—and for bringing an expanded array of crimes within the federal sphere do not seem to be abating.

Even as statutory criminal provisions are proliferating, far

more new rules backed by criminal sanctions have come from administrative bodies. The number of criminally-enforceable, administratively-generated rules is estimated at between 10,000 and 300,000.[64] Such a wide spread in the estimates indicates that there are different ways of counting—entire rules, for example, versus separate provisions that contain prohibitions of, or requirements for, particular actions, each backed by potential criminal liability. By way of comparison, one review puts the number of "individual regulatory restrictions" contained in existing federal regulations at more than one million,[65] a figure that would make the larger number of criminally enforceable rules understandable as separate regulatory requirements, rather than entire rules. It also suggests that roughly a third of all federal regulatory requirements are enforceable through criminal prosecution, a staggering number for a system of administrative rule-making that is built on flexibility for and deference to decisions of unelected officials.

Whatever the exact number of rules, it is clear that finding all federal criminal provisions would require a truly daunting search. If focused strictly on statutory enactments, the search would cover 51 titles and more than 27,000 pages of the U.S. Code, while looking for the whole body of potential criminal offenses flowing from administrative regulations would necessitate going through nearly 240 volumes of the Code of Federal Regulations spread across roughly 175,000 pages—and that was as of four years ago![66] Even for speed-readers who can master turgid prose and have a taste for tedium, that's quite a research project.

B. Rule-Application

The enormous size of the corpus of legal materials containing federal criminal laws and administrative rules with the force of law, wholly apart from any sources of authoritative explanations or interpretations, has substantial impact on the way the federal criminal law should be applied—think of this as what follows when the skinny high school kid balloons into a sumo-size grown-up. Two sorts of problematic prospects in particular follow from the way this body of criminal law has grown: penalizing the reasonably unaware and expanding discretion for law enforcers. Both of these developments threaten the rule of law.

1. Ignorance of Law in a Law-Rich World

First, conviction under the criminal law traditionally has required that the defendant either know or should have known that his conduct violates a legal requirement. So, for example, common law crimes in Anglo-American law—such as murder, mayhem, rape, robbery, assault, or arson—required behavior combined with intentionality that together so obviously violated accepted norms of behavior as to give fair warning of what conduct would prove criminal. Where statutory crimes were not defined in ways that gave similar notice, as happens where criminal laws are vague, judges customarily have held that conviction under the laws violated standards such as due process or the Sixth Amendment's requirement of notice of the nature of the accusation being made.[67] The notion is captured by Justice Sutherland's observation, writing for the Supreme Court in rejecting criminal charges for a government contractor accused of paying wages too low in relation to those "prevailing" in the "locality:"

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[68]

In the same vein, judges have remonstrated that "men of common intelligence cannot be required to guess at the meaning of" a criminal law.[69]

Most discussion of the issue of "fair warning" has focused on the degree to which laws are written clearly enough to pass muster. But other cases have turned to questions apart from the actual statutory text. On occasion, courts have asked how much uncertainty in a law's text can be cured by explication of its meaning by courts or other authoritative sources.[70]

Judges also have asserted that requirements of criminal intent can cure vagueness, as where the law requires that a defendant has "willingly" or "intentionally" engaged in conduct.[71] Certainly, eliminating mental states (some form of intentionality) as elements in criminal law can aggravate "fair warning" problems. If the conduct is not sufficiently well defined to satisfy the "fair warning" requirement, however, the fact that the conduct actually engaged in was intended cannot provide notice that the conduct is criminal.[72] Knowing that you're doing something and intending to do it is not the same as knowing that what you are doing is criminal and intending to do it anyway.

This moves us closer to the heart of the problem: the more serious issue usually is not the clarity of the law standing alone but whether there was a reason to expect the defendant to have known of the law in the first place. Taking these issues together, the question is whether there is a reason for the defendant to have known that the law applied to the sort of conduct that the defendant contemplated. The assertions made in numerous cases today are that it is not reasonable to interpret a rule in a given way and, in the event the disputed interpretation is adopted, that the defendant should not be charged with responsibility for a violation he could not have foreseen.

That is the claim, for example, in *Yates v. United States*, which will be argued next Term in the Supreme Court.[73] Yates, who operates a fishing boat, was charged under a provision of the Sarbanes-Oxley Act[74] for throwing several red grouper (possibly measuring less than 20 inches long) overboard to prevent federal officials from proving that his crew had caught undersize fish. The provision, titled "Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy," applied to anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . ."[75] Yates argues that it isn't reasonable to view the law as applying to someone

throwing fish overboard as opposed to shredding or destroying documents (whether on a computer or on a physical medium such as paper or a disk). He also says that it isn't reasonable to expect a fishing captain to know the details of Sarbanes-Oxley, a 66-page long act introduced as the "Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002," codified at various sections scattered across the U.S. Code.

The courts frequently reject assertions such as Mr. Yates' by invoking the maxim that ignorance of the law does not excuse, but the doctrine makes far less sense in the current, law-rich world than when laws were largely congruent with morality, were widely known to everyone in the community (or everyone likely to encounter the law), or reasonably should have been known by someone in a profession or business as a rule specifically applying to that profession or type of business.[76] When there are tens of thousands or hundreds of thousands of rules backed by criminal punishment, it is unrealistic to suppose that enforcement targets know all of them.

Ordinary citizens almost certainly have no idea of many of the criminal prohibitions and criminally-sanctioned requirements they might encounter, and even businesses that use highly paid legal counsel may not be able to keep up with all of the rules and regulations that could apply to them. The much-criticized Lacey Act, which criminalizes trade in wildlife or plants that were taken in violation of state, tribal, or foreign law,[77] is just one example of a law that almost certainly makes criminal conduct that almost no one could predict. Its core may be prevention of conduct that is visibly unlawful—poaching alligators in Florida for sale in New York or trading in ivory from illegally taken elephant tusks—but the full scope of conduct made criminal under the law is almost unfathomably large.[78] While commentators and judges have proffered several reasons to support the ancient maxim on ignorance, none sensibly justifies extending criminal punishment to individuals who are reasonably unaware of the law.[79] In a world where the scope of criminal law is so amazingly large, most of us are reasonably unaware of a great deal that could land us in jail.

2. Implications for Prosecutorial Discretion

The ultimate response to concerns of overcriminalization is that prosecutors will not bring charges against the reasonably unaware, but instead will spend their time targeting people and enterprises that are engaged in conduct known to be unlawful. One defense of current law starts with the proposition that federal criminal law is the tail of criminal enforcement and that everything other than cases involving drug offenses, immigration, and weapons charges lies at the tail of federal enforcement.[80] Concerns about charges based on odd or unknowable laws—use of Woodsy Owl's or Smokey the Bear's likeness, for example, two of the many crimes listed in the American Bar Association's report on the federalization of criminal law[81]—assertedly are exaggerated because federal prosecutors are as unlikely to know (and to try to use) those laws as defendants are to know them.[82]

The problem of prosecutorial discretion in a world with such massive numbers of criminal prohibitions and regulations, however, is not that there is apt to be a surge in prosecutions for trivial or obscure crimes. Instead, the problem is that prosecutors, who enjoy the option of choosing whom to charge with which crime and how many crimes to charge, now are given so expansive a range of potential charges that their discretionary power is greatly magnified.[83] Imagine that you're a student facing an important test; you know 70 percent of the questions will come from three important chapters in the book; the rest of the questions will come from the remaining material referred to during the course. Does it matter if that material covers 175 pages or 175,000 or 1.75 million pages? Does it matter if the teacher gets to select not just the questions but which students will be asked to take the test? I have no doubt how my high-school-age daughter and her friends would answer those questions.

Having the opportunity to select enforcement targets and to charge them with a very large number of crimes with potentially huge cumulative penalties gives prosecutors a weapon not all will use and in all likelihood none will use routinely. The defendants who are on the receiving end of such charges may be selected for reasons that seem laudable; the prosecution and conviction of Al Capone for tax evasion, for example, was widely applauded. There may be good reason to accept the assurance that prosecutors in general will behave in ways that are consistent with reasonable expectations.

But a focus on the typical rather than the possible—a good analytical instinct in many instances—misses the most important point here. Giving a set of government officials such a potent weapon, one that they are likely to deploy against a very small subset of possible targets, creates a dramatic opportunity for discretionary choices to be made on less attractive bases.[84] Where enforcement is necessarily highly selective, penalties often will have to be increased if enforcement is to be effective; this means that a few people or entities will be charged with crimes for which high penalties are possible but for which most offenders will not be prosecuted.

Further, highly selective enforcement, if it is to affect underlying behavior, cannot reveal the bases on which enforcement targets will be selected—imagine the IRS announcing which deductions of what magnitude will cause the agency to audit tax filers. The result is that the basis for selecting a small number of potential targets for prosecution is not visible to, or predictable by, the public. That sort of discretion, which is largely insulated from significant sources of constraint in individual cases, is antithetical to the rule of law.[85]

The problem is even greater than might first appear, thanks to other features of the current criminal law system. The ability to threaten defendants with multiple charges, many involving few defenses of the sort common in traditional crimes (defenses keyed to absence of culpable mental states, for example), and to confront them with a risk of staggering potential prison time or financial cost or both, allows prosecutors to pressure defendants to settle rather than to fight, to enter a plea bargain that admits guilt (whether it truly existed or addressed conduct that was truly wrongful in any meaningful sense), and to take a small punishment.[86]

Worse yet, if the risk is large enough—if the penalties that are threatened are sufficiently draconian—and the costs of litigating high enough, defendants might accept quite harsh punishment, even when they believe they've done nothing wrong and are confronted with criminal charges of which

they've had no fair warning.[87] The real issue in the *Yates* case is not whether the defendant did something wrong; it's whether the prosecutor should have free rein to charge a crime that seems so far removed from the conduct at issue, one drawn from a law targeting corporate accounting, not catching undersized fish. What is even more unusual than the charge in the *Yates* case is that the defendant found an ally to help fight the government, where the overwhelming majority of defendants settle to avoid the cost and risk of contesting these cases.[88]

The increase in plea bargains in place of trials has another downside: it reduces the effective check on prosecutors. The defense of prosecutorial discretion historically has been both its necessity in a world of limited resources and its subjection to the check of judicial processes for cases that go forward. As the number of cases that go through the judicial process dwindles, that argument loses force. Prosecutors are free to bring charges without having to prove them in court. Of course, wholly baseless charges that cannot be sustained are not likely to exert much pressure on defendants; but arguably sustainable charges, even if based on weak and contestable grounds, combined with a large number of charges with at least a slight prospect of success can suffice to pressure defendants to settle. High potential costs of litigation combined with some risk of conviction and huge potential penalties often are enough to do the trick.

III. Conclusion

Growing numbers of federal crimes, driven largely by the immense number of administrative rules that are criminally enforceable, have created a serious problem for anyone committed to the rule of law. The typical prosecution may be justified and the typical prosecutor may be well behaved, but changes in the law have increased the risk of prosecutors bringing charges against people who have done nothing wrong, or nothing seriously wrong—nothing that traditionally would have been thought of as criminal—and selecting the number and nature of charges in a way that puts extraordinary pressure on defendants to agree to a plea bargain.

The morphing of administrative law doctrines (which are relatively deferential to exercises of government power) with criminal law (which long was characterized by skepticism of assertions of government power and by rules designed to constrain that power) has reduced historic protections for criminal defendants. It particularly has diminished prospects that defendants will be protected against charges of violating rules that are neither self-evident nor matters a given individual reasonably should be expected to know, the requirement of "fair notice" that repeatedly has been acclaimed as an element of due process.[89]

Courts do not need to require actual knowledge of criminality to make the "fair notice" concept meaningful, but they do need to recognize that without knowledge or culpable ignorance "fair notice" is a myth. By the same token, Congress should place clear limits on the power it gives administrative officials to create criminally-enforceable rules. However much observers may applaud a given use of administrative rulemaking and criminal enforcement, it is critical to understand the growing risk to liberty from giving officials unchecked power to use the criminal law by selecting from an open field of potential charges as they see fit. Attention to small risks—not complacency that they have yet to materialize—is the legacy of aspiring to be the "city on the hill" envisioned by those who lay the foundations for our nation.

Endnotes

1 Fyodor Dostoevsky, Crime and Punishment (Constance Garnett trans., Penguin Books 1952; orig. pub. 1866).

2 Alexandre Dumas, The Count of Monte-Cristo (Robin Buss trans., Penguin Books 1996; orig. pub. 1844-1845).

3 Aleksandr Solzhenitsyn, The Gulag Archipelago (Thomas P. Whitney trans., Harper & Row 1973).

4 In fact, many legal theorists of widely divergent governing views and values agree that the essence of positive law is its coercive nature. *See*, *e.g.*, John Austin, The Province of Jurisprudence Determined 5-21 (Legal Classics Library 1984; orig. pub. 1832); Jeremy Bentham, An Introduction to The Principles of Morals and Legislation 330-31 (Hafner Press 1948; rev. ed. orig. pub. 1789); Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986).

5 *See*, *e.g.*, Ronald A. Cass, The Rule of Law in America 4-19, 28-29 (Johns Hopkins Univ. Press 2001) (Rule of Law); Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651 (1995); Lon Fuller, The Morality of Law 33-94, 209-19 (Yale Univ. Press, rev. ed. 1969); Friedrich A. Hayek, The Road to Serfdom 80-92 (Univ. Chicago Press 1944); Michael Oakeshott, *The Rule of Law*, in On History and Other Essays 119 (Barnes & Noble Books 1983); Joseph Raz, The Authority of the Law: Essays on Law and Morality 213-14 (Clarendon Press 1979).

6 For example, Magna Carta, the precursor to much of modern thinking about constraints on public power, deals primarily with limitations on powers to take property (a matter then of urgency to the feudal lords who extracted concessions from a very unenthusiastic King John, though of much less interest to the mass of English subjects) and powers to punish those deemed to have offended the King or the King's law.

7 The Federalist No. 83 (Alexander Hamilton).

8 *See* U.S. Const., art. I, §§ 9-10.

9 *Id.*

10 *See*, *e.g.*, U.S. Const., amends. V & VI.

11 *See*, *e.g.*, Lambert v. California, 355 U.S. 225 (1957). The understanding that everyone reasonably should have a sense that certain conduct is subject to criminal penalties (or at least that the conduct of the person putatively subject to the particular penalties might incur criminal sanctions), in fact, provides the strongest rationale for the maxim that ignorance of the law does not excuse. *See*, *e.g.*, Ronald A. Cass, *Ignorance of the Law: A Maxim Re-examined*, 17 Wm. & Mary L. Rev. 671 (1976) (*Ignorance of Law*).

12 *See*, *e.g.*, Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979 (1995); William Stuntz & Daniel Richman, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583 (2005); George Terwilliger, III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417 (2007); Daniel Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 Harv. Envtl. L. Rev. 159 (2014).

13 *See*, *e.g.*, Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 60 Emory L.J. 1 (2012).

14 *See*, *e.g.*, Sanford Kadish, *The Crisis of Overcriminalization*, 7 Am. Crim. L. Q. 17 (1968); Terwilliger, *supra*. Not every observer, however, would concur that the problem in criminal law is "overcriminalization." *See*, *e.g.*, Klein &

Grobey, *supra*.

15 *See* U.S. Const., art. I, §§ 9-10.

16 *Id*.

17 *See* U.S. Const., amend. VIII. Apart from a restriction on punishments that are deemed so extreme and so rare that the imposition is almost certain to be used only against specially disfavored targets, the restraint has been interpreted as requiring that punishments be proportional to the crime for which they are prescribed, a test that, controversially, turns on existence of a "national consensus." *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008).

18 *See*, *e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

19 *See*, *e.g.*, Coates v. Cincinnati, 402 U.S. 611 (1971).

20 Not surprisingly, these also are frequently cited as critical inputs to morally justified punishment. *See*, *e.g.*, Fuller, supra, at 46-55, 157-58. These concerns also are often married to concerns about *legality* (a sense that the proper authority has been the source of the law), but that issue is dealt with separately below in the context of limits on the procedures for enacting and applying criminal laws. For an introduction to the concept of legality and its relationship to other sources of constraint on criminal law, *see*, *e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985) (*Legality*).

21 *See*, *e.g.*, 1 William Blackstone, Commentaries *46.

22 *See*, *e.g.*, Burrage v. United States, --- U.S. --- (2014). Justices Ginsburg and Sotomayor concurred in the decision specifically on the basis of the rule of lenity (one element of the majority opinion), *id.*, and Justice Scalia long has argued for a reinvigorated version of this rule, *see, e.g.*, Bryan v. United States, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting); United States v. O'Hagan, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part). Not all commentators agree that the rule either is well-considered or is observed much save in the breach. *See*, *e.g.*, Jeffries, *Legality*, *supra*; Dan Kahan, *Lenity and Federal Law Crimes*, 1994 Sup. Ct. Rev. 345 (1994).

23 *See*, *e.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991) (Scalia, J.).

24 I know: ganders don't eat geese and vice versa, though there might be a peck here or there in the yard. It's just a metaphor riding on an aphorism.

25 *See* Miranda v. Arizona, 384 U.S. 436 (1966). *See also* Dickerson v. United States, 530 U.S. 428 (2000).

26 *See* Brady v. Maryland, 373 U.S. 83 (1963).

27 *See* U.S. Const., amend. V.

28 *See* U.S. Const., amend. VI.

29 *See*, *e.g.*, Sarah Cox, *Prosecutorial Discretion: An Overview*, 13 Am. Crim. L. Rev. 383 (1976); Robert Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717 (1996).

30 *See*, *e.g.*, Misner, *supra* (explaining the legislative abdication of hard choices to prosecutors respecting what laws mean and which criminal provisions are directed at what specific conduct, especially emphasizing instances in which multiple criminal provisions arguably address the same conduct).

31 For a thoughtful treatment of two different models of the criminal process, one based on effective crime control, the other on legal constraints that protect individual liberties, *see* Herbert L. Packer, The Limits of the Criminal Sanction 150-260 (Stan. Univ. Press 1968). Professor Packer concluded that many features of our criminal process sound like the second model (what he calls "The Due Process Model") in terms of legal doctrine, but function more like the first (what he refers to as "The Crime Control Model"). *Id.* at 174. It should be noted as well that acceptance of the necessity of a degree of discretion in the criminal enforcement system is not equivalent to endorsement of the degree that exists at present or its exercise by particular government officials or classes of officials.

32 Although administrative agencies often exercise a variety of functions, all combined under the aegis of the agency head (in multi-member bodies, the collective decision-making group of agency members), critically, the individuals who perform functions that might be compromised if combined (such as prosecuting and adjudicating where significant individual claims are at issue) generally are separated and, in formal adjudication, substantially insulated from controls that might compromise their fairness (perhaps even more than reasonable notions of fairness require). *See*, *e.g.*, Administrative Procedure Act, 5 U.S.C. §554(d).

33 *See id.*, at 5 U.S.C. §§553-557.

34 *See*, *e.g.*, Freedom of Information Act, codified at 5 U.S.C. §552; Government in the Sunshine Act, codified at 5 U.S.C. §552b.

35 *See*, *e.g.*, Ronald A. Cass, Colin S. Diver, Jack M. Beermann & Jody Freeman, Administrative Law: Cases & Materials 97-103,112-229 (6th ed., Wolters-Kluwer Law & Business 2011) (Cass, et al., Administrative Law).

36 Field v. Clark, 143 U.S. 649, 692 (1892).

37 *Id.*, at 680.

38 *See*, *e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

39 Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) (laying down the "intelligible principle" test and applying it to uphold delegation of broad authority to the President and Tariff Commission to set tariff rates, formerly a legislative function).

40 *See*, *e.g.*, Whitman v. American Trucking Assns., Inc., 531 (U.S. 457 (2001); Mistretta v. United States, 488 U.S. 361 (1989); Yakus v. United States, 321 U.S. 414 (1944). For a review of the doctrine more generally, *see, e.g.*, Cass, et al., Administrative Law, *supra*, at 16-33.

41 *See*, *e.g.*, Food & Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

42 *See*, *e.g.*, National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2005); United States v. Midwest Video Corp., 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

43 The initial Supreme Court approval of authority over cable television is United States v. Southwestern Cable Co., 392 U.S. 157 (1968). For more recent discussion of FCC efforts to expand its ambit of authority, *see*, *e.g.*, Verizon v. Federal Communications Commn., No. 11-1355 (D.C. Cir. 2014); Comcast Corp. v. Federal Communications Commn., 600 F.3d 642 (D.C. Cir. 2010).

44 For an example of this deference formally applying the *Chevron* doctrine discussed below, *see* City of Arlington v. Federal Communications Commn., Nos. 11-1545 & 11-1547 (U.S. Sup. Ct., May 20, 2013).

45 *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 476 U.S. 837 (1984).

46 *Id.*, at 842-43.

47 *Id.*, at 843-45.

48 For a more nuanced, but generally sympathetic, account of *Chevron* deference, *see*, *e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989).

49 *See*, *e.g.*, Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009); Massachusetts v. Environmental Protection Agency, 549 U.S. 497 (2007); National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2005); United States v. Mead Corp., 533 U.S. 218 (2001); Babbitt v. Sweet Home Chap. of Communists for a Great Oregon, 515 U.S. 687 (1995).

50 *See*, *e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010); E. Donald Elliot, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts, and Agencies in Administrative Law*, 16 Vill. Envtl. L.J. 1 (2005); William Eskridge & Lauren Baer, *The Continuum*

of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron *to* Hamdan, 96 Geo. L.J. 1083 (2008); Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992); Peter Schuck & E. Donald Elliot, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984 (1990).

51 That generalization suffices for present purposes, as it has been the case for several hundred years in America and other Anglo-American legal systems, though reaching back into far older times, criminal transgressions were such well-known and universally understood offenses as to constitute common-law crimes or ecclesiastical offenses. *See*, *e.g.*, James Fitzjames Stephen, A History of the Criminal Law of England, vol. 1 (MacMillan 1883).

52 *See*, *e.g.*, The Federalist Nos. 10 & 51 (James Madison & Alexander Hamilton).

53 *See*, *e.g.*, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act (1947).

54 5 U.S.C. §553(b)(3).

55 5 U.S.C. §553(c).

56 *See*, *e.g.*, Thomas O. McGarity, *Administrative Law as Blood Sport*, 61 Duke L. J. 1671 (2012); Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 Duke L. J. 1385 (1992); Richard J. Pierce, *Two Problems in Administrative Law: Political Parity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L. J. 300 (!988).

57 *See*, *e.g.*, Cass, et al., Administrative Law, *supra*, at 531-568; Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking (4th ed., American Bar Assn. 2006).

58 *See*, *e.g.*, Associated Industries of New York State, Inc. v. U.S. Dept. of Labor, 487 F.2d 342 (2d Cir. 1973) (Friendly, J.).

59 *See*, *e.g.*, Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Rulemaking, and Pages in the Federal Register* 5, 16-17 (Cong. Research Serv., May 2013). The annual number of rules promulgated has been in the 3,000-5,000 range since the mid-1980s. The pages devoted to rulemakings in the Federal Register account for something on the order of 40-50 percent of Federal Register pages. *See id.*, at 16-17.

60 *See*, *e.g.*, Susan Davis, *This Congress Could be Least Productive Since 1947*, USA Today, Aug. 15, 2012, available at http://usatoday30.usatoday.com/news/washington/story/2012-08-14/unproductive-congress-not-passing-bills/57060096/1; Matt Viser, *This Congress Going Down as Least Productive*, Boston Globe, Dec. 4, 2013, available at http://www.bostonglobe.com/news/politics/2013/12/04/congress-course-make-history-least-productive/kGAVEBskUeqCB0htOUG9GI/story.html.

61 *See*, *e.g.*, American Bar Assn., Section on Criminal Law, *Report of the Task Force on The Federalization of Criminal Law*, at 6-11, available at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf (*ABA Report*).

62 *See*, *e.g.*, John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, 5 Engage 23 (2004) (Study for Federalist Society for Law and Public Policy Studies), available at http://www.fed-soc.org/doclib/20080313_CorpsBaker.pdf; John Malcolm, testimony before Over-Criminalization Task Force of H.R. Comm. on Judiciary, *Hearing on Defining the Problem and Scope of Over-Criminalization and Over-Federalization*, Jun. 12, 2013, at 31, 32-34, available at http://judiciary.house.gov/_cache/files/e886416b-82d6-43f9-8d5d-68c44fc590cd/113-44-81464.pdf (*HR Hearing: Defining Over-Criminalization*). For an accessible explanation of the difficulty of coming up with an exact number, *see* Gary Fields & John Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J., Jul. 23, 2011, available at http://online.wsj.com/news/articles/SB10001424052702304319804576389601079728920?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304319804576389601079728920.html.

63 *See*, *e.g.*, William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).

64 *See*, *e.g.*, *ABA report*, *supra*, at 10; Steven D. Benjamin, testimony before *HR Hearing: Defining Over-Criminalization*, *supra*, at 49, 57; John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*,71 B.U. L. Rev. 193 (1991); Malcolm, *supra*.

65 *See* Wayne Crews & Ryan Young, *Twenty Years of Non-Stop Regulation*, Am. Spectator, Jun. 5, 2013, available at http://spectator.org/articles/55475/twenty-years-non-stop-regulation.

66 *See* Crews & Young, *supra* (calculations based on 2010 figures).

67 *See*, *e.g.*, Cline v. Frink Dairy Co., 274 U.S. 445, 458 (1927); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921); Todd v. United States, 158 U.S. 278, 282 (1895).

68 Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (citations omitted).

69 Winters v. New York, 333 U.S. 507, 515 (1948). Justice Frankfurter disagreed with the application of this principle in *Winters*, but agreed that criminal laws "must put people on notice as to the kind of conduct from which to refrain." *Id.*, at 532-33 (Frankfurter, J., dissenting). *See also* International Harvester Co. v. Kentucky, 234 U.S. 216, 223-24 (1914).

70 *See*, *e.g.*, Parker v. Levy, 417 U.S. 733 (1974); United States v. Sharp, 27 F. Cas. 1041 (No. 16,264) (C.C. Pa. 1815).

71 *See*, *e.g.*, Screws v. United States, 325 U.S. 91, 102 (1945).

72 *See*, *e.g.*, Screws v. United States, supra, 325 U.S., at 138, 149-157 (Robets, Frankfurter & Jackson, JJ., dissenting); Cass, *Ignorance of Law*, *supra*, at 680-83; Herbert Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 122-123 (1962).

73 *See* United States v. Yates, 733 F.3d 1059 (11 th Cir. 2013), *cert. granted,* Apr. 2014, Docket No. 13-7451.

74 Pub. L. 107-204, 116 Stat. 745 (2002).

75 18 U.S.C. §1519.

76 *See*, *e.g.*, Cass, *Ignorance of Law*, *supra*.

77 16 U.S.C. §§3371-3378.

78 *See*, *e.g.*, C. Jarrett Dieterle, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 Geo. L.J. 1279 (2014).

79 *See*, *e.g.*, Cass, *Ignorance of Law*, *supra*, at 689-95.

80 *See* Klein & Grobey, *supra*, at 17-32.

81 *See ABA Report*, *supra*, at 153-54.

82 *See* Klein & Grobey, *supra*, at 5-16.

83 *See*, *e.g.*, Baker, *supra*, at 27-28.

84 *See*, *e.g.*, Stuntz & Richman, *supra*; Terwilliger, *supra*.

85 *See*, *e.g.*, Cass, Rule of Law, *supra*, at 17-18, 28-29; Dorf, *supra*.

86 *See*, *e.g.*, Baker, *supra*, at 28.

87 Reports of billion-dollar-plus settlements with the government in the face of potential criminal charges—sometimes for behavior that looks like ordinary commercial decisions of the sort that might (or might not) give rise to tort liability—are symptomatic of this phenomenon. *See*, *e.g.*, Danielle Douglas & Michael A. Fletcher, *Toyota Reaches $1.2 Billion Settlement to End Probe of Accelerator Problems*, Wash. Post, Mar. 19, 2014, available at http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572_story.html; Ben Protess & Jessica Silver-Greenberg, *In Extracting Deal from JPMorgan, U.S. Aimed for Bottom Line*, NY Times, Nov.

19, 2013, available at http://dealbook.nytimes.com/2013/11/19/13-billion-settlement-with-jpmorgan-is-announced/.

88 The reported settlement rate for federal criminal cases is 97 percent, a sharp rise over the past three decades, with the increase attributed to growing numbers of criminal laws and opportunities for increased punishment. *See*, *e.g.*, Gary Fields & John Emswhiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, Wall St. J., Sep. 23, 2012, available at http://online.wsj.com/news/articles/SB10000872396390443589304577637610097206808.

89 *See*, *e.g.*, Lambert v. California, 355 U.S. 225 (1957); Winters v. New York, 333 U.S. 507, 515 (1948); Cline v. Frink Dairy Co., 274 U.S. 445, 458 (1927); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921); Todd v. United States, 158 U.S. 278, 282 (1895).

Environmental Law & Property Rights

Do Sue and Settle Practices Undermine Congressional Intent for Cooperative Federalism on Environmental Matters?

By David B. Rivkin, Jr. & Adam Doverspike***

Note from the Editor:

This article is about whether sue and settle practices undermine congressional intent for cooperative federalism on environmental matters. 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 further discussion about sue and settle, federalism, and the Environmental Protection Agency. To this end, we offer links below to other perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Avi Bargow, *Setting the Record Straight*, EPA Connect: The Official Blog of EPA's Leadership (Feb. 12, 2014, 1:35 PM): http://blog.epa.gov/epaconnect/2014/02/setting-the-record-straight/
- Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 Seattle U. L. Rev. 891 (2014): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478866
- Ann Alexander, *Sue and settle legislation: a cure in search of a disease*, Switchboard: Natural Resources Defense Council Staff Blog (Jul. 16, 2012): http://switchboard.nrdc.org/blogs/aalexander/sue_and_settle_legislation_a_c.html
- John Walke, *Cantor Report Attacks Environmental Law Enforcement, Falls Flat With Baseless Conspiracy Theory*, Switchboard: Natural Resources Defense Council Staff Blog (Oct. 25, 2012): http://switchboard.nrdc.org/blogs/jwalke/the_office_of_house_majority.html

I. Environmental Statutes Embrace Cooperative Federalism

Environmental statutes give states primary responsibility for regulatory rules. The Environmental Protection Agency reviews state programs and, in certain cases, may supplant the state program. This model has become known as cooperative federalism.[1]

Cooperative federalism encourages state regulation rather than compelling or commandeering it. Such restraint permits state officials to remain accountable to their citizens.[2] Congress embraced cooperative federalism in the Clean Air Act and Clean Water Act—the major environmental statutes that invite sue and settle arrangements.[3] The Endangered Species Act did not explicitly adopt cooperative federalism; however, in practice, a "partnership federalism" has emerged.[4]

The environmental statutes do not require the EPA to work with environmental groups; rather, they mandate the EPA to work cooperatively with the states. Yet the increasingly common sue and settle tactic permits the EPA to collude with environmental activists to keep states from having a say in important procedural and substantive decision-making.

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II. Sue and Settle—Illustrative Examples

Certain environmental statutes mandate agency action by non-discretionary deadlines.[5] The EPA chronically misses mandatory deadlines because congressional allocations and agency staffing cannot meet the sheer number of congressionally-required regulations. Citizen suit provisions entice environmental activists to sue the EPA for missing those mandatory deadlines.[6] And attorney fee provisions allow activists to profit from the lawsuits.[7]

The EPA often admits fault and settles with activists, agreeing to an expedited timetable to issue regulations. The EPA rarely informs other stakeholders, including states, regulated entities, and industry groups, about the settlement. The EPA sometimes settles the same day the suit is filed, suggesting collusion between the nominally adverse parties.[8] The EPA and the activists enter a draft consent decree with the court. Under most environmental statutes, the EPA need not even receive public comment on the consent decree, much less heed the advice of anyone other than the activists that sued.[9]

Even if third parties hear about a sue and settle case, courts generally deny intervention.[10] The court enters the consent decree, which cannot be modified without the activist group's agreement or a court order. The EPA then relies upon the consent decree deadlines to cut off stakeholders and to adopt activist-friendly regulations. The practice predates the current administration, but has exploded since President Obama took office.[11]

In practice, sue and settle shuts out all stakeholders other than the agency and the activist groups that filed a given suit. Two recent cases illustrate common problems with the sue and

settle tactic.

A. The Regional Haze Cases

The EPA prevents Oklahoma and other affected states from pursuing state plans to regulate regional haze under the Clean Air Act by relying on deadlines set through a sue and settle agreement.

The 2007 regional haze rule required states to submit State Implementation Plans by 2009. In 2009, the EPA found more than 30 states, including Oklahoma, had not submitted a State Plan. The Clean Air Act requires the EPA to create Federal Implementation Plans within 2 years after finding no State Plan was filed. By 2011, the EPA had not promulgated Federal Plans and some states, including Oklahoma, had submitted belated State Plans.

Environmental activists sued the EPA for not promulgating Federal Plans.[12] Neither the activists, nor the EPA, nor the court notified the states about the lawsuit. Plaintiffs and the EPA entered a partial consent decree that created a table of deadlines for each of the 30+ states involved.[13]

Plaintiffs and the EPA permitted one state, Arizona, to intervene solely to argue that the EPA ought to act on Arizona's February 2011 State Plan and provide time for the state to correct any deficiencies before promulgating a Federal Plan.[14] The court ultimately overruled Arizona's objection to the consent decree because Arizona had missed the State Plan deadline.[15]

While enforcing hard deadlines against the states, plaintiffs and the EPA agreed repeatedly to extend deadlines for the EPA to promulgate Federal Plans.[16] Indeed, even when the EPA missed a court-ordered deadline, the parties agreed to retroactively adjust it.[17]

Despite the EPA's freedom to miss deadlines, it relied upon the consent decree deadlines to undermine the cooperative federalism principle that the agency should consider State Plans before imposing a Federal Plan:

- New Mexico: "It would not have been possible to review the July 5, 2011 [State Plan] submission, propose a rulemaking, and promulgate a final action by the dates required by the consent decree."[18]

- North Dakota: "Given our September 1, 2011 deadline to sign this notice of proposed rulemaking under the consent decree discussed in section III.C, we lack sufficient time to act on or consider this aspect of Amendment No. 1."[19]

- Oklahoma: "We also are required by the terms of a consent decree with WildEarth Guardians, lodged with the U.S. District Court for the Northern District of California to ensure that Oklahoma's CAA requirements for 110(a)(2)(D)(i)(II) are finalized by December 13, 2011. Because we have found the state's [State Plan] submissions do not adequately satisfy either requirement in full and because we have previously found that Oklahoma failed to timely submit these [State Plan] submissions, we have not only the authority but a duty to promulgate a [Federal Plan] that meets those requirements."[20]

The EPA abandoned a cooperative federalism approach that permits states to remedy issues in the State Plans solely to meet the sue and settle deadlines that the EPA and activists set without input from the states.

B. The Lesser Prairie-Chicken Endangered Species Act Listing

Fish and Wildlife Services (FWS) abdicated its authority to prioritize which species need be considered for listing as endangered or threatened to an activist group that required unrealistic deadlines and excluded all other stakeholders. Additionally, the agency inserted a substantive rulemaking into the consent decree. While the settlement covered over 250 species, we focus here on the lesser prairie-chicken (LPC), fully cognizant that similar stories exist for other species.

FWS found the LPC warranted listing under the Act in June 1998, but that the listing was precluded by higher priority actions.[21] From 1998-2009, FWS annually found that listing was "warranted but precluded" by pending proposals in each annual Candidate Notice of Review.[22] In 2008, FWS elevated the LPC's numeric threat level from 8 to 2.[23]

Then the EPA's sue and settle practices ensnared the entire endangered species Listing Program. An environmentalist group filed suit in Colorado, alleging FWS's "warranted but precluded" finding for the LPC was arbitrary and capricious.[24] The LPC case was rolled into a multi-district litigation encompassing over 250 species in the DC federal court.[25]

The DC federal court approved a settlement requiring FWS to publish proposed rules or not warranted findings for 251 species by September 2016.[26] FWS acknowledged that meeting the settlement demands will "require substantially all of the resources in the Listing Program."[27] The Agreement set a FY 2012 deadline for FWS to submit a work-plan on the lesser prairie-chicken.[28]

The settlement also substantively restricted FWS from listing a species as warranted but precluded. Congress permits FWS to deem a species listing as warranted, not warranted, or warranted but precluded.[29] The settlement agreement, however, requires each species listing be deemed warranted or not warranted, precluding a statutorily available option.[30]

Environmentalists and agencies successfully precluded all interested parties from participating in the regulatory process that eliminated the warranted but precluded option and tied up most of the agency's listing program funds. The DC court denied stakeholders' attempts to intervene.[31] And after the Colorado court permitted industry stakeholders to intervene,[32] the parties settled the DC action without including the intervenors.[33] The settlement resolved the Colorado case as well, but sidestepped meaningful participation by the intervenors.

Before the sue and settle mandated deadline, FWS proposed a rule listing the LPC as threatened.[34] FWS delayed the LPC listing several times while repeatedly invoking the settlement as requiring quick resolution.[35] And FWS repeatedly found that Oklahoma had taken great steps in conservation:

- "The Oklahoma PFW program has implemented 154 private lands agreements on about 38,954 ha (96,258 ac) of private lands for the benefit of the lesser prairie-chicken in the State." Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. at 73835.

- "The [Oklahoma Department of Wildlife

Conservation] has shown the ability to administer the CCAA and work effectively with participating landowners to implement conservation commitments in the CCAA." Final Candidate Conservation Agreement With Assurances, Final Environmental Assessment, and Finding of No Significant Impact; Lesser Prairie Chicken, Oklahoma, 78 Fed. Reg. 14111, 14113 (Mar. 4, 2013).

Nonetheless, FWS pushed forward with asserting federal control due to the sue and settle deadline, ultimately issuing a final rule declaring the LPC as threatened on April 10, 2014.[36]

III. Sue And Settle Undermines Cooperative Federalism

A. Sue And Settle Excludes States From The Rulemaking Process

Sue and settle excludes states from participating in the rulemaking process. While courts have resisted most agency efforts to change substantive law without notice and comment procedures,[37] some agencies continue to circumvent proper rulemaking by removing substantive choices in settlements. And even settlements restricted to setting deadlines affect the substantive outcome when agencies claim an inability to consider all evidence, comments, or state efforts because a deadline looms.[38]

Agencies move their own deadlines, but forbid states to do so. The EPA relies on "court-ordered" deadlines to curtail stakeholder input.[39] When the agencies cannot meet a consent decree deadline, the colluding activists agree to extend it. Thus, states must comply with deadlines they had no input on, but the EPA and activist groups can extend their self-imposed deadlines.

B. Activists Rather Than Congress or Agencies Set Agency Priorities

When agencies embrace a consent decree without stakeholder input, it permits activists to dictate agency priorities. Activists decide when and where the EPA and FWS develop onerous regulations.

FWS functionally ceded all agency prioritization to activists without consulting with the states or considering state conservation efforts.[40] FWS Director Dan Ashe admits that the "torrent of deadline-related cases over the past decade has had the unfortunate effect of distorting and delaying our biological priorities."[41] In FY 2011, the agency spent $15.8 million of its $20.9 million Listing Program budget on taking "substantive actions required by court orders or settlement agreements resulting from litigation."[42]

Activists not only set agency priorities, they get paid by the government to do so. Activists often receive attorney fee awards for winning the lawsuits against agencies that did not even fight back. From 2003-2010, activists received millions in federal dollars for suing the EPA.[43] FWS Director Ashe testified that activists obtained "$134,156 paid out of Service funds for attorneys' fees in FY 2010."[44] With sue and settle practices increasing in recent years, the total government funding to activist groups is likely growing as well.

C. Agencies and the Courts Should Respect Congressional Intent To Bolster Cooperative Federalism

Agencies and courts can fix the major problems of sue and settle tactics. First, courts should permit intervention more freely to ensure settlements between colluding entities receive needed scrutiny.[45] Second, agencies should welcome states and other stakeholders participating fully in all sue and settle processes. Stakeholders can ensure deadlines are feasible and will not create rushed, inaccurate rulemaking processes. Third, agencies should treat states as cooperative allies rather than uninterested outsiders. If the EPA extends its own deadlines repeatedly, it should offer similar grace periods for State Plans. The agencies undermine congressional intent for them to work with states when the agencies repeatedly argue that states have no role in the activist-generated settlement process.

IV. Conclusion

Activists and federal agencies are implementing federal programs over the objections of states by relying on sue and settle tactics that make state participation in the substantive rulemaking difficult or impossible. The consent decree deadlines do not provide states sufficient time to provide state-based programs, or sufficient time to rectify minor issues in state-based programs before agencies impose federal programs.

The agencies have thwarted Congressional intent that they work with states in a cooperative manner respecting federalist principles. If the agencies and courts do not reign in this ongoing power grab, Congress should revise the environmental statutes to withdraw the citizens suit provisions or otherwise limit the collusive settlements that undermine cooperative federalism today.

Endnotes

1 *See* American Corn Growers v. EPA, 291 F.3d 1 (D.C. Cir. 2002).

2 New York v. United States, 505 U.S. 144, 168 (1992) ("By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

3 The Clean Air Act "'uses a cooperative-federalism approach to regulate air quality.'" Oklahoma v. EPA, 723 F.3d 1201, 1204 (10th Cir. 2013) (quoting U.S. Magnesium, LLC v. EPA, 690 F.3d 1157, 1159 (10th Cir. 2012)); *see also* Friends of the Earth v. Carey, 552 F.2d 25, 29-30 (2d Cir. 1997) ("Under the [Clean Air] Act, state and local governments assume the primary responsibility for establishing and implementing air quality control programs"). And the "Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' 33 U. S. C. § 1251(a)." Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).

4 Jean O. Melious, Enforcing the Endangered Species Act Against The States, 25 Wm. & Mary Envtl. L. & Pol'y Rev. 605, 609 (2001) ("The ESA has not adopted this cooperative federalism model, however, in which the federal government dictates the content of programs and state governments carry out the programs. Because all biodiversity issues, like all politics, are local, and because states have traditionally exercised primary authority over wildlife and natural resource regulation, a model is emerging that 'allows state and local governments to define the content of federal mandates.' This model has been referred to as 'partnership federalism.'"); *see also generally* Kaush Arha & Barton H. Thompson Jr., The Endangered Species Act And Federalism: Effective Conservation Through Greater State Commitment (2012).

5 *See, e.g.*, Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Clean Water Act, 33 U.S.C. § 1251 *et seq.*

6 *See* 42 U.S.C. § 7604(a)(2) (CAA); 33 U.S.C. § 1365(a)(2) (CWA).

7 U.S. Government Accountability Office, Cases Against EPA and Associated Costs over Time, GAO-11-650 at 40-48 (Aug. 2011); *see also* U.S. Chamber of Commerce, *A Report on Sue and Settle: Regulating Behind*

Closed Doors at 12-13 n.14 (May 2013) (hereinafter "Chamber Report") ("In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas…"), *available at* https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf.

8 *See, e.g.*, William S. Jordan, III, *News from the Circuits*, 38 Admin. & Reg. L. News 28, 29 (Summer 2013) (describing *Defenders of Wildlife v. Perciasepe*, 2013 WL 1729598 (D.C. Cir. 2013) where "Defenders and EPA apparently negotiated a settlement, Defenders sued EPA on November 8, 2010, and on the same day the parties filed a joint motion to enter a proposed consent decree.").

9 *But see* 42 U.S.C. § 7413(g) (for Clean Air Act cases, "[a]t least 30 days before a consent order or settlement agreement of any kind," the "Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing.").

10 *E.g.,* Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013) (denying Utility Water Act Group petition to intervene); *but see* Order Granting State of Oklahoma's Motion to Intervene (Doc. No. 16), WildEarth Guardians v. McCarthy, 13-cv-2748 (D. Colo. Feb. 11, 2014) (unopposed motion).

11 *See* Chamber Report, *supra* note 7, at 13-14.

12 *See* National Parks Conservation Ass'n v. Jackson, Case No. 11-cv-1548 (D.D.C.).

13 Partial Consent Decree (Doc. No. 21 in *National Parks Conservation Ass'n*) (D.D.C. March 30, 2012).

14 Stipulated Order (Doc. No. 12 in *National Parks Conservation Ass'n*) (D.D.C. Jan. 20, 2012).

15 Memorandum Opinion and Order (Doc. No. 35 in *National Parks Conservation Ass'n*) (D.D.C. May 25, 2012).

16 Orders and Stipulation re Consent Decree (Doc. Nos. 71, 75, 78, 80 in *National Parks Conservation Ass'n*) (orders granting extensions).

17 *See* Unopposed Mot. to Amend/Correct Consent Decree (Doc. No. 70 in *National Parks Conservation Ass'n*) (D.D.C. May 24, 2013) (Oklahoma State Plan).

18 Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination,76 Fed. Reg. 52388, 52390 (Aug. 22, 2011).

19 Approval and Promulgation of Implementation Plans; North Dakota; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze,76 Fed. Reg. 58,570, 58,579 (Sept. 21, 2011).

20 Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations, 76 Fed. Reg. 81728, 81732 (Dec. 28, 2011).

21 Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition To List he Lesser Prairie-Chicken as Threatened and Designate Critical Habitat, 63 Fed. Reg. 31400, 31406 (June 9, 1998) ("A listing priority of 8 has consequently been assigned for the lesser prairie-chicken"); 16 U.S.C. §1533(b)(3)(B)(iii)(I).

22 16 U.S.C. §1533(b)(3)(B)(iii)(I).

23 Listing Priority Numbers range from 1 to 12 with 1 the most urgent. *See* Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 73 Fed. Reg. 75,176, 75,179-80 (Dec. 10, 2008).

24 Petition (Doc. No. 1), Wildearth Guardians v. Salazar, 10-cv-2129 (D. Colo. Aug. 31, 2010); *see also* In re Endangered Species Act Section 4 Deadline Litigation, MDL No. 2165 (D.D.C.) (other species).

25 In re Endangered Species Act Section 4 Deadline Litigation, MDL No. 2165 (D.D.C.).

26 Orders (Doc. Nos. 55, 56), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. Sept. 9, 2011); Agreements (Doc. Nos. 31-1, 32-1).

27 Proposed Settlement Agreement (Doc. No. 31-1 at 10), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. May 10, 2011).

28 *Id.* at 6, 26.

29 16 U.S.C. § 1533(b)(3)(B).

30 Proposed Settlement Agreement (Doc. No. 31-1 at 7), In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. May 10, 2011) ("The Defendants shall, for all 251 species that were designated as 'candidates' in the 2010 CNOR, submit to the Federal Register for publication either a Proposed Rule or a not-warranted finding no later than September 30, 2016.").

31 Memorandum Opinion (Doc. No. 16) In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. Aug. 27, 2010) ("allowing TRC to intervene could lead to undue delay and would potentially prejudice the adjudication of the original parties' rights"); Memorandum Opinion (Doc. #54) (D.D.C. Sept. 9, 2011) ("the Court finds that allowing SCI to intervene could lead to undue delay").

32 Order Granting Intervention (Doc. No. 18) Wildearth Guardians v. Salazar (D. Colo. Jan. 3, 2011).

33 Notice of Approval of Related Settlement Agreements (Doc. No. 31) Wildearth Guardians v. Salazar (D. Colo Sept. 23, 2011).

34 Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species, 77 Fed. Reg. 73,827, 73,830 (Dec. 11, 2012) (describing sue and settle agreement mandating "a proposed listing rule for the lesser prairie-chicken" by September 30, 2012).

35 Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 Fed. Reg. 26,302, 26,304 (May 6, 2013) ("On September 27, 2012, the settlement agreement was modified to require that the proposed listing rule be submitted to the Federal Register on or before November 29, 2012. On December 11, 2012, we published in the Federal Register a proposed rule to list the lesser prairie-chicken as a threatened species under the Act (77 FR 73,828)."); Endangered and Threatened Wildlife and Plants; 6-Month Extension of Final Determination for the Proposed Listing of the Lesser Prairie-Chicken as a Threatened Species, 78 Fed. Reg. 41,022 (July 9, 2013) ("As noted in the proposed listing rule (77 FR 73828), we were previously required by the terms of judicially approved settlement agreement to make a final determination on the lesser prairie-chicken proposed listing rule no later than September 30, 2013. Therefore, with this 6-month extension, we will make a final determination on the proposed rule no later than March 30, 2014."); Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 Fed. Reg. 75,306, 73,508 (Dec. 11, 2013) ("As noted in the proposed listing rule (77 FR 73,828), we were previously required by the terms of judicially approved settlement agreement to make a final determination on the lesser prairie-chicken proposed listing rule no later than September 30, 2013. With the 6-month extension, we will make a final determination on the proposed rule no later than March 31, 2014.").

36 Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Lesser Prairie-Chicken, 79 FR 20,074 (Apr. 10, 2014).

37 *See* Conservation N.W. v. Sherman, 715 F.3d 1181, 1187 (9th Cir. 2013) ("…a district court abuses its discretion when it enters a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures."); *id.* ("Because the consent decree allows for substantial, permanent amendments to Survey and Manage, it impermissibly conflicts with laws governing the process for such amendments. It was therefore an abuse of discretion for the district court to approve it in its current form.").

38 *See* Defenders of Wildlife v. Perciasepe, 714 F.3d 1317, 1323 (D.C. Cir. 2013) ("UWAG first argues that its members have standing because the consent decree imposes too strict a timeline for EPA to decide whether and when to engage in rulemaking. According to UWAG, the timeline provides too little time for notice and comment such that its members will not have an adequate opportunity to participate in the rulemaking, making it more likely

that EPA will promulgate a rule economically harmful to its members."); *but see* Nat. Resources Def. Council v. Costle, 561 F.2d 904, 910 (D.C. Cir. 1977) ("Another impairment of the appellants' interest in valid regulations arises from their exclusion from possible proceedings about modifications in the timetable.").

39 *See, e.g.*, 76 Fed. Reg. 52,390 (EPA found the "court-supervised consent decree deadline" made review of New Mexico's State Plan impossible, requiring an EPA-written Federal Plan); 76 Fed. Reg. 58,579 (EPA "lack[ed] sufficient time to act on or consider" North Dakota Department of Environmental Protection's determination due to consent decree deadline); 76 Fed. Reg. 81,732 (finding Oklahoma's State Plan did not meet certain requirements, EPA claimed a "duty to promulgate" a Federal Plan due to a consent decree that required finalization by December 13, 2011).

40 Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before House Natural Resources Committee (December 6, 2011).

41 *Id.*

42 *Id.* Until recently, the agencies did not holistically track sue and settle agreements, rendering research about how much activists set agency priorities difficult. *See* http://www.epa.gov/ogc/noi.html (listing Notices of Intent to Sue since Jan. 1, 2013).

43 U.S. Government Accountability Office, Cases Against EPA and Associated Costs over Time, GAO-11-650 at 40-48 (Aug. 2011); *see also* Chamber Report, *supra* note 7, at 12-13 n.14 ("In effect, advocacy groups are incentivized by federal funding to bring sue and settle lawsuits and exert direct influence over agency agendas").

44 Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before House Natural Resources Committee (December 6, 2011).

45 *E.g.*, Order Granting State of Oklahoma's Motion to Intervene (Doc. No. 16), WildEarth Guardians v. McCarthy (D. Colo. Feb. 11, 2014) (unopposed motion).

Federalism & Separation of Powers

North Carolina Board of Dental Examiners v. Federal Trade Commission
An exchange between David J. Owsiany & Alexander Volokh

Federalism Implications of Applying Federal Antitrust Scrutiny to State Licensing Boards

*By David J. Owsiany**

There is a long-simmering debate over professional licensing in America. One side argues that state-based licensure and regulation of certain professions, especially in health care, is beneficial to the protection of the public in terms of ensuring minimal standards and quality of services.[1] The other side argues that professional licensing reduces the number of providers of the regulated professional services and leads to artificially higher prices, with limited evidence of consumer protection or benefit.[2]

North Carolina State Board of Dental Examiners v. FTC[3] has become a proxy for the battle over the benefits and detractions of professional licensing.[4] The issue in the case is whether the state-action exemption from federal antitrust laws applies to the actions of the North Carolina State Board of Dental Examiners (NC Dental Board or Board) in preventing unlicensed individuals from providing teeth-whitening services. The U.S. Court of Appeals for the Fourth Circuit, agreeing with the Federal Trade Commission (FTC), held that the state-action exemption did not apply to the NC Dental Board's actions.[5] The U.S. Supreme Court granted the NC Dental Board's petition for certiorari.

Much of the public debate has focused on the economic impact of professional licensing and the growth in the number of professions that the states have chosen to license in recent years.[6] While these arguments merit serious consideration, especially as policy matters before state legislatures, the *North Carolina State Board of Dental Examiners v. FTC* case presents important federalism considerations, which were largely ignored by the FTC and the Fourth Circuit.

I. Overview of the State-Action Antitrust Exemption

In *Parker v. Brown*,[7] the U.S. Supreme Court first set out the parameters of what has become to be known as the "state-action doctrine" related to application of federal antitrust laws. Specifically, the *Parker* Court held that a state's anticompetitive acts directed by the legislature are exempt from the Sherman Act's prohibitions. The Court noted that "in a dual system of government," the states are "sovereign" and that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[8] Congress has not enacted legislation to attempt to expand the reach of federal antitrust laws to cover state action since the *Parker* court defined the state-action doctrine in 1943. Instead, Congress and federal enforcement agencies have mostly focused their attention on private anticompetitive activities.[9]

The U.S. Supreme Court later applied the state-action antitrust exemption to the actions of a state supreme court in denying an applicant admission to the state bar.[10] Conversely, the U.S. Supreme Court held in *Town of Hallie v. City of Eau Claire* that actions of municipalities are not beyond the reach of federal antitrust laws by virtue of their status, because they are not themselves sovereign. In order to obtain the state-action exemption, the Court said that municipalities must demonstrate that their anticompetitive activities are pursuant to a "clearly articulated" state policy to displace competition with regulation or monopoly public service.[11] The determination that a municipality's activities constitute state action is not a purely formalistic inquiry.[12] The state may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful.[13] On the other hand, in proving that a state policy to displace competition exists, the municipality is not required to "point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit."[14] The *Hallie* Court held that this "clear articulation" test does not require the statute to compel a municipality to act. The statutory provisions must merely show that the legislature contemplated such anticompetitive actions by the municipality.[15]

The Supreme Court has also held that private parties may receive the state-action exemption but only if (1) they act pursuant to a clearly articulated state policy to displace competition with regulation or monopoly public service, and (2) the policy is actively supervised by the state itself.[16] The active supervision requirement stems from the belief that where a private party engages in the anticompetitive activity, there is a real danger that the private party is acting to further his or her own interests, rather than the governmental interests of the state.[17]

While the Court in *Hallie* considered the application of federal antitrust laws to municipalities, it noted in a footnote that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required."[18]

II. Background of *North Carolina State Board of Dental Examiners v. FTC*

A. North Carolina Board of Dental Examiners

The North Carolina statute provides that:

> The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry

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in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.[19]

The statute also provides that the "North Carolina State Board of Dental Examiners [is] heretofore created" and "is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State."[20] The NC Dental Board is made up of eight members—six licensed dentists, one licensed dental hygienist and one consumer member. Licensed North Carolina dentists elect the six dentist members, and the state's licensed dental hygienists elect the hygienist member. The consumer member is appointed by the governor. Any dentist elected to the NC Dental Board must possess a license to practice dentistry in North Carolina and be engaged in the active practice of dentistry.[21]

The statute also specifically provides that a person must hold a valid license issued by the NC Dental Board to engage in the practice of dentistry in North Carolina.[22] According to the statute, the practice of dentistry includes any person who "[r]emoves stains, accretions or deposits from the human teeth."[23]

Beginning in 2006, the NC Dental Board issued cease and desist letters to non-dentists who were providing teeth-whitening services to the public in North Carolina. The NC Dental Board based its actions on finding that non-dentists who provide teeth-whitening services were practicing dentistry without a license.[24]

B. Federal Trade Commission

In 2010, the FTC issued an administrative complaint against the NC Dental Board charging it with violating federal antitrust laws by excluding non-dentist teeth whiteners from the market.[25]

An administrative law judge held a merits trial and issued a decision finding that the NC Dental Board's concerted action to exclude non-dentists from the market for teeth-whitening services in North Carolina constituted an unreasonable restraint of trade and an unfair method of competition in violation of federal antitrust law.[26] On appeal, the FTC issued a final order sustaining the administrative law judge's decision and issuing a cease and desist order enjoining the NC Dental Board from, among other things, prohibiting, restricting, impeding, or discouraging the provision of teeth-whitening services by a non-dentist provider.[27]

In finding the NC Dental Board violated federal antitrust law, the FTC noted that "[n]o advanced degree in economics is needed to recognize that exclusion of products from the marketplace that are desired by consumers is likely to harm competition and consumers, absent a compelling justification."[28] The FTC then suggested that it did not even need to seriously consider the existence of a justification, noting that the NC Dental Board's actions to foreclose access to an entire class of competitors invites condemnation with "little, if any, consideration of any purported defenses."[29] The FTC then summarily rejected the NC Dental Board's claims that its actions were intended to promote public health and safety pursuant to state statute, finding that the board's proffered defense was not a cognizable justification for its anticompetitive actions.[30]

In rejecting the NC Dental Board's claims that its actions were protected pursuant to the principles of federalism, the FTC concluded that the NC Dental Board was a private actor, and not a state agency entitled to deference under the state-action doctrine, because the NC Dental Board was controlled by financially interested members.[31] As a private actor, the NC Dental Board had to show that it was actively supervised by the state, which it could not do, according to the FTC.[32]

C. U.S. Court of Appeals for the Fourth Circuit

The NC Dental Board petitioned to the Fourth Circuit for review of the FTC's order. The NC Dental Board contended that because it is a state agency under the state-action doctrine, it merely had to show that it was acting pursuant to a clearly articulated state policy to displace competition with regulation. The Fourth Circuit largely followed the FTC's approach, finding that the NC Dental Board is a private actor, not a state agency, because a decisive majority of the Board is made up of market participants who are chosen by their fellow market participants.[33] Accordingly, the Fourth Circuit held that the NC Dental Board had to show that: (1) it was acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) its actions were actively supervised by the state.[34] The Fourth Circuit then found that the NC Dental Board could not show any active supervision, noting, for example, that the NC Dental Board sent out cease and desist letters to non-dentist teeth whiteners "without state oversight and without the required judicial authorization."[35]

The Fourth Circuit quickly rejected the NC Dental Board's federalism arguments with little analysis, summarily holding: "given our conclusion that the Board is a private actor under the antitrust laws, there is no federalism issue" involved in the case. The Fourth Circuit concluded that its decision "hardly sounds the death knell for federal/state balance" related to professional licensing boards.[36] A closer examination of the case's facts and the history and law related to state-based professional licensing, however, reveals legitimate federalism concerns related to the Fourth Circuit's holding.

III. Brief History of Professional Licensing and Regulation in America

The regulation and licensure of health care professionals in America dates back to the Colonial Era.[37] In the 1600s, certain colonies recognized the danger to their citizens of unscrupulous or unqualified health practitioners so they adopted medical licensure requirements and other health care-related regulations.[38]

Following ratification of the U.S. Constitution, states continued to be active in the regulation and licensure of health care practitioners. For example, in 1806, New York's state legislature enacted what some have characterized as the most elaborate medical law for its time in the U.S.[39] The New York law called for the formation of medical societies to examine and license candidates for the practice of medicine following three years of medical study.[40] New York's law was typical of the direction of most licensing laws in the early 1800s with states working with medical societies to regulate the practice of medicine.[41]

The Jacksonian Era (1828-1840) ushered in an anti-

regulatory climate that led to a collapse of medical regulation and licensure in the U.S. During that time, nearly all states repealed their penalties for the unlicensed practice of medicine and other health care regulations.[42] With the onset of the Civil War in 1861, states began reconsidering and eventually reestablishing regulation of health care and licensing of medical professionals. America's Civil War involved unprecedented levels of casualties, including both soldiers and civilians, many of which were attributable to medical illnesses and unsanitary medical practices, not necessarily the direct result of the armed conflict.[43]

Two main developments led to the reestablishment of medical licensing and regulation in America. First, advancements in modern medical science by 1880 led to more advanced and successful treatment of diseases and injuries, requiring professional knowledge and skill.[44] The second development was the discovery that keeping wounds, surgical instruments, and health care providers clean would dramatically reduce deaths due to infection.[45] The states' decisions to reinstitute medical regulatory systems were largely based on these public protection considerations.[46]

By the early 1900s, most states had enacted some kind of dental and medical licensing regulations.[47] From 1900 to 1930, states expanded licensure to other professionals, including lawyers, accountants, architects, nurses, and pharmacists.[48] In recent years, some states have expanded licensing to many more professions and occupations, which has fueled the debate over the value of certain state licensing laws.[49]

The U.S. Supreme Court has long recognized the state's authority to license and regulate professionals. In the 1923 *Douglas v. Noble* case, the U.S. Supreme Court held that a state may "prescribe that only persons possessing the reasonably necessary qualifications shall practice dentistry" and that the state legislature may "confer upon an administrative board the power to determine whether an applicant possesses the qualifications which the legislature has declared to be necessary."[50] Similarly, in the 1926 *Graves v. Minnesota* case, the Court held that "[i]t is well settled that a state may, consistently with the Fourteenth Amendment, prescribe that only persons possessing the reasonably necessary qualifications of learning and skill shall practice medicine or dentistry."[51]

The Court in *Douglas*, and again in *Graves*, relied upon the seminal 1889 case, *Dent vs. West Virginia*, which held that "[t]he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud."[52] The *Dent* Court also noted that "[d]ue consideration, therefore, for the protection of society may well induce the State to exclude from [medical] practice those who have not such a license, or who are found upon examination not to be fully qualified."[53]

IV. Analysis of *North Carolina State Board of Dental Examiners v. FTC* and It's Potential Impact on State-Federal Balance

A. Scope of the Fourth Circuit's Decision

The FTC seemed to suggest the fact that most of the NC Dental Board's members are market participants was enough for it to conclude that the board is a private actor, regardless of how the board members are selected.[54] The Fourth Circuit arguably considered two factors—that a majority of the NC Dental Board is made up of market participants and that those board members are elected by other market participants—in reaching its conclusion that the NC Dental Board is a private actor. Accordingly, there appears to be some confusion over the scope of the Fourth Circuit's holding and the significance of the fact that the dentist board members are elected by North Carolina's dentists.[55]

Judge Barbara Milano Keenan issued a separate concurring opinion in the case to "emphasize the narrow scope" of the Fourth Circuit's holding. Judge Keenan pointed out that the court did not hold that a state agency must always have active state supervision to be exempt from antitrust scrutiny. Judge Keenan also claimed that the court did not hold that a state agency comprised, in whole or in part, of members participating in the market regulated by that state agency is necessarily a private actor subject to the active state supervision requirement.[56]

Judge Keenan wrote that "[i]f the Board members here had been appointed or elected by state government officials pursuant to state statute, a much stronger case would have existed" that the NC Dental Board did not need active state supervision in order to be exempt from antitrust scrutiny.[57]

States employ many different mechanisms for board appointments, including some that rely upon regulated professionals in the selection process. One common method is for states to give the governor broad authority to appoint board members.[58] In some states, as is the case with the NC Dental Board, certain board members are elected by the regulated professionals within the state.[59] Other states require the governor to appoint board members from a list of names recommended by the licensed professionals.[60] These varying methods of appointment are a reflection of state discretion in the area of professional licensure, consistent with the principles of federalism,[61] and should have no bearing on whether the state-action exemption applies.[62] Other courts have not considered the method of appointment as dispositive in determining whether a state licensing board is a private actor for state-action exemption purposes.

B. Impact on the States

The fact that the State of North Carolina chose to have dentists on the board that licenses and regulates dentists is not surprising or unique. All states have some type of professional licensure laws, and they regularly set up systems with individuals from the regulated profession participating on the regulatory boards.[63] This makes sense since market participants have the expertise to determine qualifications, set standards, and assess competence. Moreover, active practicing professionals are likely to spot emerging threats to the public—especially in dynamic fields like medicine and dentistry—much faster than state legislators or bureaucrats.[64]

States would be significantly impacted if the Fourth Circuit's decision is allowed to stand. States would be forced to make sweeping changes to their licensing and regulatory structures, impacting dozens of boards in each state.[65] Twenty-three states joined in an amicus brief filed with the Supreme Court

in support of the NC Dental Board, pointing out that each of the amici states uses active professionals on regulatory boards overseeing their own respective professions, including doctors, dentists, chiropractors, nurses, pharmacists, optometrists, lawyers, architects, funeral directors, and accountants.[66] The National Governors Association and the National Conference of State Legislatures also jointly filed an amicus brief arguing that the "level of supervision required by the Fourth Circuit and the FTC places an impractical burden on States that depend on hundreds of boards to carry out regulatory and policymaking functions." This burden "impinges upon the very principles of federalism that the *Parker* doctrine was intended to protect."[67]

The Fourth Circuit's approach would have a wide-ranging effect on the states' ability to regulate professionals. For example, by finding that these boards are private actors instead of state agencies, board members could be held personally liable for damages in court actions taken by licensees.[68] This would make it more difficult for states to find knowledgeable and experienced professionals to help them regulate other professionals who often practice in complex, dynamic, and technical fields, including medicine and dentistry.

Requiring active supervision of state licensing boards would be redundant and cumbersome, requiring one set of state actors to supervise another set of state actors. One commentator summarized the concern this way:

> [I]t is hard to imagine a greater intrusion into the internal affairs of a state than a federal inquiry into the government's oversight of its own agencies, and it is not easy to imagine just how a state in practice would go about supervising its agencies. Usually, agencies do the supervising.[69]

This would likely result in a system that is more expensive and less effective than the current system, potentially requiring states to either hire full-time bureaucrats to supervise the regulation of professions about which they have little knowledge and experience or force legislators to be actively involved in the oversight of every licensed profession.[70] Many states may stop utilizing market participants within their regulatory scheme altogether. Since the new regulators would not be active in the regulated profession, they would likely be less effective in ensuring professional standards are met and protecting consumers who use such professional services.[71]

C. Federalism Concerns

Among the powers reserved to each state under the Tenth Amendment is the power to protect the public health and safety of its citizens.[72] It is pursuant to this power that states are authorized to regulate law, medicine, dentistry, and other professions, which they typically do by delegating authority to professional licensing boards.[73] The states have engaged in the licensing and regulation of certain professionals since our nation's founding, and the state-action exemption protects the states' role in professional licensing from federal antitrust intrusion.

The critics of the state-action doctrine—including the FTC—support their desire to restrict the availability of the state action-exemption through what seems to be either an "unduly cramped notion of the value and purposes of the state-action doctrine or a policy-oriented belief that federal competition policy is generally superior to the state regulatory schemes."[74] These critics focus on "economic-efficiency" but are "reluctant to grapple openly with reassessing the value of federalism."[75] The central legal principle underlying the state-action doctrine, however, is federalism; it is not whether federal competition policy would achieve better efficiency[76] or superior outcomes versus a state regulatory scheme.[77]

The state-action doctrine allows a state to displace the federal procompetitive norm in order to achieve a policy objective that the state believes is more important.[78] The NC Dental Board's actions, taken pursuant to state statute, were intended to protect the public from potential harm related to non-dentists performing teeth-whitening services. The FTC and the Fourth Circuit's majority opinion summarily dismissed the NC Dental Board's health and safety justification.[79]

The facts of the case, however, clearly support the NC Dental Board's health and safety justification. Judge Keenan's concurring opinion states:

> In this case, I do not doubt that the Board was motivated substantially by a desire to eliminate an unsafe medical practice, namely, the performance of teeth-whitening services by unqualified individuals under unsanitary conditions. The Board was aware that several consumers had suffered from adverse side effects, including bleeding or "chemically burned" gums, after receiving teeth-whitening services from persons not licensed to practice dentistry. Additionally, the Board was aware that many of the "mall kiosks" where such teeth-whitening services are performed lack access to running water. The Board also received reports that non-licensed persons performed teeth-whitening services without using gloves or masks, thereby increasing the risk of adverse side effects. Accordingly, in my view, the record supports the Board's argument that there is a safety risk inherent in allowing certain individuals who are not licensed dentists, particularly mall-kiosk employees, to perform teeth-whitening services.[80]

The FTC and the Fourth Circuit's majority opinion did not give the NC Dental Board's health and safety justification much consideration because they focused their analyses on finding that the NC Dental Board is a private actor. By doing so, they then required that the NC Dental Board's actions had to be actively supervised by the state.[81] However, the FTC and Fourth Circuit's conclusion that the NC Dental Board is a private actor is inconsistent with the clear, unambiguous statement of North Carolina law, which declares that the NC Dental Board is "the agency of the State for the regulation of the practice of dentistry."[82]

There are several additional factors that support the conclusion that the Board is a state agency. North Carolina statutes: (1) designate NC Dental Board members as "state employees,"[83] (2) provide that NC Dental Board members may be punished by the North Carolina Ethics Commission if they act in a manner that presents a conflict of interest, which can potentially lead to removal from office,[84] (3) give the North Carolina Joint Legislative Commission on Governmental Operations the authority to study state agency activities (including those of the NC Dental Board) to ensure conformity with legislative intent,[85]

and (4) provide NC Dental Board members with sovereign immunity and legal defense from the state attorney general.[86] Moreover, the NC Dental Board members must take an oath of office promising to uphold North Carolina's laws.[87] The above statutory provisions and constitutional oath specifically apply to members of state agencies, including the NC Dental Board, but not to individuals engaged in private actions.

This is not a case where the state merely authorizes a private entity to engage in anticompetitive activities, which would require active supervision.[88] The State of North Carolina established a state agency licensing board for dentists—the NC Dental Board—and included market participants as members of the board. North Carolina through its statutes passed by the legislature clearly articulated its definition of the practice of dentistry and licensure requirements to be enforced by the NC Dental Board.

The FTC and Fourth Circuit ignored these clear dictates of North Carolina law in order to find that the NC Dental Board is a private actor. They did so because they believe that giving greater weight to the active-supervision requirement is likely the best way available to them to discourage state licensing and regulatory boards from acting in anticompetitive ways.[89] Several critics who disagree with the states' policy decisions related to occupational and professional licensing have urged courts to take this approach.[90] However, the principles of federalism and separation of powers dictate that these occupational and professional licensure policy issues should be resolved by state legislatures, not federal courts.

V. Conclusion

Because the NC Dental Board is a state agency under any reasonable interpretation of North Carolina law, the NC Dental Board should only be required to show that it acted pursuant to a clearly articulated legislative direction to displace competition with regulation. The North Carolina statute gives the NC Dental Board broad regulatory authority over dentistry, explaining that the practice of dentistry "affect(s) the public health, safety and welfare" and is "to be subject to regulation" by the NC Dental Board.[91] The statute limits the practice of dentistry only to those who possess a valid license issued by the NC Dental Board.[92] The statute, however, does more than just give the NC Dental Board broad grants of licensing and regulatory authority; it also specifically defines the practice of dentistry to include the removal of "stains, accretions or deposits from the human teeth."[93]

These statutory provisions make clear that the NC Dental Board acted pursuant to a clearly articulated policy set by the state legislature when the board acted to prevent teeth-whitening activities by unlicensed individuals.[94] In fact, it is hard to imagine a more clearly articulated policy than the North Carolina statutes: only licensed dentists can practice dentistry and the practice of dentistry is defined to include removing stains from human teeth. Arguably, the NC Dental Board would have been in dereliction of its duty if it did not act to restrict the teeth-whitening activities of unlicensed individuals.

As noted above, the *Parker* Court made clear that there is "nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[95] The NC Dental Board is an agency of the State of North Carolina that was engaged in activities directed by the North Carolina Legislature. Accordingly, the Supreme Court should reverse the Fourth Circuit and find that the NC Dental Board's actions are not restrained by federal antitrust laws.

In doing so, the Court would vindicate the principles of federalism by respecting the states' long-standing, primary role in the area of professional licensing and would clarify that the state-action exemption applies to state agency licensing boards. Those critics who have policy concerns regarding the states' recent activities in the area of professional and occupational licensing can still take their case to the state legislatures where such policy discussions belong.

Endnotes

1 *See* Neil Katsuyama, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish Between Beneficial and Anticompetitive Professional Licenses,* 19 S. Cal. Interdisc. L.J. 565, 577-78 (2010) ("Supporters of licenses argue that they are necessary because there is a lack of information available to consumers. If consumers are not able to gauge the quality of services, this will lead to two negative effects. The first is that consumers will be unable to find the appropriate level of quality they desire and will likely pay the wrong price for what they are receiving. Since they are unable to accurately assess the quality and skill of a professional, consumers will be taken advantage of and will pay for the services of quacks. This will be especially dangerous in professions like medicine and dentistry where poor quality service can cause permanent physical injury. Licenses can alert consumers that a certain professional is poorly qualified and that the consumer's money is better spent elsewhere. The second negative effect is that high quality sellers will leave the market. Sophisticated consumers will know that some of the sellers are of poor quality. Taking the chance that they will receive the services of a poor seller into account, consumers will reduce the price they are willing to pay. With no guarantee of what they are going to receive, the maximum that a consumer will pay is less than they would pay if there had been some assurance of the quality of the service. This is necessarily lower than what the value of the highest quality sellers and those sellers will have to either lower their prices or exit the market."); *see also* Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 J. Econ. Hist. 723, 754 (2005) ("The evidence presented suggests that the emergence of professional licensing regulation during the Progressive Era was motivated by a desire to improve the market for professional services. During this period, advances in knowledge and increased specialization gave rise to asymmetric information problems in the market for professional services, especially in urban areas. But, because private mechanisms alone could not eliminate all unqualified practitioners from the market, it was necessary for state governments to enact regulations that set standards of qualification to practice these occupations. Our analysis finds that licensing legislations were adopted earlier and were more likely to restrict entry into professions where informational asymmetries were most likely to be problematic. In addition, a detailed study of the effects of medical licensing shows that the specific licensing regulations that restricted entry most effectively were those that were likely to increase physician quality. Accordingly, we also find that stricter licensing also lowered mortality rates from diseases where physician quality may have mattered.").

2 Adam B. Summers, Reason Foundation Policy Study No. 361 Occupational Licensing: Ranking The States and Exploring the Alternatives (Executive Summary) (Aug. 2007) ("While occupational licensing laws are billed as a means of protecting the public from negligent, unqualified, or otherwise substandard practitioners, in reality they are simply a means of utilizing government regulation to serve narrow economic interests. Such special-interest legislation is designed not to protect consumers, but rather to protect existing business interests from competition."); Shirley Svorny, Cato Institute Policy Analysis No. 621, Medical Licensing: An Obstacle to Affordable, Quality Care 1 (Sept. 2008) ("[L]icensure not only fails to protect consumers from incompetent physicians, but, by raising barriers to entry, makes health care more expensive and less accessible.").

3 717 F.3d 359 (4th Cir. 2013).

4 *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?,* 162 U. Pa. L. Rev. 1093, 1126-27 (2014); *see also* Jarod M. Bona*, The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. St. Thomas J.L. & Pub. Pol'y 28, 46-49 (2011).

5 N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359 (4th Cir. 2013).

6 *See* Morris M. Kleiner, *Why License a Florist?,* N.Y. Times, May 29, 2014, at A35 ("On the left, there are concerns about inflated prices for essential services like plumbers and the availability of those services for people in or near poverty. Many of the jobs that require licenses are relatively low-skilled, like barbers and nurse's aides, and licensing creates a barrier that might keep low-income people out of those positions…On the right, the issue is one of economic liberty. From that perspective, government-issued licenses largely protect occupations from competition. Conservatives often see members of the regulated occupation supporting licensing laws under claims of 'public health and safety.' However, these laws do much more to stop competition and less to enhance the quality of the service."); s*ee also* Law & Kim, *supra* note 1, at 723-24 ("The late nineteenth and early twentieth centuries witnessed the birth of modern-day professions. Prior to the late 1800s only medicine, law, and theology were considered 'learned professions.' The growth of modern day professions was fueled not only by a transformation of these older professions but also by a significant increase in new professional occupations such as teaching, engineering, dentistry, and accountancy to list a few. Between 1900 and 2000 the percentage of the labor force engaged in technical and professional occupations increased from 4 percent to over 20 percent. This rise of professionals was also accompanied by the widespread adoption of occupational licensing regulation at the state level.").

7 317 U.S. 341 (1943).

8 *Id.* at 350-51.

9 *See generally* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking,* 14 J. Econ. Persp. 43 (2000); *see also* Robert Bork, The Antitrust Paradox (1993).

10 Hoover v. Ronwin, 466 U.S. 558 (1984).

11 Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39 (1985).

12 *Id.* at 39.

13 *Id.; see also Parker*, 317 U.S. at 351.

14 City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978).

15 *Town of Hallie*, 471 U.S. at 44-45.

16 Cal. Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

17 *Town of Hallie,* 471 U.S. at 47; *see also* Patrick v. Burget, 486 U.S. 94, 100 (1988). At least one commentator has taken an alternative view, noting that "[w]ith regard to antitrust state-action doctrine, the commentators fail to recognize that individuals who choose to enter public service in modern American society do not invariably pursue self interest." Steven Semeraro, *Demystifying Antitrust State Action Doctrine,* 24 Harv. J.L. & Pub. Pol'y 203, 273 (2000).

18 *Town of Hallie*, 471 U.S. at 46 n.10.

19 N.C. Gen. Stat. § 90-22(a).

20 N.C. Gen. Stat. §. 90-22(b).

21 *Id.*

22 N.C. Gen. Stat. § 90-29(a) ("No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.").

23 N.C. Gen. Stat. § 90-29(b)(2) ("A person shall be deemed to be practicing dentistry in this state who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for purposes of this Article, constitute the practice of dentistry:…[r]emoves stains, accretions or deposits from the human teeth.").

24 *See* Opinion of Commission, *N.C. Bd. of Dental Exam'rs*, FTC Docket No. 9343 at 4 (Dec. 7, 2011) [hereinafter Opinion of Commission], http://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf.

25 *See* Complaint, *N.C. Bd. of Dental Exam'rs*, F.T.C. Docket No. 9343 (June 17, 2010), http://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf.

26 Opinion of Commission*, supra* note 24, at 7.

27 Final Order, *N.C. Bd. of Dental Exam'rs,* FTC, Docket No. 9343 at 3 (Dec. 7, 2011). http://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalorder.pdf

28 Opinion of Commission, *supra* note 24, at 20.

29 *Id.* at 21.

30 *Id.* at 24-26.

31 *Id*. at 26.

32 *Id.*

33 N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d at 368-70.

34 *Id*.at 367-70.

35 *Id.* at 370.

36 *Id*. at 375.

37 *See* David A. Johnson & Humayun J. Chaudhry, Medical Licensing and Discipline in America 3-6 (2012); *see also* Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 Annals Health L. 201, 202 (1999) ("Since colonial times, the regulation of professions has been seen as a state activity in the United States."); Milton Heumann, et al., *Prescribing Justice: The Law and Politics of Discipline for Physician Felony Offenders*, 17 B.U. Pub. Int. L.J. 1, 5 (2007).

38 *See* Johnson & Chaudhry, *supra* note 37, at 4 ("A 1649 regulation passed by the Massachusetts Bay Colony, and mirrored by New York in 1665, was … among the first to acknowledge the danger to its citizens of unscrupulous and/or unqualified health practitioners.").

39 *Id.* at 11.

40 *Id.* at 11. The only penalty for the unlicensed practice of medicine in New York at the time was a prohibition on suing in the state's courts to collect outstanding fees.

41 *Id*. at 12 ("In most instances, state legislatures looked to work in concert with medical societies as the best mechanism for regulating the practice of medicine within their state.").

42 *Id.* at 18 ("The rugged individualism and anti-regulatory climate of the first half of the nineteenth century, combined with the democratization of medicine…led directly to what modern observers might find shocking: the wholesale collapse of medical regulation in the United States. Nearly every state repealed its penalties for the unlicensed practice of medicine, with Illinois leading the way in 1826, followed over the next quarter century or so by Alabama, Ohio, Mississippi, Georgia, Massachusetts, Maine, South Carolina, the District of Columbia, Maryland, Vermont, Connecticut, New York, Texas, Michigan, and, in 1852, Louisiana. Only New Jersey appears to have managed to avoid repealing its medical licensing laws throughout much of this period."); s*ee also* Richards, *supra* note 37, at 206 ("Those regulations that had been passed by state legislatures were repealed in the period from the early 1800s to the Civil War because of Jacksonian democratic notions of 'every man his own doctor' (and lawyer), combined with the poor organization of the professions.").

43 Johnson & Chaudhry, *supra* note 37, at 21 ("The 1861 onset of the Civil War represented a watershed moment in the practice of medicine, leading eventually to both a greater scrutiny of those who call themselves physicians and a higher regard for the enforcement of proper sanitation and public hygiene. From the time that hostilities commenced at Fort Sumter on April 12, 1861, to the final surrender at Appomattox Court House on April 9, 1865, more than 620,000 soldiers and countless number of civilians died in the conflict. Though the Civil War remains America's deadliest war, two-thirds of the deaths were said to be the result of medical illnesses such as typhoid and dysentery in grossly unsanitary encampments rather than at the end of a bayonet or a bullet.").

44 *See* Richards, *supra* note 37, at 209-10.

45 *Id.*; The actions of the NC Dental Board at issue in *North Carolina State Board of Dental Examiners v. FTC* relate to the regulation of the practice of dentistry, which involves significant infection control issues similar to medicine. *See* Jennifer L. Cleveland, et al., *Advancing Infection Control in Dental Care Settings: Factors Associated with Dentists' Implementation of Guidelines from the Centers for Disease Control and Prevention,* 143 J. Am. Dental Ass'n 1127, 1127-28 (2012) ("CDC published infection control recommendations for dentistry first in 1986 and again in 1993. These guidelines were developed partly in response to published reports regarding nine clusters of hepatitis B virus (HBV) transmission to patients from infected dental health care providers (DHCPs) during the 1970s and 1980s, a high prevalence of markers of past HBV infection among dentists and oral surgeons and transmission of HIV from an infected dentist to five patients. These guidelines focused on preventing transmission of blood-borne pathogens to DHCPs and patients through the use of standard precautions such as barrier precautions and the safe handling of sharp instruments."). States' dental laws and regulations address infection control issues in great detail. *See, e.g.*, Infection Control Manual, Ohio State Dental Board (Apr. 2011), http://www.dental.ohio.gov/icmanual.pdf.

46 *See* Johnson & Chaudhry, *supra* note 37, at 22 ("The reinstitution of a medical regulatory system in America can be traced to many factors, though perhaps the greatest of these was a general reassessment of what government regulation in the guise of licensing represented. Where once the licensing of physicians had been equated with 'power and privilege,' the concept now became more closely linked to a genuine effort at protecting the general public.").

47 *See* Law & Kim, *supra* note 1, at 731.

48 *See id.*; *see also* Johnson & Chaudhry, *supra* note 37, at 23. While lawyers have played an important role in society throughout American history, the legal profession was largely self-regulated in America until the 1920s. *See* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 Minn. L. Rev. 1147, 1161 (2009) ("In the 1920s, a movement began to produce court rules or statutes requiring all practicing lawyers to belong to state bar organizations. This allowed the organizations to collect fees, control (and limit) admission to the bar, and participate in the discipline of lawyers.").

49 *See* Law & Kim, *supra* note 1, at 723-24; *see also* Bona, *supra* note 4, at 31 ("Licensing is now pervasive, as about 50 occupations are licensed in all states and over 800 of them are licensed in at least one state.").

50 261 U.S. 165, 167 (1923).

51 272 U.S. 425, 427 (1926).

52 129 U.S. 114, 122 (1889).

53 *Id.* at 123.

54 *See* Opinion of Commission, *supra* note 24.

55 *See Recent Cases*, 127 Harv. L. Rev. 2122, 2129 (noting that the Fourth Circuit's opinion "has caused confusion about the degree to which selection methods are dispositive."); s*ee also* Edlin & Haw, *supra* note 4, at 1100 n.38.

56 N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d, 359, 376 (4th Cir. 2013) (Keenan, J., concurring).

57 *Id.*

58 *See, e.g.*, Ohio Rev. Code § 4715.02 (Ohio State Dental Board); Ohio Rev. Code § 4731.01 (Ohio State Medical Board);, Tex. Occ. Code Ann. § 252.001 (Texas State Board of Dental Examiners); *See also* Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. Health Care L. & Pol'y, 285, 290-91 (2010) (noting that modern American medical boards generally are dominated by physicians "appointed by the governor.").

59 N.C. Gen. Stat. § 90-22(b); *See, e.g.*, Okla. Stat. tit. 59 § 328.7 (Oklahoma State Board of Dentistry); S.C. Code Ann. § 40-15-20(B) (South Carolina Board of Dentistry); Cal. Bus. & Prof. Code § 6013.2(a) (Board of Trustees of the California State Bar).

60 *See, e.g.*, Ky. Rev. Stat. Ann. § 313.020(1) (Kentucky Board of Dentistry); Ingram Weber, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. Chi. L. Rev. 737, 767 (2012) ("State governors often appoint board members from a list of names recommended by licensed professionals."*); see also* Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. Health Pol. Pol'y & L. 587, 596 (2006) ("Although practices vary, many states appoint the members of such boards from lists of nominees provided by the professional or occupational group being regulated.").

61 Heumann, et al., *supra* note 37, at 7-8 ("Federalism accounts for the variance in regulatory structure and discretion of state boards around the country.").

62 *See* Recent Cases, 127 Harv. L. Rev. 2122, 2127-29 (2014). Both supporters and opponents of applying the state-action exemption to the NC Dental Board's actions have argued against making the method of selection of board members dispositive. *See* Brief for Petitioner at 59, N.C. State Bd. of Dental Exam'rs v. FTC, (No. 13-534) (2014) (arguing that the "particular method under state law for selecting market-participant officials is completely irrelevant under the state-action doctrine."); *see also* Edlin & Haw, *supra* note 4, at 1100 (arguing that that the Supreme Court should hold that competitor-dominated boards should be required to show that its anticompetitive actions are both (1) pursuant to the state's clearly articulated purpose to displace competition and (2) subject to active state supervision "regardless of how the board's members are appointed.").

63 While licensing boards may include a majority of market participants serving as members, these boards also typically have administrative staff, attorneys, and investigators available to assist them. *See* Heumann, *supra* note 37, at 8.

64 *See* Weber, *supra* note 60, at 755; *see also* Bona, *supra* note 4, at 45 ("Naturally, licensing boards typically consist primarily of members of the regulated occupation, as these individuals possess the best knowledge and expertise about how to regulate and discipline the licensed members.").

65 *See* Edlin and Haw, *supra* note 4, at 1144 (noting that "requiring state supervision for licensing boards that claim state-action immunity creates the potential for sweeping changes to regulations affecting over a third of the nation's workforce.").

66 Brief of Amici Curiae State of West Virginia and 22 Other States in Support of Petitioner at 8-9, N.C. State Bd. of Dental Exam'rs v. FTC (No. 13-534).

67 Brief of Amici Curiae National Governors Association, et al., in Support of Petitioner at 30, N.C. State Bd. of Dental Exam'rs v. FTC (No. 13-534).

68 Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J. L. & Pub. Pol'y 931, 1007 (2014) ("Regulators are, therefore, advised to be extremely careful. Those who think of themselves as public officials might find that they are sadly mistaken, all the more sadly to the extent that they find themselves having to pay out-of-pocket damages to their regulatory victims.").

69 John E. Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 1040-41 (1986); s*ee also* Havighurst, *supra* note 60, at 599-600 ("There is no familiar institutional model for providing state oversight of its licensing boards, however, and it would seem awkward for a federal court to prescribe added supervision to supplement a state board's normal political accountability to the legislature, the governor, and the courts. Indeed, for a federal court to declare accountability of the latter kinds inadequate under federal law would seem far more offensive to federalism values than merely expecting a state legislature to be clear about it if it really wants to authorize a state board to restrict competition in some significant way.").

70 *See* Weber, *supra* note 60, at 773 (noting that states choose to utilize professionals on regulatory boards in part "because they are cheaper than bureaucratic agencies and reduce the attention legislatures must give to creating regulations themselves.").

71 *Id.* at 740 ("Real dangers to consumers can arise in these markets. Obstructing the ability of licensing boards to regulate services when no alternative regulatory regime is in place invites harm.").

72 U.S. Const. amend. X; Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905); Sawicki, *supra* note 58, at 289; *see generally* Robert Bork, The Tempting of America (1990) ("Leaving the states as the sole regulators of areas left beyond federal power is the constitutional doctrine of federalism.").

73 *See* Sawicki, *supra* note 58, at 289.

74 Hillary Greene, *Articulating Trade-Offs: The Political Economy of State Action Immunity*, 2006 Utah L. Rev. 827, 834 (2006). The FTC has a long history of hostility toward state-based occupational licensing. *See generally* Carolyn

Cox & Susan Foster, FTC, Bureau of Econ., The Costs and Benefits of Occupational Regulation (1990).

75 Greene, *supra* note 74, at 828.

76 *See* Weber, *supra* note 60, at 739-40 (noting that "the state[-]action doctrine originates in a concern for federalism, not efficiency.").

77 Greene, *supra* note 74, at 827 (noting that the "central legal issue" related to the state-action doctrine is "federalism" and "not whether federal competition policy would achieve superior outcomes versus a state regulatory scheme.").

78 Weber, *supra* note 60, at 740.

79 *But see* Sawicki, *supra* note 58, at 295 (explaining that the primary goal of, and justification for, professional discipline is public protection.).

80 N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 377 (4th Cir. 2013) (Keenan, J., concurring).

81 One antitrust expert has questioned the value of the active supervision requirement altogether because it is inconsistent with the "economics of federalism." Frank H. Easterbrook, *Antitrust and the Economics of Federalism,* 26 J.L. & Econ. 23 (1983).

82 N.C. Gen. Stat. § 90-22(b).

83 N.C. Gen. Stat. §. 93B-16(b).

84 N.C. Gen. Stat. §§ 138A-22(a), 138A-28(a), 138A-45.

85 N.C. Gen. Stat. § 120-76(1)(d).

86 N.C. Gen. Stat. §§ 93B-16(c), 143-300.3.

87 N.C. Const. art VI, § 7.

88 *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

89 *See* Havighurst, *supra* note 60, at 599.

90 *See generally* Edlin and Haw, *supra* note 4, at 1154-55; *see also* Bona, *supra* note 4, at 51.

91 N.C. Gen. Stat. § 90-22(a).

92 N.C. Gen. Stat. 90-29(a).

93 N.C. Gen. Stat. § 90-29(b)(2).

94 *See* Weber, *supra* note 60, at 775 ("[T]he North Carolina legislature declared that only licensed dentists are permitted to remove stains from the human teeth. It delegated to practicing dentists the power to implement this and other rules on the theory that state-licensed dentists were best situated to regulate the dental profession. The Board exercised its judgment, as contemplated by the legislature, and implemented the legislature's rule by prohibiting nondentists from removing such stains in the form of teeth whitening. Allowing the FTC to use federal antitrust laws to prevent the enforcement of the Board's rule would interfere with the ability of North Carolina to regulate within its borders, thereby undermining the federalism principle animating *Parker.*").

95 Parker v. Brown, 317 U.S. 341, 350-51; *see also* Bork, *supra* note 9, at 350 (noting that *Parker*'s premise, that where a restraint upon trade is the result of a valid government action, as opposed to a private action, no violation of federal antitrust laws can be found, is "unassailable.").

The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*

*By Alexander Volokh***

Introduction

In recent years, state and federal courts have been ruling against private regulatory organizations on a number of theories. This Article explores this new private-regulation skepticism and the theories that underpin it.

This Article focuses on three main sources of law: the Due Process Clause, non-delegation doctrine, and antitrust law. To illustrate the doctrines, it follows five examples from recent cases and recent news of regulation by Amtrak, the North Carolina Board of Dental Examiners, the Mississippi Board of Pharmacy, the Texas Boll Weevil Eradication Foundation, and landowners in Texas water quality protection zones.

The Due Process Clause is a potential limit on the private exercise of regulatory power, especially if the regulators and the regulated parties compete with each other. Federal non-delegation doctrine, by contrast, is unlikely to be much help in these challenges, though some states, like Texas, have vibrant non-delegation doctrines that not only are stricter than the federal one but also strongly distinguish between public and private delegates. Some courts don't clearly distinguish between non-delegation and due process. I argue that they should, as the two doctrines serve very different purposes.

Finally, federal antitrust law is available to guard against the anticompetitive dangers of "industry regulating itself." Excessive conflicts of interest decrease the chance that a court will find state action immunity from antitrust law, and increase the chance that a court will find a substantive antitrust violation because of structural anticompetitive factors. Additionally, regulators that are sufficiently independent from state government are less likely to be insulated from liability by sovereign immunity. This new regulation skepticism thus provides several useful tools to challenge private regulation.

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I. The Problem of Private Regulation

A. *Private Regulation and Its Discontents*

Using private entities to achieve regulatory goals has been a long-standing American practice. The most salient examples for lawyers are our own professional accreditors—state bars and the American Bar Association—but examples can be found across the entire economy,1 and the growth of the regulatory state, combined with resource constraints for governments, suggests that the phenomenon will continue.2

On the one hand, relying on the private sector to regulate its own ranks seems to offer an advantage because lawyers, doctors, and the like know more about their own professions than the government does. It's a strategy that has appealed to both New Deal corporatists and modern-day pro-business advocates.

On the other hand, "industry regulating itself" has its disadvantages from both an external and an internal perspective. From the outside, this sort of "self-regulation" seems to detract from the regulatory power of government. Perhaps more interestingly, from the inside, it's apparent that "industry" isn't a monolith. "Industry regulating itself" really means "some people in industry regulating other people in industry," "people regulating their own competitors," or perhaps even "incumbents regulating potential entrants." This perspective invites one to fear self-interested bias and anticompetitive behavior.

In recent years, courts seem to have grown increasingly skeptical of these private regulatory delegations. Interesting cases have come out of Germany,3 India,4 and Israel,5 but this Article will focus on what U.S. state and federal law has to say on the matter. The most relevant doctrines that recently have been used to question private regulatory delegations have been (state or federal) non-delegation doctrine, the Due Process Clause, and federal antitrust law.6

The doctrines are mostly old, but their recent use against private delegations of all sorts is striking: The cases cutting the other way, chiefly in the context of the civil rights liability of private prisons, get more press.7 The Texas Supreme Court has developed its own theory of private delegation. The D.C. Circuit did the same—just in 2013. Also in 2013, the Fourth Circuit tightened up on antitrust immunity for a state licensing board. Moreover, these courts have characterized the relevant regulators as "private," even when one might have thought they were public.

This Article explains the contours of these emerging doctrines and their roots in past case law. The rest of this Part outlines five examples that I will follow throughout the Article, and briefly shows the complexity of the public-private distinction. Part II discusses challenges under the Due Process Clause. Part III discusses non-delegation doctrine. The Article also will explain how not all courts are clear on the difference between due process and non-delegation theories. I argue that this commingling is unfortunate, and that non-delegation and due process reasoning are very different animals that ought to be kept analytically separate.

Part IV discusses how private regulatory delegation can run afoul of federal antitrust law. Usually, state regulation is immune from federal antitrust law under antitrust's state action immunity, but relying on private entities to do the regulation can make the action just private enough to lose the immunity.

B. *Five Examples*

Throughout this Article, I will follow a few examples, some pulled from current legislative activity and some pulled from recent cases, to see how they would fare under the various doctrines.8

1. *Amtrak*

Amtrak is a passenger rail corporation created by federal statute in 1970. It's a for-profit corporation9 that's run by presidential appointees and in which the federal government holds most of the stock.10 The Passenger Rail Investment and Improvement Act of 2008 requires the Federal Railroad Administration (FRA) and Amtrak to "jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations."11 These performance measures are used, among other things, as a basis for the Surface Transportation Board (STB) to assess damages against railroads if "on-time performance" or "service quality" is substandard for two consecutive quarters.12

If Amtrak and the FRA can't agree on performance measures, they "may petition the [STB] to appoint an arbitrator to assist [them] in resolving their disputes through binding arbitration."13 Amtrak thus has equal authority with the FRA on this issue; no metrics or standards can be developed unless they agree, or appoint a binding arbitrator.

2. *The North Carolina Board of Dental Examiners*

The North Carolina Board of Dental Examiners, composed almost entirely of practicing dentists who are elected by practicing dentists, regulates the practice of dentistry.14 It's illegal to practice "dentistry" in North Carolina—a term that includes teeth-whitening services—without a license from the board.15 The Board sent dozens of letters to non-dentist providers of teeth-whitening services, asserting that their activities constituted the illegal practice of dentistry and ordering them to cease and desist. As a result, non-dentist teeth whiteners were successfully excluded from North Carolina.16

3. *The Mississippi Board of Pharmacy*

The Mississippi Board of Pharmacy, composed entirely of practicing pharmacists appointed by the Governor from a list submitted by pharmacy associations,17 regulates the practice of pharmacy and the distribution of drugs and devices.18 In 2011, it was given regulatory authority over pharmacy benefit managers. Pharmacy benefit managers administer prescription drug benefits for HMOs and others; they negotiate discounts with pharmacies and manufacturers, and thus are the market adversaries of pharmacists, competing with them for a share of the profits arising out of the prescription drug business.19

The statute requires that pharmacy benefit managers, as a condition of doing business in the state, disclose their financial statements to the state Board of Pharmacy.20 These financial statements are to include balance sheets, income statements, and "[a]ny other information relating to the operations of the pharmacy benefit manager required by the board under this section," though pharmacy benefit managers aren't required to disclose "proprietary information."21

Also, the Board recently attempted to institute a regulation imposing a fiduciary duty on pharmacy benefit managers, but ultimately backed down.22

4. *The Texas Boll Weevil Eradication Foundation*

The Texas legislature has created a nonprofit Boll Weevil Eradication Foundation, which operates boll weevil eradication programs and charges growers for the cost.23 Growers vote to decide whether to establish a boll weevil eradication zone and (if they choose to establish a zone) elect a member to the Foundation board.24 The board determines assessments on growers in each zone, which growers then have to approve by a two-thirds referendum vote.25

The Foundation wields significant power. It determines what programs to conduct.26 It imposes penalties for late payment of assessments: A grower who is sufficiently in arrears is required to destroy his crop or have it destroyed at his cost by the Department of Agriculture, and failing to pay or destroy the crop is a misdemeanor.27 Foundation representatives can enter any private property subject to eradication without the owner's permission for any purpose under the statute, including "the treatment, monitoring, and destruction of growing cotton or other host plants."28 The Foundation also has rulemaking authority.29

The Commissioner of Agriculture retains some authority: For instance, the Board requires Commissioner approval to change the number of board positions or change zone representation on the board, the Commissioner can exempt a grower from excessive penalties, and the Board can only spend money on Commissioner-approved programs.30

5. *Texas Water Quality Protection Zones*

A provision of the Texas Water Code allows landowners to establish "water quality protection zones" in some cities' extraterritorial jurisdictions.31 By establishing such a zone, landowners exempt themselves from certain regulations and create their own water quality plan.32

Landowners owning 500 to 1000 contiguous acres can't designate a zone without approval from the state agency, but owners of more than 1000 contiguous acres can designate a zone without agency approval.33 As to the water plan, the state agency can't reject a plan unless it "finds that implementing the plan will not reasonably attain" either of the two listed water quality objectives: "(1) . . . maintain[ing] background levels of water quality in waterways; or (2) . . . captur[ing] and retain[ing] the first [one and a half] inches of rainfall from developed areas."34 Once the zone is designated, the municipality can't enforce any ordinances or regulations in the zone that are inconsistent with the land use and water quality

plans.35

C. *What Is "Private"?*

The Texas property owners above are of course private, but not all the other examples seem self-evidently so. Amtrak was created by federal statute, has presidentially appointed board members, is a "state actor" for purposes of constitutional rights, and the federal government holds most of its stock.36 The North Carolina Board of Dental Examiners is labeled public by statute.37 The Mississippi Board of Pharmacy members are gubernatorial appointees. The Texas Boll Weevil Foundation is labeled a "state agency," "governmental unit," and "governmental body" for various purposes.38

And yet, as we'll see, various courts have held that these entities are private, at least for some purposes. The public-private distinction is fuzzy, and statutory labels aren't always dispositive:39 For example, federal law states that Amtrak "shall be operated and managed as a for-profit corporation."40 The members of the North Carolina Board of Dental Examiners all have private dental practices and are only accountable to other dentists.41 The Texas Boll Weevil Foundation board members are likewise "private interested parties."42 The Mississippi Board of Pharmacy could similarly be considered private for some purposes: its members are in private practice, and the governor is restricted to choosing from lists submitted by trade associations.

The bottom line is that private regulators are vulnerable on a number of fronts. Moreover, some regulators might be surprised to find out that they're "private." Courts might not invalidate the entire agency, but they might prevent it from regulating in certain ways, and—depending on the doctrine—individual regulators might be held liable for damages. Regulators who aren't sure that they're unambiguously public might want to exercise greater caution: one of the new wave of skeptical courts might find them to be private and, as private actors, they might find themselves disempowered or, perhaps worse for them, liable.

II. The Due Process Clause

The Due Process Clause is a plausible avenue for challenging certain private delegations. There's no due process doctrine that's specific to private parties, but delegation of power plus pecuniary bias is a due process faux-pas, and it is easy to imagine (or presume) that such bias will be more likely if the delegate is private. Thus there are many Supreme Court cases, some fairly recent, that strike down private delegations on due process grounds.

Under current law, Amtrak's exercise of regulatory authority violates due process; the North Carolina Board of Dental Examiners's driving out non-dentist teeth whiteners doesn't, and neither does the Texas homeowners' establishing a water quality zone. As for the Mississippi Board of Pharmacy's regulation of pharmacy benefit managers and the Texas Boll Weevil Foundation's regulation of cotton growers, whether there's a due process violation depends on what actions these boards undertake in the course of their duties.

A. *The "Private Due Process" Doctrine*

1. *The* Eubank-Thomas Cusack-Roberge *Synthesis*

Delegating coercive power to private parties has long been held to be a potential violation of due process. In *Eubank v. City of Richmond*,43 the Supreme Court examined a city ordinance allowing the owners of two thirds of the property abutting a street to establish a "building line" beyond which construction would be illegal.44 The Supreme Court held that this violated due process:45

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously . . . .
>
> This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.46

In other words, there was no protection against the property holders' using their coercive power arbitrarily or to serve their own purposes.

One shouldn't read *Eubank* too broadly: A few years later, in *Thomas Cusack Co. v. City of Chicago*,47 the Supreme Court *upheld* a city prohibition on billboards, where the prohibition could be waived on any block if the owners of a majority of the property fronting the street consented.48 Why didn't this case fall within *Eubank*? Because *Eubank* involved an *unregulated* status quo and property owners *regulating* their fellows, while *Thomas Cusack* involved a *regulated* status quo and property owners *deregulating* their fellows.49 This made all the difference:

> The [petitioner] cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property.50

At first glance, *Thomas Cusack* seems to deprive *Eubank* of much of its force. Many ordinances that run afoul of *Eubank* could be salvaged simply by switching the legal baseline around and making them into waivable prohibitions. In *Eubank*, perhaps the city of Richmond could have established an extremely conservative building line (i.e., extremely far from the street), and voting among property owners would have progressively relaxed the requirement.

But perhaps, in reality, it's *Thomas Cusack* that should be read narrowly. In *Washington ex rel. Seattle Title Trust Co. v. Roberge*,51 a city ordinance allowed the construction of a "philanthropic home for children or for old people" in a particular residential district with the written consent of the owners of two thirds of the property within 400 feet.52 In language reminiscent of *Eubank*, the Court wrote that it violated due process to give coercive power over the property owner to a minority of property owners who could dissent or abstain "for selfish reasons or arbitrarily," "uncontrolled by any standard or rule prescribed by legislative action" and without

any "provision for review."53 What distinguished this from *Thomas Cusack*, which looks similar on its face? As the Court saw it, the billboards had been found to be a nuisance,54 while there was no such showing for this "home for the aged poor."55

What emerges thus looks like a general rule that property owners can't regulate other property owners—with an exception if, as in *Thomas Cusack*, they're actually *deregulating* against the baseline of a general prohibition of a nuisance. This general principle was also on display in *Carter v. Carter Coal Co*.56 In *Carter*, the Supreme Court examined the Bituminous Coal Conservation Act of 1935. The Act allowed the producers of two thirds of the coal in any "coal district," negotiating with unions representing a majority of mine workers, to set wages and hours for all coal producers in the district.57 The Supreme Court's decision, against the background of the preceding cases, shouldn't be surprising:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . . The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question [such as *A.L.A. Schechter Poultry Corp. v. United States*,58 *Eubank*, and *Roberge*.]59

2. *The Mandatory-Discretionary Distinction*

Several constitutional law doctrines didn't survive the 1930s, but the due process rationale for striking down delegations of regulatory authority to private parties—in particular competitors—remained alive and well. *Eubank* was cited as good law in Supreme Court opinions three times (though twice in dissent) in the 1970s,60 and *Roberge* was cited as good law in a concurring opinion as recently as 2010.61 The Supreme Court has cited *Thomas Cusack* (which went against the claimant) as good law only once recently.62 The case citing *Thomas Cusack* is an important case, as discussed below,63 but *Eubank* and *Roberge* remain viable.64 The newer cases are essentially consistent with the older *Eubank-Thomas Cusack-Roberge* synthesis.

A generation after the early cases, in 1972, the Supreme Court decided *Fuentes v. Shevin*.65 *Fuentes* concerned state statutes "ordering state agents to seize a person's possessions, simply upon the *ex parte* application of any other person who claims a right to them and posts a security bond."66 The Court established that the possessor's interest was a property interest protected by procedural due process,67 and that due process was violated because of the lack of a predeprivation hearing for the possessor.68 But, in the portion of its opinion rebutting the claim that this was an "extraordinary situation[]" justifying a departure from the requirement of a predeprivation hearing,69 the Court wrote:

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.70

The Court added, in a footnote, that "[t]he seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant" (evidently to counter the concern that its holding might now require predeprivation hearings in those situations): Among other distinctions, "the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause."71

Fuentes thus sets up a mandatory-discretionary distinction, which one can trace through its progeny of cases about garnishment and prejudgment attachment procedures.72 This is consistent with the old cases: in *Eubank*, property owners could *force* establishment of a building line; in *Roberge*, they could *force* a waiver of the rule against old people's homes; in *Carter Coal*, coal producers could *force* a binding wage through their collective bargaining activity.73 In all these cases, the due process problem was that they were able to force an alteration in the legal regime without any discretion remaining in government and without any protection against their personal biases.74

The Supreme Court's decision the following year in *Gibson v. Berryhill*75 was also consistent with this principle. The Alabama Board of Optometry sued Lee Optical Co. and its employees in Alabama state court, charging that they were engaged in the "unlawful practice of optometry" by working for a corporation rather than being self-employed.76 The state court agreed with the Board and "enjoined Lee Optical both from practicing optometry without a license and from employing licensed optometrists."77 When the state court proceedings were over, the Board moved to hold delicensing proceedings against the individual optometrists.78 The optometrists sued to enjoin the Board proceedings on the grounds (among others) that the Board was impermissibly biased.79 After all, by statute, the Board was entirely composed of self-employed optometrists.80 The Supreme Court agreed: "[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes," whether as judges or as administrative adjudicators.81

Gibson didn't invalidate the entire Board; it made no pronouncements on the Board's ability to proceed by lawsuit in state court against optometrists or corporations it believed were unlawfully practicing optometry, which it had just done before the attempted delicensing proceedings. In light

of *Fuentes*, this makes sense: Running your own potentially biased tribunal makes your victim fully subject to your bias, like the target of your writ of replevin in *Fuentes*. Suing someone in court, on the other hand, has no coercive effect beyond forcing the opposing party to appear to answer your charges. That's an important coercive effect, to be sure, but at least the entity is limited to making a *request* for government action—a request that the court may deny.82

The same distinction from *Fuentes*, between giving private parties *mandatory* control over coercive processes and merely allowing them to petition the government to (in its *discretion*) coerce private parties, seems to continue to be key in the recent cases, even if the Supreme Court hasn't been very clear in its reasoning. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,83 the Supreme Court examined a scheme where car manufacturers had to get the approval of the New Motor Vehicle Board before opening a new dealership, but only if a nearby incumbent franchisee protested.84 The Supreme Court upheld the scheme, though the portion dealing with private delegation had little depth of analysis. Here is the entirety of its private delegation analysis:

> Appellees and the dissent argue that the California scheme constitutes an impermissible delegation of state power to private citizens because the Franchise Act requires the Board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest.
>
> The argument has no merit. Almost any system of private or quasi-private law could be subject to the same objection. Court approval of an eviction, for example, becomes necessary only when the tenant protests his eviction, and he alone decides whether he will protest. An otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection.85

The Court ended this analysis with a citation to *Thomas Cusack*, a case that does not appear relevant here. There was no blanket prohibition of car dealerships that incumbents could waive, and in any case car dealerships aren't like nuisances. Rather, the status quo, if there is no protest, is that a car dealership is allowed. In this respect, it's more like *Eubank* (no building line unless some property owners petition for one)86 or *Carter Coal* (no binding wages unless some producers and unions agree to them).87

Nonetheless, read in light of the mandatory-discretionary distinction, the result makes sense. Incumbent auto dealers couldn't unilaterally shut down entrants: all they could do was force the New Motor Vehicle Board to decide whether to allow a new dealership. And it isn't as though Board consideration is a meaningless rubber stamp: The Board actually allowed the new dealership in 99% of cases.88 So the incumbent auto dealers were more in the position of private parties authorized to sue in court (recall, in the Court's quote above, a tenant's power to force court consideration of his eviction). The incumbent auto dealers' only coercive power was to delay matters while their protest was pending.89

The Supreme Court relied on the weakly justified private delegation holding in *New Motor Vehicle Board* in an even more under-reasoned private delegation holding in *Hawaii Housing Authority v. Midkiff*.90 The Hawaii Legislature enacted a statute under which certain tenants could ask a state agency to condemn the property on which they lived; if the state agency, after a public hearing, decided that condemnation would serve the statute's public purposes, it could condemn the property and could then sell it to tenants who had applied for fee simple ownership.91 Famously, the Supreme Court upheld this scheme against a Takings Clause challenge, holding that the condemnation was for a "public use" because it was "rationally related to a conceivable public purpose."92 Less famous, though, is the Court's private-delegation-based due process holding, buried in a footnote, the entirety of which runs as follows:

> We similarly find no merit in appellees' Due Process . . . Clause argument[]. The argument that due process prohibits allowing lessees to initiate the taking process was essentially rejected by this Court in [*New Motor Vehicle Board*].93

The best way to explain this result is, again, via the mandatory-discretionary distinction. Hawaiian tenants couldn't force a condemnation, they could only force the state agency to *determine* whether to condemn land. The actual decision whether to condemn rested with the agency itself, based on whether the agency believed a condemnation would serve the Act's public purposes.94 In this sense, the private petitioners had no greater delegated coercive power than any litigant who can set legal machinery in motion.95

The best reading of these cases thus suggests that the basic *Eubank* due process rule against delegating mandatory authority to private parties without protection against self-interested decisionmaking continues to this day. Lower federal court cases96 and state cases97 bear this out.

3. *Application*

Now let's apply this framework to our examples. The Amtrak delegation is probably invalid under the Due Process Clause because Amtrak can unilaterally impose a disadvantageous regulatory regime on its market adversaries.98 I discuss this case at greater length below in connection with the D.C. Circuit's Amtrak case.99 Challengers could enjoin Amtrak's conduct, as well as potentially obtain money damages under *Bivens*100 against the Amtrak officials involved in the formulation of the performance measures.101

The North Carolina Board of Dental Examiners didn't create the rule against non-dentist teeth-whiteners; that rule is statutory.102 Obviously the private-bias arguments against the Board do not apply to the state legislature. Nor can the Board expel non-dentist teeth-whiteners from the market except by suing them in court; they're saved by the mandatory-discretionary distinction. At that point, it's the court, not the Board, that rules that the non-dentists are violating the law.103 But—though the Board's actions in connection with driving out the non-dentist teeth whiteners don't violate due process—it is still possible that the Board could violate due process through other things it does, like its own disciplinary hearings against dentists.104

Whether the Mississippi Board of Pharmacy is violating due process depends on what they do and how. If turning

over sensitive business information were required by a general statute, then—as with the dental examiners—the Board of Pharmacy's pecuniary bias wouldn't seem relevant unless the Board adjudicates violations of the rule in its own tribunal. But because the statute empowers the Board to demand "[a]ny other information" relating to pharmacy benefit managers' operations,105 one can challenge the Board's bias when such extra information is demanded. Similarly, the proposed fiduciary duty for pharmacy benefit managers106 would have been a Board regulation. Perhaps one could then bring a due process challenge to the rule based on the Board's bias even in the case of in-court enforcement,107 and obtain money damages under 42 U.S.C. § 1983 against the board members. But this is less clear because some Supreme Court cases have suggested that potential pecuniary bias in adjudication is easier to challenge than potential pecuniary bias in rulemaking.108 The same is true of enactments by the Texas Boll Weevil Foundation.109

The property owners in the Texas water quality protection zones present a much easier case. They aren't violating due process, as (1) they're probably not state actors,110 and (2) even if they were, they don't have coercive authority over other landowners, so no one suffers a deprivation of "life, liberty, or property" within the meaning of the Due Process Clause.111

It's clear, then, that the Due Process Clause has the potential to be a strong tool against private regulatory delegation. Biased rulemakers can be challenged, unless their role is limited to enforcing commands they didn't create by suing violators in courts they don't operate.

B. *No Private Due Process Doctrine*

The reality about due process, though, is that there's no federal doctrine specific to private parties.112 Indeed, some of the classic cases of this line of doctrine involve *public* officials.113 For instance, in *Tumey v. Ohio*,114 the offender was a village mayor who also sat as a judge in prohibition-related cases (this was in the dry '20s) and who was impermissibly biased because his costs were only reimbursed by the defendant in case of a conviction.115 In *Ward v. Village of Monroeville*,116 the offender was another village mayor who also sat as a traffic court judge; his bias arose because the traffic fines he assessed as judge contributed a substantial portion of the village finances that he would be able to use as mayor.117 And in *Aetna Life Insurance Co. v. Lavoie*,118 the offender was an Alabama Supreme Court Justice whose rulings on a case could directly affect a pending case in which he was a litigant.119

Thus, if the Due Process Clause applies with special force to private delegations, it's only to the extent that bias is more obviously present in such cases.120 This will certainly be true if private parties are given unconstrained discretion: In such cases, we can probably assume that the private parties will seek their individual gain. Public officials, on the other hand, are often presumed to be public-minded.121 But cases like *Tumey* and *Ward* show that this presumption can be overcome even without a showing of *actual* bias122—for instance by showing the details of public employee or agency compensation arrangements.123

III. Non-Delegation Doctrine

Non-delegation doctrine is a separation of powers doctrine based on the idea that legislative power is vested in the legislative branch and that there are limits to how much (if any) of it the legislature can give away. At the federal level, non-delegation doctrine isn't terribly strict—all Congress needs to do to avoid being held to have delegated legislative power is to provide an "intelligible principle" to guide the delegate's exercise of power. Nor is there any difference between public and private delegations.

So non-delegation doctrine seems to have much less bite than the Due Process Clause in potentially controlling private delegations of regulatory power (though there's a chance that, as a matter of constitutional avoidance, non-delegation concerns might affect the interpretation of the statute).124 But this may be different at the state level: Some states have non-delegation doctrines that are stricter than the federal one; these are discussed in Subpart B. The most interesting state doctrine comes from Texas, which recently has devised its own strict non-delegation doctrine exclusively for *private* delegations.

Moreover, because the Due Process Clause is also relevant to delegations, the common presence of the word "delegation" leads many courts to indiscriminately mix non-delegation and due process ideas. Subpart C explains this commingling. The most recent offender is the D.C. Circuit, in a case concerning the delegation of regulatory power to Amtrak, but the confusion has possibly existed since 1936 and infects many state-level doctrines.

The moral of non-delegation doctrine is that an attack under the federal doctrine is likely to lose, except possibly in the D.C. Circuit—or in other circuits, to the extent they follow the D.C. Circuit's lead. All five of our examples are probably valid under the permissive federal non-delegation doctrine. Many more private delegations might be vulnerable under a Texas-style private non-delegation doctrine—obviously, the two Texas examples that have in fact been struck down under the doctrine, though the other examples are vulnerable as well. Note, though, that Texas is an outlier among states in having a doctrine that's so strict and that's limited to private parties.

A. *At the Federal Level*

Non-delegation doctrine in the federal Constitution derives from the Vesting Clause of Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States."125 This language has long been interpreted to mean that the legislative powers—being vested in Congress—can't be transferred to anyone else,126 though this reading isn't an obvious one.127 Clearly rights that "vest" aren't usually inalienable: consider vested property rights128 or vested stock options.129

This separation of powers doctrine hasn't been explicitly used very often: The Supreme Court has used it only twice to strike down a federal statute, both times in 1935.130 Nonetheless, the doctrine plays a more significant role under the radar than it might seem: A Supreme Court majority in 1974 and a plurality in 1980 used it as an avoidance canon to save statutes from unconstitutionality by adopting narrowing

constructions,131 and Cass Sunstein argues that the doctrine continues to play an important role in this way.132 The basic doctrinal test has been the same since 1928: Congress must provide an "intelligible principle" to guide the delegate's discretion.133 An intelligible principle makes the difference between, on the one hand, a (forbidden) delegation of legislative power, and on the other hand, a (permitted) delegation of gap-filling power, which is essentially executive.

The structure of non-delegation doctrine suggests that it should be irrelevant whether the recipient of the delegation is public or private: the focus is whether Congress has given up too much power, not to whom it's given the power.134

True, in 1935, the Supreme Court expressed itself somewhat negatively about broad private delegations:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.135

But this was dictum,136 and it was 1935. The language doesn't question private delegation as such, only extremely broad private delegation. Further, because the case went on to strike down the delegation based entirely on the delegation to the President (without reference to the participation of private industry),137 it's not clear that the public-private distinction played any role.

The existence of administrative procedures and judicial review has occasionally been used to provide an intelligible principle,138 and these tend to be less common when delegates are private.139 Perhaps privateness should make some difference in how the doctrine plays out in the cases, but that doesn't require a special doctrine for private delegations.140

And indeed, in practice the public-private distinction hasn't much mattered in the federal non-delegation cases. In *Currin v. Wallace*,141 the Supreme Court examined a challenge to the Tobacco Inspection Act of 1935.142 The Act was designed to provide "uniform standards of classification and inspection" of tobacco, without which "the evaluation of tobacco [would be] susceptible to speculation, manipulation, and control" and "unreasonable fluctuations in prices and quality determinations . . . ."143 Under the Act, the Secretary of Agriculture was authorized to "designate those markets where tobacco bought and sold at auction or the products customarily manufactured therefrom move in commerce"; the result of a designation was that "no tobacco [could] be offered for sale at auction [at such a market] until it [had] been inspected and certified by an authorized representative of the Secretary according to the established standards."144

But the Act contained a delegation of discretion to the regulated industry: The Secretary was not to designate a market "unless two-thirds of the growers, voting at a prescribed referendum, favor[ed] it."145 Private industry thus held the "on-off" switch for regulation.

The Supreme Court upheld this delegation. First, it made a few preliminary comments:

- "Similar conditions are frequently found in police regulations. [*Thomas Cusack*.]"146
- "This is not a case where a group of producers may make the law and force it upon a minority . . . . [*Carter Coal*.]"147
- This was also not a case "where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners. [*Roberge*.]"148

These cases cited—*Thomas Cusack*, *Carter Coal*, and *Roberge*—are all due process cases.149 Perhaps citing the due process cases in a non-delegation opinion was somewhat sloppy, as non-delegation and due process cases aren't interchangeable, for reasons explained below;150 but in any event, this much is dictum.151

The Court held: "Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions."152 In this sense, the relevant distinction was one stated in *J. W. Hampton, Jr., & Co. v. United States*:153

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.154

One may quarrel with the theory here. In *Panama Refining Co. v. Ryan*,155 the President also held an on-off switch—he could decide whether to prohibit (as a matter of federal law) the shipment of oil in excess of permitted amounts under state law.156 And his discretion in choosing whether to flip the switch had no constraint, except for a hodgepodge of vague and conflicting policy statements in the preamble of the statute.157 If that sort of unconstrained delegation were valid, the *Panama Refining* Court said, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function."158 But the private tobacco growers' discretion in flipping this particular on-off switch was just as unconstrained, if not more so; they didn't even have the minimal constraint of a statement of policy, and on the contrary could have voted based on whim or (more likely) private interest.

So maybe *Currin* was wrong given the doctrine as it stood in 1939; or maybe it implicitly overruled *Panama Refining*. But the important thing is that the *Currin* Court treated the two on-off switches identically; the power to flip

a regulatory on-off switch isn't a legislative power, whether the switch is flipped by "the decision of an [e]xecutive" or "a popular vote of the residents of a district to be affected by the legislation."159 The result is that public and private delegations are both judged by the same "intelligible principle" standard160—even though the occasional lower court decision will at least hint that private delegations are more problematic.161

Let's turn to the examples noted in Part I.162 Most of the examples are state delegations, which aren't subject to the federal non-delegation doctrine, so let's assume that the identical programs were passed by Congress;163 or let's assume that the programs occur in states with vesting clauses and non-delegation doctrines identical to those found in federal constitutional law.

These examples mostly have sufficient intelligible principles to protect them against a federal non-delegation challenge. Amtrak is supposed to "be operated and managed as a for-profit corporation."164 This principle is general, but the Supreme Court has made it clear that general language can be "intelligible" enough for purposes of non-delegation doctrine.165

The other examples fare similarly. The North Carolina dental board authorizes regulation of dentistry "in the public interest"166—pathetic, but welcome to non-delegation doctrine.167 The Texas Boll Weevil Eradication Foundation, as the dissenting Justices point out, "contains relatively comprehensive standards to guide both the Commissioner of Agriculture (a statewide elected official) and the Foundation in their joint efforts to execute the legislative mandate to 'suppress and eradicate boll weevils and other cotton pests.'"168 And the Texas statute authorizing water quality protection zones, as the Texas Supreme Court acknowledged, "provides fairly detailed statutory standards to guide landowners in formulating their initial water quality plans" (though not as many standards as the court would have liked).169 Landowners in these zones also can't implement their own water quality plans and suspend the operation of municipal ordinances unless the state agency determines that their plans reasonably can be expected to maintain background levels of water quality in waterways or capture and retain the first one and half inches of rainfall from developed areas.170 Of the five examples, only the Missisippi board of pharmacy seems to lack an intelligible principle for licensing pharmacy benefit managers.171

B. *In the States*

Because the federal non-delegation doctrine derives from Article I of the federal Constitution, which only discusses the legislative powers of the *federal* government,172 it has no applicability to state delegations. Various states, however, have their own non-delegation doctrines. Mississippi's doctrine is about as loose as the federal one; Mississippi courts are "committed to a liberal rule governing the delegation of legislative functions";173 "[t]he essential is that the statute delegating the power must reasonably define the area in which the administrative agency operates and the limitations upon its powers."174 But other states' non-delegation doctrines are stricter than the federal one.175 Gary Greco lists 18 states that (as of 1994) had relatively strict non-delegation doctrines: Arizona, Florida, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and West Virginia.176 Some states, like Florida177 and Oklahoma,178 clearly ground their doctrines in separation of powers concerns;179 other states, like Arizona, have non-delegation doctrines that don't clearly distinguish between separation of powers concerns and due process concerns, as discussed later in this Article.180

Some states, like Iowa,181 Minnesota,[182] Pennsylvania,183 and South Carolina,184 have non-delegation doctrines, based on their state constitution's vesting clauses, that specifically impose some limits on delegations to private parties.185 Perhaps the most interesting such state is Texas, which (more recently than Greco's article) came up with a new non-delegation doctrine, based on the vesting clauses of the Texas constitution, specifically to deal with private delegations.186 The first use of this doctrine was to declare the structure of the Boll Weevil Eradication Foundation illegal.187

First, the Court established that the Boll Weevil Eradication Foundation was private. This wasn't obvious, as "the statutory provisions as to governmental powers suggest both public and private attributes."188 The court listed the public factors:

> The Act exempts the Foundation from taxation and affords state indemnification to its board members. The Foundation's board members, officers, and employees have official immunity except for gross negligence, criminal conduct, or dishonesty. The Foundation must adopt and publish its rules in accordance with state requirements, it may be dissolved by the Commissioner when its purpose has been fulfilled, and it (or at least its board) is subject to . . . the Texas Sunset Act. The Legislature specifically denominates the Foundation a "governmental unit" for purposes of immunity from suit under the Tort Claims Act. Finally, the Foundation does not dispute that it is a "governmental body" subject to the Texas Open Meetings Act.189

On the other hand, some factors cut in favor of describing the Foundation as private. For instance, the statute classified the board and the Foundation as "state agencies" only for the limited purposes of tax exemption and indemnification.190 Moreover:

> [T]he funds the Foundation collects are expressly "not state funds and are not required to be deposited in the state treasury." The Act also does not subject the Foundation to state purchasing or audit requirements, and its board members are not required to take oaths of office. Finally, there is no provision for administrative appeal from Foundation decisions, except as to penalties imposed for nonpayment of assessments.191

The court ended up coming down on the side of the Foundation's being private, because the statute "delegate[d] authoritative power to private interested parties."192

As to the validity of the private delegation, the court created its own eight-part test:

> 1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of

state government?

2. Are the persons affected by the private delegate's actions adequately represented in the decisionmaking process?

3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?

4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?

5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?

6. Is the delegation narrow in duration, extent, and subject matter?

7. Does the private delegate possess special qualifications or training for the task delegated to it?

8. Has the Legislature provided sufficient standards to guide the private delegate in its work?193

We can immediately see how the Texas private delegation doctrine differs from the federal doctrine (which doesn't distinguish between public and private). The federal doctrine only requires an intelligible principle, which appears in Texas's factor 8, but Texas adds (1) supervision, (2) representation, (3) generality, (4) bias, (5) restriction to civil cases, (6) narrowness, and (7) expertise. In the court's view, factors one, three, four, seven, and eight cut against the delegation in this case, while factor two cut in favor; factor five was neutral because the criminal penalties were severable from the rest of the statute; and factor six was "inconclusive" because the purpose was narrow but cost and duration weren't.194 With so many factors cutting against the delegation, the court concluded that the delegation as a whole was unconstitutional.195

The Texas approach is potentially quite stringent; a partial dissent in the *Texas Boll Weevil* case charged that it could invalidate school choice plans (delegations to parents), prison privatization (delegations to private prison firms),196 the Texas Automobile Insurance Plan (which is administered by private insurers),197 the delegation of the power of eminent domain to utilities,198 or lawyer licensing through the American Bar Association (as well as licensing in other professions),199 though of course dissents can be hyperbolic in characterizing the slippery slope.200 Since that case, the Texas Supreme Court has upheld the Civil Service Act's delegation of the power to designate permissible arbitrators to the American Arbitration Association and the Federal Mediation and Conciliation Service.201 Not that arbitrators are immune from delegation analysis: The Court has been continually mindful of the potential private delegation problems surrounding arbitrators. In one case, it interpreted a statute to give municipalities the right to appeal arbitrators' decisions, lest the first prong of the *Texas Boll Weevil* test be violated.202

The Texas Supreme Court also struck down the provision of the Texas Water Code allowing water quality protection zones.203 The landowners establishing a zone were empowered to create their own water quality plan. Unlike in *Texas Boll Weevil*, this didn't give the landowners regulatory authority over other people's property.204 But, the Court said, there was still a delegation of legislative power to the landowners, because water quality regulation is a legislative power, as is the power to decide which municipal regulations are enforceable.205 Then, relying on the factors from *Texas Boll Weevil*, the Court concluded that this delegation was unconstitutional; the most significant factors weighing against the delegation were that, in the Court's view—referring to the eight prongs of the test—(1) the opportunities for governmental review were insufficient, (2) affected persons such as downstream landowners were inadequately represented, (4) landowners had a pecuniary interest in protecting their property values, and (6) the extent of the delegation was broad.206

Going to our examples under this test, we already know how the two Texas cases would be resolved, as they were in fact resolved under the Texas test by the Texas Supreme Court. The North Carolina Board of Dental Examiners (in its regulation of teeth-whiteners) and the Mississippi Board of Pharmacy (in their regulation of pharmacy benefit managers) seem likewise questionable, as (2) the targets of the regulation aren't represented in the process, (3) the organizations apply rules to particular individuals, (4) the organizations are peopled with practicing practitioners who have a pecuniary bias against their competitors, (6) the extent of the delegation is broad, and (8) the legislature hasn't provided detailed standards. (As to (8), general guidance like "public interest" may be enough for the federal doctrine,207 but Texas is more demanding.208)

The Amtrak delegation also appears to violate a few of the Texas factors: (1) there's no meaningful review, (2) affected parties aren't represented, (4) Amtrak has a pecuniary bias, and (8) there are likely insufficient standards for Texas's liking. So the Amtrak delegation might be vulnerable under a Texas non-delegation standard, though on the other hand, (3) Amtrak's power is limited to making rules, (5) there are no criminal sanctions attached, (6) the delegation is narrow, and (7) Amtrak has railroad expertise.

C. *Commingling Non-Delegation and Due Process*

1. *The D.C. Circuit's Private Delegation Doctrine*

The D.C. Circuit has recently applied a special private non-delegation doctrine in a new and, as this Article contends, incorrect way. In *Association of American Railroads v. Department of Transportation*,209 it held that Amtrak was private and that therefore a statute that delegated regulatory power to it violated non-delegation doctrine.210

The court wrote that, though generally an "intelligible principle" is enough to save a delegation by Congress, such a principle isn't enough when the recipient of the delegation is private: "Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority"211—here citing *Carter Coal*.212 The court distinguished *Currin*, where industry merely held the on-off switch,213 and *Sunshine Anthracite Coal Co. v. Adkins*, where industry merely had an advisory role.214 This case was more like *Carter Coal*, where industry had binding authority over wages: here, Amtrak had an "effective veto" over Federal Railroad Administration regulations and, in fact, enjoyed "authority equal to the FRA."215

To complete the reasoning, the D.C. Circuit had to establish that Amtrak was indeed private.216 Such an approach could be problematic in light of *Lebron v. National Railroad Passenger Corp.*,217 where the Supreme Court held, in a First Amendment context, that Amtrak was a state actor.218 No problem, said the D.C. Circuit: one can be governmental for purposes of the state action doctrine, but private for purposes of non-delegation doctrine.219

The court then tallied up the indicia of privateness and publicness. Cutting in favor of calling Amtrak public was *Lebron*.220 Also, Amtrak's Board of Directors has nine members, one of whom is the Secretary of Transportation and seven of whom are presidential appointees; the ninth, the president of Amtrak, is elected by the other eight.221 Amtrak has some private shareholders, but almost all its stock is preferred stock held by the federal government.222 Amtrak receives substantial subsidies from the federal government223—though the amount of government money an actor receives generally isn't relevant to whether that actor is public or private.224

Cutting in favor of calling Amtrak private, the 1970 statute specifies that Amtrak "is not a department, agency, or instrumentality of the United States Government."225 The statute also commands that Amtrak "shall be operated and managed as a for-profit corporation."226 Relatedly, by statute, "Amtrak is encouraged to make agreements with the private sector and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies."227 Amtrak itself announces that it's "not a government agency or establishment [but] a private corporation operated for profit."228 The D.C. Circuit attached some significance ("somewhat tellingly"229) to the fact that Amtrak's URL is amtrak.com—not amtrak.gov—but this marketing decision doesn't really seem all that telling, as one could make a similar claim about the U.S. Postal Service, whose website is located at usps.com.

To decide the issue, the D.C. Circuit looked to "what functional purposes the public-private distinction serves when it comes to delegating regulatory power."230 One purpose is accountability: a private delegation dilutes democratic accountability, because when power is delegated to a private organization, the government is no longer blamed for that organization's decisions.231 (Perhaps; but if something goes wrong, why can't the voters blame the government for the initial decision to delegate?232) Another purpose is the distinction between the public good and private gain: public recipients of delegated power are "presumptively disinterested"233 and are bound by "official duty," whereas private recipients may act "for selfish reasons or arbitrarily."234 (Perhaps; but doesn't this display an overly optimistic view of the motivations of public employees?235) In the D.C. Circuit's view, these considerations cut in favor of treating Amtrak as private: the statutory command that it be "managed as a for-profit corporation" requires that it seek its private good, not the public good, and Congress's and Amtrak's consistent labeling of Amtrak as "private" tends to distance Amtrak's decisions from democratic accountability.236 The end result was that the statute delegated regulatory power to a private party and was therefore invalid.237

2. *The* Carter Coal *Puzzle*

Whether the D.C. Circuit is correct depends in large part on how to interpret *Carter Coal*, which is, doctrinally speaking, a confusing case. The quote reproduced earlier is replete with references to "delegation."238 But it also mentions arbitrariness and denial of "due process." Is it a delegation case or a due process case (or both)?

By deciding that an intelligible principle couldn't save a private delegation,239 the D.C. Circuit chose to treat *Carter Coal* as a non-delegation decision. But, at the same time, the court suggested that the characterization didn't matter: it wrote, in a footnote, that "the distinction evokes scholarly interest," but the parties in this case didn't press the point, and "neither court nor scholar has suggested a change in the label would effect a change in the inquiry."240 But this is quite wrong. Labels don't always matter, though in this case, non-delegation and due process doctrines have quite different implications.

First—as a matter of doctrine—a non-delegation holding only applies against federal delegations while a due process holding applies against the states as well.241 Admittedly, this wouldn't change the result in the Amtrak case, which concerned a federal delegation; but making the basis clear would help litigants in future cases of state delegation. Non-delegation cases have their particular "intelligible principle" doctrine, while due process cases have their own separate doctrine involving *Washington ex rel. Seattle Title Trust Co. v. Roberge*,242 *Mathews v. Eldredge*,243 *Board of Regents v. Roth*,244 and so on. Thus, treating the doctrine of private delegations as a unitary entity rooted in both the Vesting Clause and the Due Process Clause needlessly raises questions that could be avoided if the doctrinal basis were clear. For instance, must all non-delegation cases import due process case law? Must cases involving federal delegations (where both clauses apply) proceed identically with cases involving state delegation (where only one clause applies)?

Second, plaintiffs in cases involving federal delegation would prefer to win on a due process theory rather than on a non-delegation theory. A due process victory can give rise to a damages claim under *Bivens* against the federal actors responsible for the violation,245 while *Bivens* has never been applied to non-delegation doctrine.246

Third—as a matter of realpolitik—given the widespread perception that non-delegation doctrine is mostly dead247 while due process is used constantly, a theory grounded in due process is probably more likely to be used.

Fourth—as a matter of convenience—a due process approach would have the advantage of being able to use the existing holding of *Lebron* that Amtrak is a state actor for constitutional rights purposes, rather than having to invent a new ad hoc test to make Amtrak private for non-delegation purposes.248

Finally, and most fundamentally—as a jurisprudential

matter, even putting aside pragmatic concerns and assuming away all cases involving state delegation—the Due Process Clause and non-delegation doctrine serve quite different purposes. Non-delegation doctrine is structural and seeks to ensure that Congress makes the important decisions. Due process, on the other hand, is all about fairness. Fairness and structural boundaries may be related, but not in any necessary way.

Consider, for instance, *Whitman v. American Trucking Ass'ns, Inc.*,249 where the Supreme Court considered a non-delegation challenge to a provision of the Clean Air Act.250 Earlier, the D.C. Circuit had agreed with the challengers that the delegation of regulatory authority to the EPA lacked an intelligible principle.251 Nonetheless, it had given the EPA a chance to cure the overbreadth of the delegation by adopting a limiting construction.252 The D.C. Circuit's approach had been suggested by administrative law scholar Kenneth Culp Davis, who argued that the goal of non-delegation doctrine should be to protect against "arbitrariness" and "uncontrolled discretionary power," and that administrative safeguards could fulfill this purpose as well as statutory language.253

No way, said the Supreme Court: If Congress has delegated too broadly, separation of powers has already been breached.254 The EPA's trying to adopt the limiting construction would itself be a forbidden exercise of regulatory power.255 But note that, under the Davis theory, there would be no unfairness: everyone will be on notice as to the precise conduct required or prohibited, and everyone will have had an opportunity to comment under the Administrative Procedure Act.256 So presumably, if the limiting regulations were adopted, a due process challenge would, and should, fail.

A violation of non-delegation doctrine thus needn't violate due process. The same is true in reverse: If Congress passes a very specific statute allowing welfare benefits to be withdrawn without any process, presumably due process will be violated257 but there will be no impermissible delegation.

Not that non-delegation doctrine and due process should never talk to each other. As noted above, the presence of procedures has sometimes been held to prevent a violation of non-delegation doctrine.258 This is still good law after *American Trucking*, as long as these procedures aren't made up by the recipient of the overbroad delegation. APA procedures or the availability of statutory or constitutional judicial review really do narrow a delegation—in the case of APA procedures, Congress made some of the important decisions in 1946, and in the case of constitutional review, Congress legislated against the background of decisions that were made in, say, 1791 or 1868 and that are now out of the delegate's hands. The availability of these procedures will no doubt also be relevant to a due process inquiry. So the doctrines aren't entirely unrelated. Moreover, to the extent certain procedures are unavailable against the government (for example, the APA, which governs only agencies,259 or Bill of Rights protections, which often don't apply against private actors260), non-delegation doctrine—just like due process—might end up applying differently against public and private parties even though the inquiry is the same.261

Nonetheless, the doctrines should still be kept distinct as an analytic matter. The procedures that save a delegation from overbreadth are the sorts that constrain a delegate's discretion, for instance by enforcing substantive rationality. One example might be "hard look" review under the APA.262 The procedures that save a delegation from violating due process, on the other hand, are the sorts that ensure fair treatment for the affected party, for instance by minimizing bias or by ensuring that the three-part *Mathews v. Eldridge* balancing test263 is met—one example might be the APA procedures for formal adjudication.264

Having established that the label matters, an important question is whether the *Carter Coal* holding265 is best thought of as a non-delegation or due process decision. The Supreme Court's references to "delegation" aren't very probative. Merely saying the word "delegation" isn't enough to invoke non-delegation doctrine. Delegations can be unconstitutional for many reasons. This Article has discussed many cases as being about private delegations even though (as state cases) they were unambiguously about due process.266 One can argue that Congress can't constitutionally delegate a "private attorney general" power to qui tam plaintiffs, either on standing grounds267 or on Appointments Clause grounds;268 or, one can argue that delegation to religious groups violates the Establishment Clause.269 One can thus speak of "delegations" and call them unconstitutional without implying that the case has anything to do with non-delegation doctrine as discussed in *Panama Refining* or *Schechter Poultry*.270

Slightly more probative is the opinion's citation of *Schechter Poultry*, which is indisputably a non-delegation case.271 I say "slightly" because mere citation isn't a jurisprudential argument. That citation is immediately followed by citations to *Eubank* and *Roberge*, which are due process cases.272 As I mentioned above in the context of *Currin v. Wallace* (a non-delegation case that cites *Roberge*, a due process case, as well as *Carter Coal*),273 perhaps this "commingling" of doctrines is a sign of sloppiness,274 or maybe it's a sign that the Supreme Court thought private delegations automatically raise due process issues while public delegations don't. Or perhaps this is reading too much into a mere citation.

One could—on the basis of the *Schechter Poultry* citation—call *Carter Coal* both a non-delegation decision and a due process decision.275 Some venerable commentators take this route and characterize *Carter Coal* in both ways. In 1971, dissenting in *McGautha v. California*,276 Justice Brennan characterized non-delegation doctrine as having "roots both in . . . separation of powers . . . and in the Due Process Clause"—here citing *Carter Coal*277—and stated that, as a due process doctrine, it applied to the states.278 A little bit later, Justice Thurgood Marshall agreed that *Carter Coal* was (at least) a non-delegation case: "The last time that the Court relied on *Schechter Poultry* was in [*Carter Coal*]."279 Paul Verkuil explicitly writes that the *Carter Coal* Court "held the delegation arbitrary both under Article I of the Constitution and the Due Process Clause."280

The non-delegation rationale wouldn't be crazy: Entrusting

a decision entirely to the unreviewable and unguided discretion of private parties is the opposite of having an "intelligible principle." But then the Court wouldn't need to explicitly use the fact that the delegates were private.281 So even if *Carter Coal* were labeled a non-delegation case, it wouldn't be one that supports a special doctrine for private parties (some private parties, like Amtrak, do have intelligible principles attached to their delegation282); nor would it add anything to a due process analysis.

On balance, *Carter Coal* is properly considered a due process case and not a non-delegation case, at least not one that has a distinctive take on private delegations283—though the text (as well as the text in *Currin*284) isn't a model of clarity. More importantly for the law, the last thirty years' worth of Supreme Court cases agrees with this conclusion.285 In 1983, Justice White, in his dissent in *INS v. Chadha*,286 characterized *Schechter Poultry* and *Panama Refining* as the only two cases where a statute was struck down on non-delegation grounds, and omitted *Carter Coal* entirely.287 Justice Blackmun did the same in his majority opinion in *Mistretta v. United States*288 in 1989,289 and Justice Scalia did the same in his majority opinion in *Whitman v. American Trucking Ass'ns, Inc.* in 2001.290 A former appellate judge, one Antonin Scalia, wrote in 1986 that, though *Carter Coal* "discussed" non-delegation doctrine, the holding of the case "appears to rest primarily upon denial of substantive due process rights."291

3. *How the Amtrak Case Should Have Been Decided*

The wording of *Carter Coal* (aside from the mere citation of *Schechter Poultry*) and the characterization of the last thirty years of Supreme Court cases establish that *Carter Coal* is a due process case, not a non-delegation doctrine case. What does this imply about the D.C. Circuit's Amtrak case?

The Amtrak case may have been rightly decided, but for the wrong reason. Here's how the reasoning should have proceeded.[292] As a matter of non-delegation doctrine, there's no problem. As mentioned above, the statutory command that Amtrak "be operated and managed as a for-profit corporation" is enough to provide an intelligible principle for how Amtrak should exercise its power, jointly held with the FRA, to set performance standards.293

The very intelligible principle that dooms the non-delegation challenge, however, also establishes bias for purposes of a due process challenge. As a threshold matter for due process protections to apply, Amtrak must be a state actor. (Unlike the D.C. Circuit, which was concerned to call Amtrak private, here we would be concerned to call Amtrak public to achieve the same result.) No problem: see *Lebron*.294 Next, the bias must be substantial enough to establish a due process violation. Here, the statute requires Amtrak to maximize its profits, and Amtrak has an effective veto power over performance measures. Therefore, it plausibly can't, without a conflict of interest, regulate the rest of the railroad industry.[295]

4. *Other Commingers*

The D.C. Circuit isn't the only court that has commingled non-delegation and due process concepts so as to make the precise basis of a holding unclear. In 2004, the Fourth Circuit considered a non-delegation challenge to a supposed delegation of power to the United Mine Workers of America Combined Benefit Fund made in the Coal Industry Retiree Health Benefits Act of 1992.296 Faced with severely underfunded benefit funds in the coal industry and an exit of firms from the industry, Congress required currently active coal companies to pay into the Combined Benefit Fund, which in turn would pay promised healthcare benefits to active and retired coal miners.297 The Pittston Company, a coal company, argued that the Act "unconstitutionally delegates governmental authority to the Combined Fund, a private entity, giving the Combined Fund 'discretionary authority to collect and spend federal taxes and the plenary authority to administer a federal entitlement.'"298

The Fourth Circuit summarized private non-delegation doctrine by citing *J.W. Hampton, Jr., & Co. v. United States*299 and *Whitman v. American Trucking Ass'ns, Inc.*300—as well as *Carter Coal*. Having characterized non-delegation doctrine as stemming from the Vesting Clauses,301 the court continued by stating that a delegation to private entities rather than to the executive branch would be a "legislative delegation in its most obnoxious form."302 Therefore, "[a]ny delegation of regulatory authority 'to private persons whose interests may be and often are adverse to the interests of others in the same business' is disfavored."303

This is doctrinally incorrect insofar as it doesn't recognize that the private delegation aspect of *Carter Coal* is a due process issue, but the doctrinal confusion in this case was innocuous. The *Pittston* court determined that the Combined Benefit Fund didn't determine who paid it, how much it would get paid (or whether penalties for nonpayment could be excused), who the beneficiaries would be, or the nature or amount of the benefits. Every important decision was made by the Act itself, the Social Security Commissioner, or the Secretary of the Treasury. All the supposed powers of the Fund related to its internal governance, or were non-regulatory, ministerial, advisory, or otherwise inconsequential. Therefore, the court held—relying on *Sunshine Anthracite Coal Co. v. Adkins*304—there was no invalid delegation.

Upholding the delegation based on *Sunshine Anthracite* was clearly correct (assuming the court correctly characterized the Fund's powers, or lack thereof). In retrospect, the court's characterization of private delegations as being specially disfavored under non-delegation doctrine is just dictum.

State courts also often commingle. In general, state courts are more likely to analyze delegations under a due process theory; Wyoming is one example of a state that has seen the difference clearly and apparently adopted an exclusively due-process-based theory.305 In fact, several commentators argue that the due process approach is better than the separation of powers approach, and suggest junking the latter and retaining the former.306 Most states haven't done that, but instead rely on both theories simultaneously.

The Texas Supreme Court, whose private delegation doctrine is discussed above,307 claims to have been careful to keep separation of powers and due process principles

separate;308 nonetheless, the potential bias of the private delegate (factor four in its test)309 sounds like an infusion of due process.310

Arizona has a non-delegation doctrine based on the legislative vesting clause of the Arizona constitution;311 but a case apparently based on that vesting clause, *Emmett McLoughlin Realty, Inc. v. Pima County*,312 cites *Roberge*,313 a federal due process case, as well as a previous Arizona case314 that cites *Carter Coal*. The same goes for Illinois, which also has a general non-delegation doctrine based on its legislative vesting clause315 and at least one other specific non-delegation doctrine based on a constitutional grant to the legislature of the power to grant homestead exemptions;316 cases citing the relevant structural clauses also cite federal due process cases like *Eubank*, *Thomas Cusack*, and *Carter Coal*, or other cases relying on these.317

For states, though, the commingling seems less harmful than for the federal government. Granted, the general concern that structural violations needn't implicate fairness, while unfair delegations raise all their own issues even if they're structurally sound, still applies.318 But the concern that non-delegation is purely federal while due process also applies to states no longer applies when a state has its own structural non-delegation doctrine based on its own constitution.319

How does this apply to our examples? Recall from the due process section that several of the examples—Amtrak, and possibly the Mississippi Board of Pharmacy and the Texas Boll Weevil Eradication Foundation, but not the North Carolina Board of Dental Examiners or the Texas homeowners in the water quality protection zones—were vulnerable for bias.320 (The dental board was immune because its role was limited to enforcing statutory commands through ordinary lawsuits, while the Texas landowners were non-state actors who didn't regulate anyone.) If a state mixes non-delegation concepts with due process concepts, the result should probably be the same as under the Due Process Clause alone.

IV. Antitrust Theories

Moving from constitutional theories like non-delegation and due process to federal statutory challenges under antitrust law isn't as great a change of gears as it might seem. As mentioned in Part I, private delegation—in particular an industry "regulating itself"—raises the possibility that incumbents will regulate potential entrants or current competitors, which can be anticompetitive.

For federalism reasons, regulation by the state itself, through the legislature or judiciary, is absolutely immune from antitrust liability under the "state action" doctrine.321 Agencies stretch the doctrine, depending on their degree of privateness. Here, too, agencies can be private for antitrust purposes even if they otherwise look public. Once state action immunity is overcome, however, the question is whether there is an actual antitrust violation. In many of the preceding examples, this will be true, or at least will be easier to prove because of structural factors like the competitive relationship between the regulator and the regulated parties.

Once an antitrust violation is established, there remains the issue of remedy. The standard remedy is treble damages. Municipalities are exempt from damages, and many agencies will be exempt as well under sovereign immunity, mainly if the state is required to pay their bills. For some of the examples, the sovereign immunity question is difficult, so the most that can be said definitively is that they *might* be fully liable, and that they're in any event subject to injunctive lawsuits in which they'll have to pay attorney fees.

A. *State Action Immunity*

A state board charged with anticompetitive behavior will always argue, as an initial matter, that its behavior is state action exempt from antitrust law under *Parker v. Brown*.322 The acts of state governments *themselves*—that is, a state legislature323 or a state supreme court in its regulatory role324—aren't covered by federal antitrust law,325 but a state board doesn't fall within this category. At the opposite extreme, private parties get state action immunity if they satisfy the two prongs of the test from *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*—that is, if they (1) act according to a clearly articulated state policy and (2) are actively supervised by the state.326

In between these poles, we have intermediate entities like municipalities, which have to satisfy only the first *Midcal* prong. They don't get blanket *Parker* immunity because they have no sovereignty of their own; but they're also public enough to dispense with the requirement of active supervision. The second *Midcal* prong, as the Supreme Court explained in *Town of Hallie v. City of Eau Claire*,327 serves an essentially evidentiary purpose—that the first *Midcal* prong is truly satisfied and the body is really acting pursuant to state policy.328 When the entity is private, "there is a real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State";329 a "private price-fixing arrangement" might be concealed by "a gauzy cloak of state involvement."330 But when a municipality is involved, the court "may presume, absent a showing to the contrary, that [it] acts in the public interest,"331 partly because of the increased public scrutiny that comes from municipal elections and mandatory disclosure laws.332 Thus, the court doesn't need the extra evidentiary benefits that active state supervision would provide.

1. *Applicability to State Agencies*

As for state agencies, the Supreme Court suggested in *Town of Hallie* that "it is likely that active state supervision would also not be required."333 This is dictum, but the influential Areeda-Hovenkamp antitrust treatise agrees with it: "Dispensing with any supervision requirement for municipalities implies, a fortiori, the same for the 'public' departments and agencies of the state itself."334 The treatise adds that "[t]oday the courts uniformly agree with that conclusion,"335 which gives a nice three-part doctrine where legislatures themselves get blanket immunity, public state agencies and municipalities are subject to the first *Midcal* prong, and private parties are subject to both *Midcal* prongs. But the apparent uniformity might be misleading, as "determining whether an actor is sufficiently 'public' so

as not to require supervision has often proven difficult."336

2. *The Cursory View*

Determining whether an actor is sufficiently public has proven so difficult that the circuits are split three ways on the question, though the Supreme Court may resolve this split in the 2014 Term, in which case this Subpart will become partly moot.[337] The Fifth Circuit held that Louisiana's State Board of Certified Public Accountants (CPAs), which made rules prohibiting CPAs from "engaging in incompatible professions" like selling securities,338 was public enough to be exempt from the active supervision requirement. Even though it was "composed entirely of CPAs who compete in the profession they regulate," the "public nature of [its] actions mean[t] that there [was] little danger of a cozy arrangement to restrict competition."339 The Board was thus "functionally similar to a municipality."340 The analysis here was unfortunately fairly cursory. Similarly, the Tenth Circuit held, in the context of a public university (which allegedly conspired to "monopolize certain agricultural testing services" in the state341), that the active supervision requirement was unnecessary "[g]iven the nature of these defendants, a constitutionally created state board, its executive secretary, and a state created and funded university."342

The Second Circuit's analysis of why an urban development corporation was exempt from the active supervision requirement seems to have the same flavor: The development corporation at issue was presumed to be public-interested because it was "by statute a political subdivision of the state."343 This one-factor test certainly seems incorrect in light of the Supreme Court's holding that the Virginia State Bar, though a state administrative agency,344 was a "private part[y]"345 subject to the active supervision requirement.

3. *The Intermediate View*

Other circuits don't rely on formal labeling or take the publicness of a state agency for granted. The Oregon State Bar adopted a rule making itself the sole legal provider of malpractice insurance for the state's lawyers.346 The Ninth Circuit ended up exempting it from the active supervision requirement, but only after analyzing a number of factors: not just the Bar's formal classification as "a public corporation and an instrumentality of the State of Oregon," but also how many of its members "must be nonlawyer members of the public," the requirement that its records be "open for public inspection" and its accounts "subject to periodic audits by the State Auditor," its open meeting requirements, and the fact that its members "are public officials who must comply with the Code of Ethics."347 "These requirements leave no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption."348

The First Circuit seems to also follow a nuanced approach. Then-Judge Stephen Breyer discussed whether the Massachusetts Board of Registration in Pharmacy was acting anticompetitively in limiting pharmacist advertising, mail-order pharmacies, and "branch offices" or "pick-up stations."349 According to Judge Breyer, whether the pharmacy board was essentially private for the purposes of the active supervision requirement would depend "upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."350 Just half a year earlier, Judge Breyer had used a similarly pragmatic approach, holding that the Massachusetts Port Authority was similar to a municipality because it possessed "such typical governmental attributes as the power of eminent domain, rulemaking authority, bonding authority, and tax exempt status."351

The Eleventh Circuit summarized its own (and other circuits') cases as focusing on how "public the entity looks"352 through an analysis of "the government-like attributes of the defendant entity":

> Factors favoring political-subdivision treatment include open records, tax exemption, exercise of governmental functions, lack of possibility of private profit, and the composition of the entity's decisionmaking structure. The presence or absence of attributes such as these tells us whether the nexus between the State and the entity is sufficiently strong that there is little real danger that the entity is involved in a *private* anticompetitive arrangement.353

A similar multi-factor analysis—where the entity's nonprofit status also plays a role—can be found in the Seventh Circuit.354

4. *The FTC and Areeda-Hovenkamp View*

This multi-factor analysis, while more nuanced than the simple "public is public" view of the Second, Fifth, and Tenth Circuits, still is insufficient for the FTC. Rather than a "laundry list of attributes" approach, the FTC prefers to focus on one particular aspect of the challenged bodies: the extent to which they're driven by private self-interest.

In 2011, the FTC examined the case of North Carolina's Board of Dental Examiners.355 The Board had been accused of conspiring to drive non-dentists out of the state market for teeth-whitening services.356 The FTC's position was that the state action exemption required active supervision "in circumstances where the state agency's decisions are not sufficiently independent from the entities that the agency regulates."357 This includes cases where the agency has a "financial interest in the restraint that [it] seeks to enforce"358 and is "controlled by private market participants"359 "who [stand] to benefit from the regulatory action."360

Using this framework, the FTC concluded that the Board must meet the active supervision requirement if it wants to benefit from state action immunity. "Because North Carolina law requires that six of the eight Board members be North Carolina licensed dentists, the Board is controlled by North Carolina licensed dentists."361 Moreover, dentists perform teeth whitening. Therefore, "Board actions in this area could be self interested."362

According to the FTC, the need for active supervision is especially acute when the agency "is not accountable to the public but rather to the very industry it purports to regulate."363 This political unaccountability concern was present here: The Board was only accountable to dentists, as "the six dentist members of the Board are elected directly by their professional colleagues, the other licensed dentists in

North Carolina."364 Because the Board couldn't show that it was actively supervised,365 it wasn't immune from federal antitrust law. The Fourth Circuit affirmed the FTC's holding, at least to the extent of requiring active supervision when *both* of the FTC's factors were present—domination by *and* accountability to market participants.366 (This is the decision on which the Supreme Court has granted cert.[367])

The Areeda-Hovenkamp treatise seems to take a position closer to the FTC's, not requiring the additional element of accountability to market participants:

> We would presumably classify as "private" any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market. This presumption would be rather weak . . . where the competitive relationship between the decision maker . . . and the plaintiff is weak and the potential for anticompetitive effects not particularly strong. It would be weaker still where the decision maker responds to the court, governor, or legislature directly and on an ongoing basis. But the presumption should become virtually conclusive where the organization's members making the challenged decision are in direct competition with the plaintiff and stand to gain from the plaintiff's discipline or exclusion.368

Or, as Einer Elhauge puts it, "[F]inancially interested parties cannot be trusted to restrain trade in ways that further the public interest."369 The strict view could also be supported by capture-based theories of the state action doctrine, like that advocated by John Wiley.370 Aaron Edlin and Rebecca Haw, surveying recent scholarship on the subject, conclude that "although the various accounts differ in other ways, they all agree that self-dealing, unaccountable decision-makers should face antitrust liability."[371]

The Areeda-Hovenkamp treatise thus takes issue with the Ninth Circuit's approach in the Oregon State Bar case,372 agreeing with the dissent that the self-interest of the lawyers composing the Bar should make the Bar private for state action immunity purposes.373 The treatise additionally disagrees with approaches like that of the Second Circuit, stating that "state legislative declarations that the body is a 'public' corporation"374 or "state mandates that the organization serve the 'public interest'" should count for little.375 Nor should an entity's nonprofit status376 count for much: "the typical trade or professional association is *itself* a nonprofit organization dedicated to improving the welfare of its members. The key is not the profit or nonprofit status of the organization, but the identity of its decision-making personnel."377

5. *Application*

How might the distinction between the Fourth Circuit's approach and the FTC and Areeda-Hovenkamp approach play out? The distinction is irrelevant if a state legislature imposes restraints on its own, in which case its action is absolutely immunized under *Parker v. Brown*.378 For example, the Mississippi statute requiring pharmacy benefit managers to disclose their financial statements to the state Board of Pharmacy379 is immunized from antitrust attack because it's the act of the legislature. The Board also, however, has a delegated power to require additional information besides balance sheets and income statements,380 so conceivably particular bits of financial information that the Board might eventually require could still be challenged. The fiduciary duty requirement for pharmacy benefit managers, had it been adopted, would have come entirely from the Board.

If there is to be a challenge, consider the applicability of state action immunity. The Mississippi Board of Pharmacy is appointed by the Governor from lists submitted by the Mississippi Pharmacy Association with input from other pharmacist organizations.381 All members must be licensed pharmacists and have at least five years of experience practicing pharmacy in Mississippi.382 These requirements probably make the Board "private" for purposes of state action immunity under the FTC and Areeda-Hovenkamp approach.

The Fourth Circuit's approach would, in addition, require accountability to market actors. At first sight, this seems lacking because the Governor appoints and removes the Board members. But, on the other hand, Board members can only be removed for cause and with procedural protections,383 so the Governor can't remove a Board member for purely policy reasons. The Governor is also constrained to appoint members suggested by pharmacist associations.384 There is thus a plausible, though not inescapable, argument that the accountability is more to market participants than to politicians.385

The Texas Boll Weevil Eradication Foundation should be private enough to require active supervision under either the Fourth Circuit's or FTC and Areeda-Hovenkamp standards, because it's both peopled with growers and accountable to (that is, elected by) growers.386

Texas landowners in water quality protection zones are private under any test, but as we will see in the next section, they don't engage in anticompetitive behavior, so the point is moot. As for Amtrak, state action immunity is irrelevant because Amtrak is federal, so the federalism concerns animating the state action doctrine387 don't apply.388 Hypothetically, if Amtrak were a state entity, its for-profit nature and its statutory labeling as private should satisfy even the loose approach of the Second, Fifth, and Tenth Circuits.

Whether a state agency like the Mississippi Board of Pharmacy or the Texas Boll Weevil Eradication Foundation will be able to benefit from state action immunity from federal antitrust law will thus depend on the circuit and how strictly it analyzes the agency's structure for signs of privateness. A challenger who can show that an agency is dominated by and accountable to market participants is certainly well off in the Fourth Circuit, though such characteristics may also make the difference in "laundry list" circuits like the First (where Judge Breyer had specifically referred to pharmacists389), Ninth, and Eleventh, especially among judges who respect the author of the Areeda-Hovenkamp treatise. As to lesser degrees of privateness, the "laundry list" circuits might still deny state action immunity, but it's always hard to predict the outcome of a broad-ranging multi-factor test. The agencies are best off in the formalist circuits that merely look at the agency's legal designation as public.

B. *Actual Antitrust Violations*

Denying the agency state action immunity is only a first step, which is of no help to a challenger unless the agency's actions violate the antitrust laws.

1. *The Fourth Circuit's* Dental Examiners *Reasoning*

The Fourth Circuit's recent *Dental Examiners* opinion390 and the FTC decision that it upheld391 illustrate how a board found to lack state action immunity can also be found in violation of antitrust law. The FTC determined that the Board's action—sending cease-and-desist letters to drive non-dentist teeth whiteners out of the North Carolina market—was anticompetitive,392 and the Fourth Circuit had little trouble upholding that determination.393

First, using the "quick look" framework,394 the FTC determined that the Board's conduct was "inherently suspect" because "at its core," the Board was excluding lower-cost competitors.395 The Board offered some procompetitive justifications for its conduct: first, that teeth whitening by non-dentists carried greater health risks; second, that teeth whitening by non-dentists was illegal; and third, that it acted in good faith.396 Promoting public safety, however, isn't a recognized excuse for colluding to restrain trade (and, moreover, the alleged health risks weren't sufficiently proven);397 neither is the illegality of the competition sought to be restrained.398 Good faith likewise isn't a valid antitrust defense.399

Next, using a "rule of reason" analysis,400 the FTC determined that the Board (obviously) had market power;401 this power, combined with the competition-suppressing nature of the conduct, provided indirect evidence of anticompetitive effects.402 In any event, the actual abandonment of the market by non-dentist providers as a result of the conduct provided direct evidence of anticompetitive effects.403 These findings shifted the burden to the Board to provide procompetitive justifications, but the same analysis from the "quick look" section likewise showed that these justifications were insufficient.404

One final consideration concerns whether the Board, arguably a unitary entity, was capable of concerted action, which is required for a "contract, combination . . . , or conspiracy[] in restraint of trade"405 that violates Section 1. (A Section 1 violation requires "concerted," not "independent," action,406 unlike, say, monopolization under Section 2,407 which can be done by a single actor.)

The discussion of Board members' personal commercial interests in the context of state action immunity408 also shows up here. The test for concerted action is functionalist, not formalist:409 One needs to look for "'separate economic actors pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests,' and thus of actual or potential competition."410 "[C]ompetitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or "joint venture."'"411 Applying this framework, the FTC noted that the dentist Board members operated their own dental practices and were elected by practicing dentists; that they thus had a personal financial interest in limiting the teeth-whitening market; and that they therefore remained separate economic actors.412

2. *The Other Cases*

The Board's action in this case made it one of the easier cases for antitrust analysis, because it involved conduct seeking to actually exclude competitors from a market.413 In other cases, the antitrust analysis might be more complicated.

Areeda and Hovenkamp give an example of a municipality setting "safety standards forbidding any taxicab operator from working more than ten hours per day."414 A private arrangement to that effect would of course be illegal. A municipality would want to claim state action immunity, but suppose the immunity fails because the necessary state authorization is lacking. Presumably there would nonetheless be no antitrust liability because this might be considered "reasonable" regulation.415

And presumably calling this reasonable wouldn't require a court to actually do an analysis of the policy.416 Surely it matters more that a municipality is governmental. "This conclusion is strengthened by the fact that the city is presumably (a) not a seller of taxicab services itself; and (b) not in a position to profit from any cartel limiting output of taxicab services."417 Areeda and Hovenkamp suggest that a structural inquiry, similar to that of standard-setting organizations, is appropriate.418 In such a context, it becomes relevant whether the antitrust plaintiffs and defendant are competitors (and, more generally, whether the defendant has a financial interest in the outcome),419 whether they're in vertically related or collateral markets,420 and whether they're in the same geographic market.421

The Mississippi Board of Pharmacy thus seems vulnerable. Once state action immunity is overcome,422 the competitive relation between pharmacists and pharmacy benefit managers—which was already relevant to the state action inquiry under the FTC and Areeda-Hovenkamp approach423—can at least create a strong presumption of a substantive antitrust violation. As noted above, the requirement of financial disclosure comes from the legislature, so state action immunity is dispositive. The Board of Pharmacy, however, still has its own discretion to choose what extra information to require, and of course the proposed fiduciary duty for pharmacy benefit managers came entirely from the Board.424 Establishing the anticompetitive effect will still take some proof—one can imagine a challenge to disclosure of financial information because knowing one's adversaries' costs helps one to compete against them and can also facilitate collusion among pharmacists. In any event, the structural considerations should make a challenge that much easier.

The same goes for Amtrak, which has a competitive relationship with other railroads, and the Texas Boll Weevil Eradication Foundation, whose growers on its board compete with other regulated growers. On the other hand, it's hard to argue that homeowners in Texas water quality protection zones are acting anticompetitively by using a neutral state law to exempt themselves from certain water quality regulations.

C. *Remedies*

The result could be treble damages and attorney's fees425 for those who are found to have conspired to restrain trade.426 In *City of Lafayette v. Louisiana Power & Light Co.*,427 Justice Blackmun, dissenting, noted that municipalities found in violation of antitrust laws and not shielded by state action immunity would be liable for treble damages.428 The majority punted on the question,429 but the "shall recover threefold the damages" language of the Clayton Act430 is mandatory. Justice Rehnquist, dissenting a few years later, wrote that avoiding this conclusion would "take a considerable feat of judicial gymnastics."431

In Rehnquist's view, the need to avoid subjecting governmental entities to treble damages counseled interpreting anticompetitive local ordinances not as *violating* antitrust law but merely as being *preempted*.432 That was a dissent, however; the law at the time was that even municipalities could violate antitrust law and be found liable.433

For municipalities, this is no longer the case. Congress passed the Local Government Antitrust Act in 1984 to protect local governments, their "official[s] or employee[s] . . . acting in an official capacity,"434 or anyone acting under a local government or official's or employee's direction.435 Municipalities can still violate antitrust law, but now they can only be enjoined.436

But this statute is of no help to private actors or state agencies that fail the tests for state action immunity.437 In *Hoover v. Ronwin*,438 for instance, the majority and the dissent disagreed over whether it was an antitrust violation for the Arizona Supreme Court's Committee on Examinations and Admissions to have conspired to restrain trade by reducing the number of attorneys in the state.439 The majority thought it wasn't a violation because the challenged action was that of the Arizona Supreme Court in its sovereign capacity.440 The dissent thought it was a violation because the challenged action was that of the Committee, not the Arizona Supreme Court,441 and there was no clearly articulated state policy to reduce the number of attorneys.442 But both sides agreed that had there been a violation, the board members would be subject to treble damages.443 *Goldfarb v. Virginia State Bar*[444] would be another example of this—where the board was denied state action immunity.[445]

This has apparently been the fate of the California Travel and Tourism Commission, which was alleged to have colluded with the rental car industry to fix rental car prices.[446] The Ninth Circuit found that the Commission—which was chaired by a California cabinet official and whose commissioners were one-third gubernatorial appointees and two-thirds elected by the tourism industry[447]—wasn't acting pursuant to a "clearly articulated" state policy.[448] Thus, the Ninth Circuit found, the Commission failed *Midcal*'s first prong; the court therefore didn't need to consider whether the Commission had (or required) "active state supervision" under *Midcal*'s second prong.[449] The case against the Commission was allowed to proceed to trial, and the parties later settled for an amount that included nearly $6 million in attorneys' fees and costs alone.[450]

Some state agencies will nonetheless be considered "arms of the state" and share the state's sovereign immunity for purposes of the Eleventh Amendment, but other agencies and boards won't. The Supreme Court has explained that the arm-of-the-state inquiry—like the Eleventh Amendment itself—is focused on protecting both the state's dignity and the state's treasury.451 Operationalizing this two-factor test has been left to the individual federal circuits, with the predictable result that arm-of-the-state jurisprudence "is, at best, confused."452 Whether the state is legally liable for the agency's debts is an important factor, but how important is unclear.453 The treasury concern trumps the dignity concern in some circuits,454 but dignity can sometimes be more important in others,455 and the Eleventh Circuit has stated that the most important factor is how the entity is treated by state courts.456

For instance, in the Fourth Circuit, the relevant factors for whether an agency shares the state's sovereign immunity are (1) whether judgments against the entity will be paid by the state or whether recoveries inure to the state's benefit; (2) whether the entity exercises substantial autonomy (this involves looking at who appoints the entity's directors and funds the entity and whether the state can veto the entity's actions); (3) whether the entity is involved with state concerns as opposed to local concerns; and (4) how the entity is treated under state law.457 The Fifth Circuit has a similar test, but with more factors: (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the entity's degree of autonomy; (4) whether the entity is concerned primarily with local concerns; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.458

An extra twist is that most circuits deny sovereign immunity to private entities.459 Some of the private entities that show up in the cases are indisputably private corporations contracting with the state,460 but for others, one could make a colorable argument that they were public.461 Sometimes courts seem to be merely applying their multi-factor "arm of the state" tests to these entities, but at least the Ninth Circuit has an explicit doctrine against extending sovereign immunity to private parties.462 It's thus possible that, if an entity is found to be private under some other test—for example, the antitrust state action immunity test discussed above463—one will be able to import that finding of privateness as at least one factor cutting against sovereign immunity.

In any event, even if the entity is covered by sovereign immunity, it will still be subject to injunctive suits. The FTC primarily proceeds by cease-and-desist orders, though it also has the power to assess civil penalties,464 and even private plaintiffs can pursue injunctions under *Ex parte Young*.465 Such suits would still require defendants to pay both their own and the prevailing plaintiff's litigation costs.466

Not surprisingly, given the multitude of factors and unclear tests, it's hard to say whether some of our example organizations are potentially subject (if found in violation of antitrust law) to treble damages. Amtrak is easy; it's a for-

profit entity, so it should be liable.467 The Texas water quality protection zone landowners are likewise easy; they're just private landowners.468

The North Carolina Board of Dental Examiners supports itself through fees469 and seems fairly autonomous, which cuts in favor of liability, but, on the other hand, it's also treated like an agency under state law (and its employees like state employees)470 and deals with an issue of statewide concern, which cuts in favor of immunity. Ultimately, the Board probably has sovereign immunity because North Carolina statutes envision that in case of tort judgments against occupational boards, the state will pay the excess liability over $150,000 unless the Board's insurance covers more.471

The Mississippi Board of Pharmacy is funded by licensing fees and penalties,472 but the money is deposited into the state treasury "in a special fund to the credit of the board," and funds can be expended only by legislative appropriation.473 So perhaps the state is liable for its debts, but it's hard to tell from the statute. It's also characterized as a state board by the statute474 and is concerned with statewide problems, which again cuts in favor of immunity.475 On the other hand, the only state role is appointment and removal of board members by the Governor,476 which cuts in favor of liability. It's unclear from the statute whether it has the right to hold and use property. This factor is one of the prongs of the Fifth Circuit test, discussed above.477 As for suing and being sued in its own name, there are certainly cases involving the Board both as plaintiff and defendant;478 this again is a factor that cuts in favor of liability.479

The Texas Boll Weevil Eradication Foundation is a separate nonprofit corporation,480 which cuts in favor of liability, though it's also labeled a "quasi-governmental entity,"481 which (depending on how strong the "quasi" is) might cut in favor of imunity. It's funded through fines and assessments and has power to borrow money,482 though this doesn't tell us whether the government is on the hook for its debts. The Foundation does have some autonomy, though a State commissioner retains some authority. His approval is required to change the number of Board positions or change zone representations on the Board.483 The Commissioner also can exempt a grower from excessive penalties,484 and the Board can only spend money on Commissioner-approved programs.485 The Foundation is concerned with the statewide problem of boll weevil eradication, which cuts in favor of immunity. The Foundation can sue in its own name, which cuts in favor of liability,486 but the statute also declares the Foundation "immune from lawsuits and liability,"487 which of course can cut in favor of immunity depending on how relevant the state-law sovereign immunity treatment is to federal law.488

In short, I lean strongly toward sovereign immunity for the North Carolina Board of Dental Examiners but wouldn't draw any firm conclusions on the immunity of the Mississippi Board of Pharmacy or the Texas Boll Weevil Eradication Foundation. Instead, I would simply reiterate two points: that the boards would at least possibly be liable, and that injunctive suits and attorney's fees are issues regardless.

Putting the conclusions on state action immunity, substantive antitrust violations, and liability together, Amtrak should be non-immune, in violation, and fully liable. The North Carolina Board of Dental Examiners was found non-immune in the Fourth Circuit and may be found non-immune in the intermediate circuits. It's in violation and it might be fully liable. The Mississippi Board of Pharmacy's state action immunity likewise depends on the circuit. It may be found in violation, depending on the anticompetitive effect of its activities, and it might be fully liable. The Texas Boll Weevil Eradication Foundation's state action immunity depends on the circuit. It may be found in violation, depending on the anticompetitive effect of its activities, and it might be fully liable. The Texas landowners in water quality protection zones are non-immune and fully subject to liability but are unlikely to be substantively violating the law.

V. Conclusion

These are just some of the most salient doctrines that are currently being used, often successfully, to challenge the legality of private regulatory delegations. Federal non-delegation doctrine is unlikely to be a successful avenue for challenging these delegations. State doctrines like that in Texas will probably fare much better. The Due Process Clause seems quite promising for challenging private regulators, especially if the regulators are competitors of the regulated parties and have mandatory control over coercive processes. Due process cases can also lead to money damages against the specific individuals responsible under 42 U.S.C. § 1983 or *Bivens*. (In jurisdictions that confuse non-delegation and due process, the result under their non-delegation analysis should be similar to the result under a proper due process analysis.)

Federal antitrust law likewise seems promising, especially if the regulators are competitors of the regulated parties. State action immunity is then more likely to fail, at least in the more stringent circuits, a substantive antitrust violation is more likely to succeed because of the presence of structural anticompetitive factors, and the more independent the regulators are from the state, the more likely they are to be fully liable for treble damages. Even if treble damages aren't available, injunctive relief and the litigation costs that come with antitrust suits are still an issue.

Even more interesting is the proliferation of public-private tests: the familiar "state action" test for federal constitutional law, including the Due Process Clause; the public-private test for Texas's private non-delegation doctrine; the public-private test for the D.C. Circuit's recent private non-delegation doctrine; and the various circuits' and the FTC's tests for whether state action immunity applies. One can easily dismiss the characterization of Amtrak or the North Carolina Board of Dental Examiners as "private," but one would be wrong. At the very least, one would be wrong to presume that entities with governmental powers are necessarily public or that a finding that an organization (like Amtrak) is public for some legal doctrines implies that it can't be private for other doctrines.

Regulators are, therefore, advised to be extremely careful. Those who think of themselves as public officials

might find that they are sadly mistaken, all the more sadly to the extent that they find themselves having to pay out-of-pocket damages to their regulatory victims.

Endnotes

1. Harold Abramson, writing a quarter century ago, distinguished three categories of "private regulators." Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 Hastings Const. L.Q. 165, 169 (1989). First, there are private actors who are "formally deputized by government as private regulators" (not counting actual public officials). *Id.* These include, for instance, professional licensing boards, such as the Louisiana State Board of Embalmers and Funeral Directors. *See, e.g.*, St. Joseph Abbey v. Castille, 700 F.3d 154, 158 (5th Cir. 2012) (noting that the FTC had raised concerns about state funeral boards' being "dominated by funeral directors"). At the other extreme, there are private adjudicatory and standard-setting organizations with no formal connection to government, like the Better Business Bureau or Consumers Union. Abramson, *supra*, at 170–71. In between, there are organizations with some formal connection with government, though one that's less definite than in the first category. These include standard-setting organizations whose standards are incorporated by reference into law, like the American National Standards Institute, or private court-ordered arbitrators. *Id.* at 172–74.

2. *See, e.g.*, Michael J. Astrue, Health Care Reform and the Constitutional Limits on Private Accreditation as an Alternative to Direct Government Regulation, Law & Contemp. Probs., Autumn 1994, at 75, 81.

3. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 18, 2012, 2 BvR 133/10, *available at* http://www.bverfg.de/entscheidungen/rs20120118_2bvr013310.html, [http://perma.cc/G7A5-TBZ9]; *see also* Maximilian Steinbeis, *Outsourcing als Mittel der Haushaltssanierung ist verfassungswidrig*, Verfassungsblog (Jan. 18, 2012), http://verfassungsblog.de/outsourcing-als-mittel-der-haushaltssanierung-ist-verfassungswidrig/, [http://perma.cc/YZ55-75MR].

4. *See* Judith Resnik, *Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century*, 11 Int'l J. Const. L. 162 (2013).

5. *See* HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Finance [2009] (Isr.) ¶ 18, *available at* http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm, [http://perma.cc/42AY-XV2F]; Barak Medina, *Constitutional limits to privatization: The Israeli Supreme Court decision to invalidate prison privatization*, 8 Int'l J. Const. L. 690 (2010); Resnik, *supra* note 4; Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. Davis L. Rev. 133, 180–85, 198–200 (2012).

6. These aren't the only doctrines used today to support the accountability of private entities doing government-like tasks: another example is the narrow scope that has recently been given to government contractor immunity. Government contractor immunity was first recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and extended in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993), and *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). But recent cases have taken a narrower view, including *McMahon v. General Dynamics Corp.*, 933 F. Supp. 2d 682 (D.N.J. 2013), and at least four other cases since 2005. *See id.* at 692–94 (collecting cases); Alexander Volokh, *Are Federal Contractors Immune from Tort Suits Just Because the Government Is?*, Reason.Org, May 9, 2013, http://reason.org/news/show/government-contractor-immunity, [http://perma.cc/4YS3-FH8M].

7. Private prison liability—and civil rights liability generally—is a mixed bag that resists easy characterization. Although the Supreme Court did restrict qualified immunity in civil rights suits against private prisons in *Richardson v. McKnight*, 521 U.S. 399 (1997), it established in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), that qualified immunity for private parties was still available in other contexts. Moreover, in *Minneci v. Pollard*, 132 S. Ct. 617 (2012), it cut back on the availability of civil rights suits for money damages against federal private prisons, though this was on a theory that state tort law already provided an adequate remedy. *Id.* at 620. *See generally* Alexander Volokh, *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 Akron L. Rev. 287 (2013); Alexander Volokh, *Recent Developments in the Federal Civil-Rights Liability of Federal Private Prisons*, Reason.Org, May 6, 2013, http://reason.org/news/show/apr-2013-federal-liability-prisons, [http://perma.cc/77KJ-XSHM]; Alexander Volokh, *Supreme Court Clarifies Standards for Qualified Immunity in Civil Rights Cases—Or Does It?*, Reason.Org, Apr. 5, 2013, http://reason.org/news/show/privatization-qualified-immunity, [http://perma.cc/ZKF4-ECJC].

8. Although the organizations below are described in the present tense, in reality some of them are described as they were before cases, discussed in this Article, striking them down or altering their workings in some way.

9. *See infra* notes 227–29 and accompanying text.

10. *See infra* notes 221–23 and accompanying text.

11. Ass'n of Am. Railroads v. Dep't of Transp., 721 F.3d 666, 669 (D.C. Cir. 2013) (quoting Passenger Rail Investment and Improvement Act of 2008 [hereinafter PRIIA], Pub. L. No. 110-432, § 207(a) (codified at 49 U.S.C. § 24101 note)) (internal quotation marks omitted) (holding PRIIA § 207 to be unconstitutional).

12. *Id.* (citing 49 U.S.C. § 24308(f)(1)–(2)) (internal quotation marks omitted).

13. *Id.* (citing PRIIA § 207(d) (codified at 49 U.S.C. § 24101 note)).

14. N.C. Gen. Stat. Ann. § 90-22(b) (West 2013).

15. *Id.* § 90-29(a), (b)(2).

16. *See* text accompanying *infra* notes 355–67.

17. Miss. Code Ann. § 73-21-75(1) (West 2013).

18. *Id.* § 73-21-83(1).

19. Similar bills are pending in Oregon, Hawaii, and Oklahoma. *See* Joanna Shepherd, *The Fox Guarding the Henhouse: The Regulation of Pharmacy Benefit Managers by a Market Adversary*, 9 Nw. J.L. & Soc. Pol'y 1 (2013).

20. Miss. Code Ann. § 73-21-157(3).

21. *Id.* (internal quotation marks omitted).

22. *See* Shepherd, *supra* note 19, at 19–21; Mari Edlin, *PBMs concerned oversight involves conflict of interest*, Managed Healthcare Executive, June 2013, at 30.

23. Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 457 (Tex. 1997) (citing Tex. Agric. Code §§ 74.101–.127 (1995)).

24. *Id.* (citing Tex. Agric. Code §§ 74.105–.106).

25. *Id.* (citing Tex. Agric. Code § 74.113, 4 Tex. Admin. Code § 3.3(c) (1995)).

26. *Id.* at 458 (citing Tex. Agric. Code § 74.108(a)(4)).

27. *Id.* (citing Tex. Agric. Code §§ 74.115(a)–(b), 74.126).

28. *Id.* (quoting Tex. Agric. Code § 74.117) (internal quotation marks omitted).

29. *Id.* (quoting Tex. Agric. Code § 74.120(c)).

30. *Id.* (quoting Tex. Agric. Code §§ 74.107(b), 74.116, 74.109(h)).

31. *See* FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 870 (Tex. 2000) (internal quotation marks omitted).

32. *Id.*

33. *Id.* at 871 (citing Tex. Water Code § 26.179(d) (1995)).

34. *Id.* (citing Tex. Water Code § 26.179(g)).

35. *Id.* at 872 (citing Tex. Water Code § 26.179(i)).

36. *See infra* notes 225–29 and accompanying text.

37. N.C. Gen. Stat. Ann. § 90-22(b) (West 2013).

38. *See infra* notes 188–91 and accompanying text.

39. *See, e.g.*, Alexander Volokh, *What a Recent Labor-Relations Decision Teaches Us About the Meaning of "Public" and "Private,"* Reason.Org, Mar. 21, 2013, http://reason.org/news/show/nlrb-public-private, [http://perma.cc/QEX3-N5KN].

40. 49 U.S.C. § 24301(a) (2006).

41. *See infra* notes 363–67 and accompanying text.

42. Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W. 2d 545, 471 (Tex. 1997).

43. 226 U.S. 137 (1912).

44. *Id.* at 141–42 (internal quotation marks omitted).

45. *Id.* at 143.

46. *Id.* at 143–44.

47. 242 U.S. 526 (1917).

48. *Id.* at 530–31.

49. *Id.* at 531.

50. *Id.* at 530.

51. 278 U.S. 116 (1928).

52. *Id.* at 118 (internal quotation marks omitted).

53. *Id.* at 122.

54. *Thomas Cusack*, 242 U.S. at 529.

55. *Roberge*, 278 U.S. at 122.

56. 298 U.S. 238 (1936).

57. *Id.* at 283–84.

58. 295 U.S. 495 (1935). I discuss *Schechter Poultry* in the section on non-delegation doctrine, see text accompanying *infra* note 130.

59. *Carter Coal*, 298 U.S. at 311; *cf.* Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 614 (1937) (dodging the issue).

60. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 677–78 (1976); McGautha v. California, 402 U.S. 183, 253 n.3 (1971) (Brennan, J., dissenting); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 126 n.30 (1978) (Stevens, J., dissenting).

61. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

62. *New Motor Vehicle Bd.*, 439 U.S. at 109.

63. *See* text accompanying *infra* notes 83–87.

64. *See also* Gen. Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1455 (2d Cir. 1991) ("*Eubank* and *Roberge* remain good law today."); Silverman v. Barry, 727 F.2d 1121, 1126 (D.C. Cir. 1984) (noting that the Supreme Court has had recent opportunity to overrule *Eubank* and *Roberge* but has chosen to distinguish them instead); *cf.* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 Duke L.J. 17, 155 (2000) (making this point about *Carter Coal*); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 Wm. & Mary L. Rev. 411, 457 n.199 (2000) (same).

65. 407 U.S. 67 (1972).

66. *Id.* at 69–70.

67. *Id.* at 84–90.

68. *Id.* at 80–84.

69. *Id.* at 90 (internal quotation marks omitted). This case was decided before *Mathews v. Eldridge*, 424 U.S. 319 (1976), which sets forth the current balancing test, under which predeprivation hearings aren't always necessary.

70. *Fuentes*, 407 U.S. at 93.

71. *Id.* at 93 n.30.

72. *See* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606–07 (1975) (finding a due process violation: The "writ of garnishment [was] issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer" and was based on "conclusory allegations."); Mitchell v. W.T. Grant Co., 416 U.S. 600, 605–06 (1974) (finding due process satisfied: "The writ [of sequestration] . . . will not issue on the conclusory allegation of ownership or possessory rights" but only when a judge is convinced of particular facts.); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 338 (1969) (finding a due process violation: "[N]otice and an opportunity to be heard are not given before the *in rem* seizure of the wages . . . . [T]he clerk of the court issues the summons at the request of the creditor's lawyer . . . .").

73. Froomkin, *supra* note 64, at 149 ("The coal boards' decisions went into effect directly, without review or intervention by the federal government.").

74. If there were some standards to protect against personal bias, the result might well have been different. *See, e.g.*, Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 610 (6th Cir. 2006) (finding no due process violation when a statute required abortion clinics to be licensed by hospitals, because a government official retained the ability to waive the requirement); Biener v. Calio, 361 F.3d 206, 216 (3d Cir. 2004) ("Delaware's limitation on the [primary election] filing fee amount[, set by the relevant political party itself,] is a sufficient limitation on the Party's authority to prevent the delegation from running afoul of the Due Process Clause."); Gen. Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1455 (2d Cir. 1991) (stating that *Eubank* and *Roberge* "stand for the proposition that a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, *without supplying standards to guide the private parties' discretion*." (emphasis added)); Seidenfeld, *supra* note 64, at 457 n.199 ("There is some academic disagreement about the extent of an agency's discretion to deviate or reject negotiated rules necessary to avoid the process being deemed unconstitutional private law making, but the agency or courts must retain some power to ensure that negotiated rules do not contravene statutory provisions and aim to implement something other than deals struck by some, but not all, affected interest groups." (citations omitted)); *cf.* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 188 n.4 (2000) ("[T]he Federal Government retains the power to foreclose a citizen suit by undertaking its own action.").

75. 411 U.S. 564 (1973).

76. *Id.* at 568 (internal quotation marks omitted).

77. *Id.* at 569.

78. *Id.*

79. *Id.* at 569–70.

80. *Id.* at 571. Specifically, board members had to be members of the Alabama Optometric Association, which excluded from membership non-self-employed optometrists. *Id.*

81. *Id.* at 579; *see also* Wall v. Am. Optometric Ass'n, Inc., 379 F. Supp. 175, 188–90 (N.D. Ga. 1974), *summarily aff'd sub nom* Wall v. Hardwick, 419 U.S. 888 (1974); *cf.* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 146–50 (1968) (pecuniary bias of arbitrator).

82. Of course, claimants may still sometimes lose for one reason or another under this line of cases. For example, merely speculative, remote, or conflicting claims of bias aren't sufficient. In *Schweiker v. McClure*, the Court unanimously upheld the delegation of authority to administer Part B Medicare payments, and adjudicate disputed claims, to private insurance companies like Blue Shield of California. 456 U.S. 188 (1982). The Court held that there was no basis for finding that the hearing officers were biased because their salaries, as well as the medical claims they approved, were paid by the federal government, not by the company that employed them. *Id.* at 196–97. While it's quite plausible that self-employed optometrists will benefit financially from disqualifying corporate-employed optometrists, the same can't be said of Blue Shield employees who deny Medicare claims. I thus disagree with the discussion of *McClure* in Abramson, *supra* note 1, at 202–03. *See also* N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n,

198 F.3d 1, 14–15 (1st Cir. 1999); Chrysler Corp. v. Tex. Motor Vehicle Comm'n, 755 F.2d 1192, 1199 (5th Cir. 1985); *cf.* Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Schs., Inc., 432 F.2d 650, 658–59 (D.C. Cir. 1970) (rejecting a due process challenge to an educational accreditation organization (assuming that it could be a state actor) without even mentioning the possibility of financial bias). A private organization could also alleviate due process concerns by its own internal regulations. *See N.Y. State Dairy Foods*, 198 F.3d, at 15.

As another example, delegation to the state referendum process isn't really a private delegation. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 677–78 (1976). Referenda are part of democracy and don't fall within the rule.

83. 439 U.S. 96 (1978).

84. *Id.* at 98.

85. *Id.* at 108–09.

86. *See* text accompanying *supra* notes 43–45.

87. *See* text accompanying *supra* notes 56–57.

88. *New Motor Vehicle Bd.*, 439 U.S. at 120 (Stevens, J., dissenting).

89. This is admittedly an important coercive power, but not one whose self-interested exercise raises due process concerns. In fact, filing lawsuits (unless they're "sham") is a form of petitioning the government and, as such, is protected under the Petition Clause of the First Amendment under the *Noerr-Pennington* doctrine. *See* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180 (9th Cir. 2005).

90. 467 U.S. 229 (1984).

91. *Id.* at 233–34.

92. *Id.* at 241; *see also* Kelo v. City of New London, 545 U.S. 469, 480 (2005).

93. *Midkiff*, 467 U.S. at 243 n.6; *see also* Br. for Appellees at 82–85, *Midkiff*, 467 U.S. 229, Nos. 83-141, 83-236, 83-283, 1984 WL 987633 (citing Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), Eubank v. City of Richmond, 226 U.S. 137 (1912), and other cases).

94. *Midkiff*, 467 U.S. at 233–34.

95. *See also* Berry v. Bd. of Governors of Registered Dentists of Okla., 611 P.2d 628, 630 (Okla. 1980) (bias in a board's decision to enforce the law by suing in state court doesn't violate due process).

96. *See* Biener v. Calio, 361 F.3d 206, 215–17 (3d Cir. 2004) (entertaining under *Eubank* and *Roberge*, though ultimately rejecting, a challenge to political parties' right to charge and keep filing fees for primary elections); Gen. Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1455 (2d Cir. 1991) ("[T]he determination of wage and supplement rates is delegated in the first instance to private parties who are not those persons the statute is designed to protect, and . . . the statute gives the state no option other than to accept the decision made by those private parties."); Silverman v. Barry, 727 F.2d 1121, 1126 (D.C. Cir. 1984) (holding that a challenge to a delegation of tenants of the power to prevent conversion of apartments to condos can survive a motion to dismiss); Beary Landscaping Inc. v. Shannon, No. 05 C 5687, 2008 WL 4951189 (N.D. Ill. Nov. 18, 2008) (similar to *General Electric Co. v. New York State Department of Labor*); Schulz v. Milne, 849 F. Supp. 708, 712–13 (N.D. Cal. 1994) (holding that allegations that a city had unlawfully surrendered permitting power to a "neighborhood review board," a local citizens' group, adequately stated a § 1983 claim under *Eubank* and *Roberge*); Independence Pub. Media of Phila., Inc. v. Pa. Pub. Television Network Comm'n, 808 F. Supp. 416, 424–27 (E.D. Pa. 1992); Nissan Motor Corp. in U.S.A. v. Royal Nissan, Inc., 757 F. Supp. 736, 740–41 (E.D. La. 1991); Wall v. Am. Optometric Ass'n, Inc., 379 F. Supp. 175, 187–90 (N.D. Ga. 1974); *cf.* Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 666–67 (4th Cir. 1989) (suggesting that consideration of adverse public sentiment in waste facility permitting raises similar issues to those in *Eubank* and *Roberge*); Sierra Club v. Sigler, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (stating, in a case where the U.S. Army Corps of Engineers apparently rubberstamped information provided by a private firm for an Environmental Impact Statement, that "an agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest," but locating the source of this prohibition in NEPA (internal citations omitted)); Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974) (same).

97. Some of these state courts may also be applying their own constitutional law. *See, e.g.*, People *ex rel.* Rudman v. Rini, 356 N.E.2d 4, 7 (Ill. 1976) (striking down delegation to political parties of the power to fill vacancies in political offices, citing *Carter Coal* and Illinois cases); People *ex rel.* Chi. Dryer Co. v. City of Chicago, 109 N.E.2d 201, 204–06 (Ill. 1952) (striking down delegation to residents of the power to name streets, citing *Eubank* and *Thomas Cusack*); Am. Motors Sales Corp. v. New Motor Vehicle Bd. of Cal., 138 Cal. Rptr. 594, 596–600 (Cal. Ct. App. 1977); Bayside Timber Co. v. Bd. of Supervisors, 20 Cal. App. 3d 1, 10–15 (Cal. Ct. App. 1971) (striking down law giving private parties veto power over enforcement of environmental and public protection laws on their property, citing *Carter Coal* and California cases); Murtha v. Monaghan, 151 N.E.2d 83 (N.Y. 1958); David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 Yale L.J. 815, 827 n.66 (1987) (collecting state cases); *cf.* Santaniello v. N.J. Dep't of Health & Senior Servs., 5 A.3d 804, 809 (N.J. Super. Ct. App. Div. 2010) (recognizing the doctrine but calling it a "principle[] of administrative law" rather than a state or federal constitutional doctrine).

98. *See supra* Part I.B.1.

99. *See infra* Part III.C.3. This would require a showing that Amtrak is a state actor, but fortunately one can simply rely on *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995).

100. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

101. Perhaps not against Amtrak itself. *See* FDIC v. Meyer, 510 U.S. 471 (1994); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001); Volokh, *Modest Effect*, *supra* note 7, at 297. As with all these examples, the employees sued under *Bivens* or 18 U.S.C. § 1983 would be able to argue qualified immunity. The question would be whether the boards are closer to the private attorney hired by the government in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), or the private prison firm in *Richardson v. McKnight*, 521 U.S. 399 (1997). I would lean toward *Filarsky* (and thus the presence of qualified immunity), but this is an unresolved issue. *See* Volokh, *Supreme Court*, *supra* note 7. But even if this argument succeeded, that wouldn't help against clear violations of due process or against injunctive challenges. *See also* Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 Cardozo L. Rev. 35 (2004) (discussing qualified immunity, vicarious liability, and punitive damages issues in § 1983 suits).

102. N.C. Gen. Stat. Ann. § 90-29(b)(2) (West 2013).

103. *See supra* Part I.B.2.

104. N.C. Gen. Stat. Ann. §§ 90-27, 90-41.1.

105. Miss. Code Ann. § 73-21-157(3)(b) (West 2013).

106. *See* Shepherd, *supra* note 19.

107. Or there may be pre-enforcement review of the biased rule, regardless of the forum in which the rule will ultimately be enforced.

108. As to general allegations of bias (not necessarily pecuniary), compare *Federal Trade Commission v. Cement Inst.*, 333 U.S. 683, 701 (1948) (a rulemaker is impermissibly biased if his mind is "irrevocably closed"), with *Cinderella Career & Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 589–92 (D.C. Cir. 1970) (an adjudicator is impermissibly biased if he has prejudged the law or facts). For pecuniary bias, see *Friedman v. Rogers*, 440 U.S. 1, 18–19 (1979) ("Finding [in previous cases involving adjudicatory hearings] the presence of . . . prejudicial [pecuniary] interests [in regulatory board members], it was appropriate for the courts to enjoin further proceedings against the plaintiffs. In contrast, [the current challenger's] challenge to the fairness of the Board does not arise from any disciplinary proceeding against him."), *N.Y. State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, 198 F.3d 1, 13–14 (1st Cir. 1999), *Alliance of Auto. Mfrs. v. Gwadosky*, 353 F.

Supp. 2d 97, 108–09 (D. Me. 2005) (distinguishing between facial and as-applied challenges to boards), *Wall v. Am. Optometric Ass'n*, 379 F. Supp. 175, 190–91 (N.D. Ga. 1974) (invalidating board adjudication because of biased board membership, but upholding validity of rules without even mentioning biased board membership). *But see* Wecht, *supra* note 97, at 825 n.58 (arguing that this distinction is "murky").

109. Challengers should have no trouble showing that all three of these boards are state actors since, as regulators, they fulfill traditionally exclusive governmental functions. *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

110. Non-state actors are not subject to Bill of Rights protections like the Due Process Clause. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic. Ass'n, 531 U.S. 288, 295 (2001); Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982).

111. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972).

112. *See* Volokh, *supra* note 5, at 153–56.

113. *Cf.* Galaxy Fireworks, Inc. v. City of Orlando, 842 So. 2d 160, 166–67 (Fla. Dist. Ct. App. 2003) (noting that it would be unconstitutional (though the precise constitutional provision is left ambiguous) for a state statute to incorporate federal laws or private code provisions *as they may exist in the future*, without distinguishing between the public and private sources incorporated).

114. 273 U.S. 510 (1927).

115. *Id.* at 514–20.

116. 409 U.S. 57 (1972).

117. *Id.* at 57–60.

118. 475 U.S. 813 (1986).

119. *Id.* at 821–25.

120. *See* Withrow v. Larkin, 421 U.S. 35, 47 & n.14 (1975) (identifying "pecuniary interest" cases as one type where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," and citing *Gibson v. Berryhill*, *Ward v. Village of Monroeville*, and *Tumey v. Ohio*—both private-adjudicator and public-adjudicator cases).

121. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) ("[I]t is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."); Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928) ("They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice."); *see also* text accompanying *infra* notes 233–235.

122. *See* Wecht, *supra* note 97, at 825–26 & n.59.

123. *See, e.g.*, Esso Standard Oil Co. v. Cotto, 389 F.3d 212, 218–19 (1st Cir. 2004); United Church of the Med. Ctr. v. Med. Ctr. Comm'n, 689 F.2d 693, 698–700 (7th Cir. 1982).

124. *See* text accompanying *infra* notes 130–132.

125. U.S. Const. art. I, § 1.

126. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001); Field v. Clark, 143 U.S. 649, 692 (1892).

127. *See Am. Trucking*, 531 U.S. at 487–90 (Stevens, J., concurring in part and concurring in the judgment).

128. *See, e.g.*, Joseph William Singer, Property Law: Rules, Policies, and Practices 590 (2d ed. 1997) (quoting the traditional Rule Against Perpetuities: "No interest is good unless it must vest, if at all, no later than 21 years after the death of some life in being at the creation of the interest").

129. *See, e.g.*, *In re* Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999).

130. *See* Panama Refining v. Ryan, 293 U.S. 388, 430 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935).

131. Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 341–42 (1974); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion); *cf.* Arizona v. California, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting in part) (using constitutional doubts raised by a broad delegation to "buttress the conviction, already firmly grounded in [a statute] and its history," that an agency lacked certain power under the statute).

132. Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315–16 (2000).

133. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

134. *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2167–68 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1731, 1757 (2002). *But see* Merrill, *supra*, at 2168 (suggesting that private delegations might run afoul of deep structural considerations—there are only three branches, and delegation to someone outside of the three branches is invalid—or some other provision like "the Appointments Clause, Article III's guarantee of judicial independence, or the Due Process Clause" (footnotes omitted)). Thus, for instance, one can object to the delegation to citizens of the power to enforce federal statutes on Article II grounds; this is one of the dormant themes of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), though the point wasn't squarely presented there, *see id.* at 209 (Scalia, J., dissenting). As Justice Kennedy wrote:

> Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.

Id. at 197 (Kennedy, J., concurring).

135. *Schechter Poultry*, 295 U.S. at 537.

136. *See* Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 Harv. L. Rev. 751, 763 (2013) ("[T]his passage relating to the industrial actors might best be read as unnecessary dicta.").

137. I thus disagree with David Wecht, Michael Froomkin, and David Horton, who argue that this was a *holding* of *Schechter* regarding delegation to private organizations. *See* Wecht, *supra* note 97, at 824; Froomkin, *supra* note 64, at 148; David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. Rev. 437, 475 (2011). The delegation was to the President, and analyzed as such, so any statement about delegation to private groups was dictum.

138. *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245, 253 (1947); Yakus v. United States, 321 U.S. 414, 426 (1944) (noting adequate opportunity for judicial review); *Schechter Poultry*, 295 U.S. at 539–40 (distinguishing delegation to the ICC, which acts on "notice and hearing," and the Federal Radio Commission, which enforces congressional standards "upon hearing, and evidence, by an administrative body acting under statutory restrictions adapted to the particular activity"); *see also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) (one goal of non-delegation doctrine is to ensure adequate judicial review).

139. *See* Abramson, *supra* note 1, at 180–87 (discussing difference in accountability mechanisms for public and private actors); *see also, e.g.*, text accompanying *infra* note 191.

140. *See also* text accompanying *infra* notes 259–61.

141. 306 U.S. 1 (1939).

142. *Id.* at 5.

143. *Id.* at 6 (quoting Act) (internal quotation marks omitted).

144. *Id.*

145. *Id.*

146. *Id.* at 15.

147. *Id.* at 15–16.

148. *Id.* at 16.

149. *See supra* Part II.A.1.

150. *See* text accompanying *infra* notes 241–64.

151. Or perhaps the Court was hinting that private delegations *become* due process issues (and thus problematic even if states do it), while public delegations are just a matter of the division of power within the government (and therefore only a matter of constitutional concern if the federal government does it). This is all very tantalizing, but this, too, is dictum.

152. *Currin*, 306 U.S. at 16.

153. 276 U.S. 394 (1928).

154. *Id.* at 407. This section was cited in *Currin*, 306 U.S. at 16.

155. 293 U.S. 388 (1935).

156. *Id.* at 406.

157. *Id.* at 416–19.

158. *Id.* at 430.

159. *Currin*, 306 U.S. at 16 (quoting *J.W. Hampton*, 276 U.S. at 407) (internal quotation marks omitted). The Supreme Court relied on *Currin* under similar circumstances in *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 577–78 (1939). *See also* United States v. Frame, 885 F.2d 1119, 1127–28 (3d Cir. 1989) (upholding similar industry referendum provision based on *Currin*). The Court also upheld a regulatory scheme for the coal industry in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), where Congress delegated power to a government commission but made private industry into advisors to the commission. Justice Douglas wrote: "Nor has Congress delegated its legislative authority to the industry. The [private industry] members of the code function subordinately to the [government] Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid." *Id.* at 399. *See also Frame*, 885 F.2d at 1128 (upholding delegation to beef industry of power to collect assessements and plan spending of funds, because of considerable government involvement and lack of actual lawmaking power in hands of beef industry); Cospito v. Heckler, 742 F.2d 72, 86–89 (3d Cir. 1984) (no invalid delegation to Joint Commission on Accreditation of Hospitals because Secretary of Health, Education and Welfare retained ultimate authority on accreditation); Todd & Co., Inc. v. SEC, 557 F.2d 1008, 1012–13 (3d Cir. 1977) (self-regulation of over-the-counter securities dealers by the National Association of Securities Dealers was not an unconstitutional delegation because "the Association's rules and its disciplinary actions [are] subject to full review by the SEC"); R.H. Johnson & Co. v. S.E.C., 198 F.2d 690, 695 (2d Cir. 1952) (similar).

160. *See Frame*, 885 F.2d at 1128 (upholding delegation to beef industry based on the presence of sufficient standards, without referring to any special test for private delegates); Crain v. First Nat'l Bank of Or., Portland, 324 F.2d 532, 537 (9th Cir. 1963) (under Article I, Section 1, "Congress cannot delegate to *private corporations or anyone else* the power to enact laws" (emphasis added)); Metro Med. Supply, Inc. v. Shalala, 959 F. Supp. 799, 801 (M.D. Tenn. 1996) ("Plaintiffs aver that the pedigree provisions constitute an unconstitutional delegation of legislative authority, under Article I, Section 1, of the Constitution, to the FDA and, in turn, to private drug manufacturers."); Abramson, *supra* note 1, at 193 (asserting that, in *Currin* and *Rock Royal*, the Supreme Court examined private delegation "under the same test that it applied to public delegations"); *id.* at 198 (arguing that, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), involving "an Article III challenge to a private adjudication, . . . the majority did not analyze the implications of [the] crucial fact [that the adjudicators were private]; instead it concluded summarily that delegation did not 'diminish the likelihood of impartial decisionmaking'"); *cf.* Luxton v. N. River Bridge Co., 153 U.S. 525, 529–30 (1894) (implying that Congress can not only exercise the power of eminent domain, but also create a corporation to exercise eminent domain if this is necessary and proper to exercise Congress's powers).

161. The most recent case is *Ass'n of American Railroads v. Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), discussed *infra* Part III.C.1, which does quite a bit more than hint. *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), is also discussed below, *see* text accompanying *infra* notes 296–303. *See also* Cospito v. Heckler, 742 F.2d 72, 87 n.25 (3d Cir. 1984) (in dictum, citing *Schechter* and *Roberge* as cases possibly establishing a higher bar for private delegations under non-delegation doctrine); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1143 (D.C. Cir. 1984) ("[A non-delegation] argument is typically presented in the context of a transfer of legislative authority from the Congress to agencies, but the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals. [But w]e need not examine the problem because we divine no such abdication of the Commission's role as disinterested arbiter to any interested party."); United States v. Mazurie, 487 F.2d 14, 19 (10th Cir. 1973) ("Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located."), *rev'd*, 419 U.S. 544, 557 (1975) (holding that the Indian tribe to which authority was delegated wasn't private but rather a "unique aggregation[] possessing attributes of sovereignty").

162. *See supra* Part I.B.

163. Assume away any problems of Congressional powers, such as Commerce Clause problems.

164. *See* 49 U.S.C. § 24301(a) (2006).

165. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474–75 (2001).

166. N.C. Gen. Stat. Ann. § 90-22(a) (West 2013).

167. *See, e.g.*, NBC v. United States, 319 U.S. 190, 225–26 (1943); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

168. Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 496 (Tex. 1997) (Cornyn, J., concurring in part and dissenting in part) (quoting Tex. Agric. Code § 74.101(c) (1995)).

169. FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 887 (Tex. 2000).

170. *See* text accompanying *supra* note 34.

171. *See* Miss. Code Ann. § 73-21-157 (West 2013).

172. *See* text accompanying *supra* notes 125–27.

173. Abbott v. State, 63 So. 667, 669 (Miss. 1913).

174. State *ex rel.* Patterson v. Land, 95 So. 2d 764, 777 (Miss. 1957); *see also* City of Belmont v. Miss. State Tax Comm'n, 860 So. 2d 289 (Miss. 2003); State v. Allstate Ins. Co., 97 So. 2d 372, 375 (Miss. 1957).

175. *See* Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 468 (Tex. 1997) (citing Kenneth Culp Davis, Administrative Law Treatise § 3.14, at 204 (2d ed. 1978)); Peter L. Strauss et al., Gellhorn and Byse's Administrative Law: Cases and Comments 617–19 (11th ed. 2011) (citing Boreali v. Axelrod, 517 N.E.2d 1350 (1987)); Hans A. Linde et al., Legislative and Administrative Processes 477–78 (2d ed. 1981)). The state cases are often criticized for being not very well reasoned or not forming a coherent whole. *See, e.g.*, Davis, *supra*, § 3.12, at 196 ("[I]dentifiable principles do not emerge.").

176. Gary J. Greco, Note, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 Admin. L.J. 567, 580–88 (1994).

177. *See* Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978).

178. *See In re* Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002); Democratic Party of Okla. v. Estep, 652 P.2d 271 (Okla. 1982); Oliver v. Okla. Alcoholic Beverage Control Bd., 359 P.2d 183 (Okla. 1961).

179. *See also* City of Covington v. Covington Lodge No. 1, 622 S.W.2d 221, 222–23 (Ky. 1981) (adopting powers-based approach to forbid a municipality from delegating "legislative or discretionary," but not "administrative," powers).

180. *See infra* Part III.C.4; *see also* Grp. Health Ins. of N.J. v. Howell, 193 A.2d 103, 108–09 (N.J. 1963) (striking down a requirement that the nomination of trustees of medical service corporations be approved by "a recognized medical society or professional medical organization" under both

a separation of powers analysis and a due process analysis). Several states have moved from a separation of powers view to a "procedural safeguards" view, which sounds more in due process. Colorado, for instance, followed a separation of powers-based view, see *Olinger v. People*, 344 P.2d 689, 691–92 (Colo. 1959) (en banc), but later adopted the procedural safeguards view, see *People v. Lowrie*, 761 P.2d 778, 782 (Colo. 1988) (en banc). The same evolution can also be seen in New York. *Compare* Fink v. Cole, 97 N.E.2d 873, 876 (N.Y. 1951) (citing N.Y. Const. art. III, § 1) (referring to the need for "guides and proper standards"), *with Boreali*, 517 N.E.2d at 1353–54 (stating that "[t]he modern view" insists on "'reasonable safeguards and standards'"). And likewise in Maryland. *Compare* Md. Co-operative. Milk Producers v. Miller, 182 A. 432, 435 (Md. 1936), *with* Dep't of Transp. v. Armacost, 532 A.2d 1056, 1060 (Md. 1987).

181. Gamel v. Veterans Memorial Auditorium Comm'n, 272 N.W.2d 472, 475 (Iowa 1978) (citing Iowa Const. art. III, § 1); *id.* at 476 (striking down a delegation to a veterans' group of the power to spend public funds; also citing similar cases from other jurisdictions); *see also* Vietnam Veterans Against the War v. Veterans Memorial Auditorium Comm'n, 211 N.W.2d 333, 338–39 (Iowa 1973) (McCormick, J., dissenting).

182. Remington Arms Co. v. G.E.M. of St. Louis, Inc., 102 N.W.2d 528, 534–35 (Minn. 1960); West St. Paul Fed. of Teachers v. Indep. Sch. Dist. No. 197, West St. Paul, 713 N.W.2d 366, 376–77 (Minn. App. 2006) (recognizing *Remington Arms* as good law but distinguishing it). A recent challenge to Minnesota's occupational licensing of horse teeth floaters relied in part on a private delegation theory. *See Challenging Barriers to Economic Opportunity*, Institute for Justice, http://www.ij.org/minnesota-horse-teeth-floating-background, [perma.cc/FC55-9LKR]. But this challenge failed in a district court in 2008. *See Minnesota District Court Upholds Economic Protectionism*, Institute for Justice (June 23, 2008), http://www.ij.org/minnesota-horse-teeth-floating-release-6-15-07, [http://perma.cc/G8Z9DQMV].

183. Hetherington v. McHale, 329 A.2d 250, 253–54 (Pa. 1974) (striking down delegation to private organizations of the power to select eight out of seventeen members of a board responsible for spending public funds); Commonwealth *ex rel.* Kane v. McKechnie, 358 A.2d 419, 420–21 (Pa. 1976); Independence Pub. Media of Phila., Inc. v. Pa. Pub. Television Network Comm'n, 808 F. Supp. 416, 422–24 (E.D. Pa. 1992).

184. Toussaint v. State Bd. of Med. Exam'rs, 329 S.E.2d 433 (S.C. 1985); Gold v. S.C. Bd. of Chiropractic Exam'rs, 245 S.E.2d 117, 119–20 (S.C. 1978); Gould v. Barton, 181 S.E.2d 662, 674 (S.C. 1971); Ashmore v. Greater Greenville Sewer Dist., 44 S.E.2d 88, 95 (S.C. 1947).

185. Some Utah cases have struck down private delegations, but the constitutional basis for these holdings has been quite ambiguous. *See, e.g.*, Salt Lake City v. Int'l Ass'n of Firefighters, 563 P.2d 786, 789 (Utah 1977); Union Trust Co. v. Simmons, 211 P.2d 190, 191–93 (Utah 1949); Revne v. Trade Comm'n, 192 P.2d 563, 565–68 (Utah 1948).

186. Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 465 (Tex. 1997) (citing Tex. Const. art. II, § 1; *id.* art. III, § 1). For previous cases applying a non-delegation doctrine against the judiciary and a state administrative agency, see *id.* at 468–69 (citing cases).

187. *See supra* Part I.B.4.

188. *Tex. Boll Weevil*, 952 S.W.2d at 470.

189. *Id.* (citing Tex. Agric. Code §§ 74.109(d), 74.109(f), 74.110, 74.120(c), 74.127; Tex. Gov't Code § 551.001(3) (1995) (internal citations omitted)).

190. *Id.* (citing Tex. Agric. Code § 74.109(d)).

191. *Id.* (citing Tex. Agric. Code § 74.109(e), 4 Tex. Admin. Code § 3.57) (internal citations omitted).

192. *Id.* at 471. *But see id.* at 494 (Cornyn, J., concurring in part and dissenting in part) ("The Court also fails to adequately explain why this largely fictional distinction [between public and private agencies], which leads it to propose an 'either/or' choice, is so important that this entire statute should turn on it."); *see also* text accompanying *infra* note 248 (noting potential disadvantages of developing new public-private tests).

193. *Tex. Boll Weevil*, 952 S.W.2d at 472 (majority opinion).

194. *Id.* at 473–75.

195. *Id.* at 475. Justice Hecht believed the unconstitutionality of the delegation was even clearer than the majority had thought; in his view, the Foundation was "little more than a posse: volunteers and private entities neither elected nor appointed, privately organized and supported by the majority of some small group, backed by law but without guidelines or supervision, wielding great power over people's lives and property but answering virtually to no one." *Id.* at 479 (Hecht, J., concurring in part and concurring in the judgment). Justice Hecht's opinion analyzed the delegation using due process cases like *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), *Eubank v. City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). *See Tex. Boll Weevil*, 952 S.W.2d at 487–89 (Hecht, J., concurring in part and concurring in the judgment). The majority opinion avoided using such cases. *See* text accompanying *infra* note 304. These due process cases are discussed above, *see supra* Part II.A.1. For a discussion of why non-delegation ideas and due process ideas should be kept separate, *see infra* Part III.C.

196. *Tex. Boll Weevil*, 952 S.W.2d at 492 (Cornyn, J., concurring in part and dissenting in part).

197. *Id.* at 493.

198. *Id.*

199. *Id.* at 493–94.

200. Justice Abbott recapitulated the concerns of the *Texas Boll Weevil* dissent the next time the Texas Supreme Court used the doctrine to strike down a private delegation. *See* FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 899 (Tex. 2000) (Abbott, J., dissenting).

201. *See* Proctor v. Andrews, 972 S.W.2d 729, 734–38 (Tex. 1998).

202. *See* City of Houston v. Clark, 197 S.W.3d 314, 320 (Tex. 2006); *see also* City of Pasadena v. Smith, 292 S.W.3d 14 (Tex. 2009). For the analogous use of the federal non-delegation doctrine as an avoidance canon, see text accompanying *supra* notes 131–32.

203. *See supra* Part I.B.5.

204. *FM Props.*, 22 S.W.3d at 879.

205. *Id*. at 875–77.

206. *Id*. at 880–88; *see also* Froomkin, *supra* note 64, at 158 (suggesting that, according to *FM Properties*, factors (1) and (4) are most important).

207. *See* text accompanying *supra* notes 160–61.

208. *See, e.g.*, *FM Props.*, 22 S.W.3d at 887–88 (fairly searching review of standards).

209. 721 F.3d 666 (D.C. Cir. 2013).

210. *Id.* at 668. For the facts surrounding the Amtrak case, *see supra* Part I.B.1. This case is already being relied on to challenge other delegations of regulatory authority to private parties. *See, e.g.*, Appellants' Brief, Contender Farms, L.L.P. v. U.S. Dep't of Agric., No. 13-11052, 2013 WL 6823424 (5th Cir. Dec. 18, 2013) (challenging rule delegating USDA's enforcement authority under Horse Protection Act to private parties).

211. *Ass'n of Am. Railroads*, 721 F.3d at 671.

212. *Id*. at 671 n.3 (citing Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)).

213. *See* text accompanying *supra* notes 141–51.

214. *See supra* note 159; *Ass'n of Am. Railroads*, 721 F.3d at 671.

215. *Ass'n of Am. Railroads*, 721 F.3d at 671.

216. *See* text accompanying *supra* notes 188–95 (explaining the Texas Supreme Court's test establishing that the Boll Weevil Eradication Foundation was private).

217. 513 U.S. 374, 400 (1995).

218. *Id.*

219. *Ass'n of Am. Railroads*, 721 F.3d at 676–77.

220. *Id.*

221. *Id.* at 674.

222. *Id.*

223. *Id.*

224. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982); Blum v. Yaretsky, 457 U.S. 991, 1010–11 (1982).

225. *Ass'n of Am. Railroads*, 721 F.3d at 675 (quoting 49 U.S.C. § 24301(a)) (internal quotation marks omitted).

226. *Id*. (quoting 49 U.S.C. § 24301(a)) (internal quotation marks omitted).

227. *Id*. at 676 (quoting 49 U.S.C. § 24101(d)) (internal quotation marks omitted).

228. *Id*. at 675 (quoting Nat'l R.R. Passenger Corp., Freedom of Information Act Handbook 1 (2008)) (internal quotation marks omitted).

229. *Id.*

230. *Id.*

231. *Id.*

232. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81, 85–91 (1985).

233. *Ass'n of Am. Railroads*, 721 F.3d at 675 (quoting Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)) (internal quotation marks omitted).

234. *Id.* (quoting Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 118, 122 (1928)) (internal quotation marks omitted).

235. *Cf.* Volokh, *supra* note 5, at 172–87.

236. *Ass'n of Am. Railroads*, 721 F.3d at 676.

237. This case is also discussed in Alexander Volokh, *A New Private Delegation Doctrine?*, Reason.Org (Aug. 1, 2013), http://reason.org/news/show/private-delegation-doctrine-amtrak, [perma.cc/CUZ9-5FPR].

238. *See* text accompanying *supra* note 58.

239. *See* text accompanying *supra* note 206.

240. *Ass'n of Am. Railroads*, 721 F.3d at 671 n.3.

241. *See* Wecht, *supra* note 97, at 825 n.57; *The Vagaries of Vagueness*, *supra* note 136, at 764; text accompanying *supra* note 172.

242. 287 U.S. 116 (1928).

243. 424 U.S. 319 (1976).

244. 408 U.S. 564 (1972).

245. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

246. On *Bivens*, see Volokh, *Modest Effect*, *supra* note 7.

247. *See* Fed. Power Comm'n v. New England Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., dissenting); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 131–33 (1980); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 58–81 (1993); Sunstein, *supra* note 132, at 315.

248. *Cf.* Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 494 (Tex. 1997) (Cornyn, J., concurring in part and dissenting in part) (criticizing majority's newly minted public-private analysis).

249. 531 U.S. 457 (2001).

250. *Id.*

251. *Id*. at 463 (citing Am. Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

252. *Id*. (citing *Am. Trucking*, 175 F.3d at 1038).

253. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713, 713 (1969). The D.C. Circuit, by the time of *American Trucking*, had already used this approach in *Amalgamated Meat Cutters & Butcher Workmen AFL-CIO v. Connally*, 337 F. Supp. 737, 758–59 (D.D.C. 1971) (three-judge panel).

254. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472–73 (2001).

255. *Id*. at 473.

256. *See* 5 U.S.C. § 553(b)–(c) (2012).

257. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

258. *See supra* notes 138–39 and accompanying text.

259. *See* 5 U.S.C. § 551(1) (defining "agency"); *id.* § 551(4)–(7) (limiting the definitions of "rule," "rule making," "order," and "adjudication" to agencies).

260 . Bill of Rights protections apply only against "state actors," a category that often (though not always) excludes private parties. *See* sources cited *supra* note 110.

261 . *See* text accompanying *supra* notes 139, 160–61.

262 . *See* 5 U.S.C. § 706(2)(A); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

263 . 424 U.S. 319, 335 (1976) (holding that analysis of whether procedure conforms to due process is done by balancing affected party's interest, government's interest, and importance of procedure for accuracy).

264 . *See* 5 U.S.C. §§ 554, 556–57.

265 . *See* text accompanying *supra* notes 56–59.

266 . *See supra* Part II.A.

267 . *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771–78 (2000) (rejecting this argument).

268 . *See, e.g.*, *id.* at 778 n.8 (noting the question but not deciding it); Paul R. Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It 106–13 (2007); Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 Yale L.J. 341, 374–80 (1989).

269 . *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982); Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 Ohio St. L.J. 983, 1015–20 (2011); *The Vagaries of Vagueness*, *supra* note 136, at 767–68.

270 . *See supra* note 130 and accompanying text.

271 . *See* Carter v. Carter Coal Co., 298 U.S. 238, 311–12 (1936).

272 . *See id.* at 311–12.

273 . *See* text accompanying *supra* notes 141–59.

274 . *See* Abramson, *supra* note 1, at 208–09 (calling *Carter Coal* "[t]he most glaring example of this commingling" and attributing the "persistent" commingling in part to "sloppy judicial analysis").

275 . *See* Horton, *supra* note 137, at 473–74 & nn.205–07 (listing sources that locate private delegation doctrine in the Vesting Clause, the Due Process Clause, or both—and correctly listing *Carter Coal* as a due process case).

276 . 402 U.S. 183 (1971).

277 . *Id.* at 272 n.21 (Brennan, J., dissenting).

278 . *Id.* at 272.

279 . Fed. Power Comm'n v. New England Power Co., 415 U.S. 352, 354 n.2 (1974) (Marshall, J., concurring in the result and dissenting); *see also* Hornell Ice & Cold Storage Co. v. United States, 32 F. Supp. 468, 470 (W.D.N.Y. 1940) (stating that "Congress did not unlawfully delegate legislative power to private persons in violation of Article I, Section 1 of the Constitution" but, in justifying why not, distinguishing *Carter Coal*); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J.

Const. L. 251, 264 n.72 (2010) ("The nondelegation doctrine . . . survives instinctively, . . . appearing variously in the guise of the Due Process Clause, *see, e.g.*, [*Carter Coal*], [and other provisions]."); Posner & Vermeule, *supra* note 134, at 1722 n.5, 1757; Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. Rev. 911, 914, 919–20 (1988).

280 . Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. Rev. 397, 422 (2006); *see also* Froomkin, *supra* note 64, at 151 (treating *Carter Coal* as having been limited by *Currin v. Wallace*, discussed above as a non-delegation case); *id.* at 153 (recognizing due process aspect of *Carter Coal*).

281 . Thus, Chief Justice Hughes writes, in his separate opinion in *Carter Coal*, that the delegation violates (1) non-delegation doctrine and (2) the Due Process Clause. Carter v. Carter Coal Co., 298 U.S. 238, 318 (1936) (separate opinion of Hughes, C.J.). But his non-delegation discussion doesn't refer to the public-private distinction: If the argument in support of the delegation were valid, he writes, it "would remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated *officials or private persons* . . . ." *Id.* (emphasis added). Only the due process discussion treats the private nature of the delegates as relevant. *See id.*

282 . *See* text accompanying *supra* notes 164–65.

283 . Wecht calls *Carter Coal* a "de facto application of the nondelegation doctrine to private, for-profit entities through the Due Process clause." Wecht, *supra* note 97, at 824 (section title) (section capitalization removed).

284 . *See* text accompanying *supra* notes 141–59.

285 . *But see* Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 467 (Tex. 1997) ("Even in its heyday, the nondelegation doctrine was sparingly applied, having been used by the United States Supreme Court to strike down a federal statute only three times." (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), *Carter Coal*, 298 U.S. 238)).

286 . 462 U.S. 919 (1983).

287 . *See id.* at 985 (White, J., dissenting).

288 . 488 U.S. 361 (1989).

289 . *Id.* at 373 (citations omitted); *see also Tex. Boll Weevil*, 952 S.W.2d at 499 n.5 (Cornyn, J., concurring in part and dissenting in part).

290 . 531 U.S. 457, 474 (2001).

291 . Synar v. United States, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986), *aff'd sub nom.*, Bowsher v. Synar, 478 U.S. 714 (1986).

292 . I make many of these arguments in my amicus brief supporting the cert petition in this case. *See* Brief of Alexander Volokh as Amicus Curiae in Support of Petitioners, Dep't of Transp. v. Ass'n of Am. Railroads, No. 13-1080 (Apr. 10, 2014), *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2014/04/Amtrak_Volokh-Amicus.pdf, [perma.cc/N6TA-GBS4].

293 . *See supra* notes 164–65 and accompanying text.

294 . *See* text accompanying *supra* notes 217–19.

295 . *But see* Ass'n of Am. Railroads v. Dep't of Transp., 865 F. Supp. 2d 22, 31–32 (D.D.C. 2012) (stating that the Association of American Railroads had waived this argument, but "not[ing]" "[i]n passing" that "in light of the FRA's and STB's involvement and Amtrak's political accountability, the potential for bias appears remote" (citation omitted)).

296 . *See* Pittston Co. v. United States, 368 F.3d 385, 389 (4th Cir. 2004).

297 . *Id.* at 390–91.

298 . *Id.* at 393.

299 . 276 U.S. 394 (1928); *see* text accompanying *supra* notes 153–58.

300 . 531 U.S. 457 (2001); *see* text accompanying *supra* notes 249–56.

301 . *See Pittston*, 368 F.3d at 394 (citing U.S. Const. art. I, § 1; *id.*, art. II, § 1; *id.*, art. III, § 1).

302 . *Id.* (quoting Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)) (internal quotation marks omitted).

303 . *Id.* (quoting *Carter Coal*, 298 U.S. at 311) (internal quotation marks omitted).

304 . 310 U.S. 381 (1940); *see supra* note 159 and text accompanying *supra* note 214.

305 . *See* Newport Int'l Univ., Inc. v. State Dep't of Educ., 186 P.3d 382, 388–90 (Wyo. 2008).

306 . *See, e.g.*, Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 248 (1937); David M. Lawrence, *Private Exercise of Governmental Power*, 61 Ind. L.J. 647, 662 (1986).

307 . *See supra* Part III.B.

308 . *See* Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 467 n.10 (Tex. 1997).

309. *See* text accompanying *supra* note 193.

310. Factor (1), the availability of "meaningful review by a state agency or other branch of state government," also sounds like the relevant due process factor of the availability of post-deprivation remedies.

311. *See* Emmett McLoughlin Realty, Inc. v. Pima Cnty., 58 P.3d 39, 41 (Ariz. Ct. App. 2002) (citing Ariz. Const. art. IV, pt. 1, § 1(1) ("The legislative authority of the State shall be vested in the Legislature . . . .")).

312. *Id.*

313. *See* text accompanying *supra* notes 51–55.

314. *Emmett McLoughlin Realty*, 58 P.3d at 41 (citing Indus. Comm'n v. C & D Pipeline, Inc., 607 P.2d 383, 385 (Ariz. App. 1979) (citing Carter v. Carter Coal Co., 298 U.S. 238 (1936))).

315. *See* People *ex rel.* Chi. Dryer Co. v. City of Chi., 109 N.E.2d 201, 204 (Ill. 1952) (citing Ill. Const. art. IV, § 1).

316. *See* Chicagoland Chamber of Commerce v. Pappas, 880 N.E.2d 1105, 1118–19 (Ill. App. Ct. 2007) (citing Ill. Const. art. IX, § 6). The title heading of the section of that case discussing the doctrine is "Nondelegation Doctrine Separation of Powers," *id.* at 1118, which makes the source of the doctrine clear.

317. *Chicagoland Chamber of Commerce*, 880 N.E.2d at 1120 (citing *Chi. Dryer Co.*, 109 N.E.2d at 201, 204); *Chi. Dryer Co.*, 109 N.E.2d at 205–06 (citing Eubank v. City of Richmond, 226 U.S. 137 (1912), Thomas Cusack Co. v. City of Chi., 242 U.S. 526 (1917), Carter v. Carter Coal Co., 298 U.S. 238 (1936)).

318. *See* text accompanying *supra* notes 257–70.

319. *See* text accompanying *supra* notes 241–44, 247.

320. *See supra* Part II.A.3.

321. Don't confuse this with the "state action" doctrine of constitutional law. S*ee* sources cited *supra* note 110.

322. 317 U.S. 341 (1943).

323. *Id.* at 350–52.

324. Bates v. State Bar of Ariz., 433 U.S. 350, 361–62 (1977).

325. *See* Hoover v. Ronwin, 466 U.S. 558, 568 (1984) (summarizing *Parker* doctrine as to state legislatures and state supreme courts acting in legislative capacity).

326. *See* Fed. Trade Comm'n v. Phoebe Putney Health Sys. Inc., 133 S. Ct. 1003 (2013); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980); *see also, e.g.*, Patrick v. Burget, 486 U.S. 94, 100–01 (1988); Alexander Volokh, *Supreme Court Antitrust Ruling Supports Public-Private Neutrality, Reduces Barriers to Privatization*, Reason.Org, Feb. 21, 2013, http://reason.org/news/show/scotus-antitrust-privatization,

[http://perma.cc/C9XR-RLGS]. William Page has questioned whether active supervision should be required. William H. Page & John E. Lopatka, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U. L. Rev. 1099, 1125–26 (1981). *But see* William H. Page, *State Regulation in the Shadow of Antitrust:* FTC v. Ticor Title Insurance Co., 3 Sup. Ct. Econ. Rev. 189 (1993) (justifying the active-supervision requirement as a way to guarantee that states aren't effecting a naked repeal of antitrust law, as they could if all that was required was clear articulation). *See also* Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. St. Thomas J.L. & Pub. Pol'y 28, 44–51 (2011) (discussing the application of the state action doctrine to licensing boards).

327. 471 U.S. 34, 46 (1985).

328. *Id.*

329. *Id.* at 47.

330. *Midcal*, 445 U.S. at 106 (quoted in *Town of Hallie*, 471 U.S. at 46–47).

331. *Town of Hallie*, 471 U.S. at 45.

332. *Id.* at 45 n.9.

333. *Id.* at 46 n.10.

334. 1A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 226b, at 166 (3d ed. 2006).

335. *Id.*

336. *Id.*; *see also* Ingram Weber, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. Chi. L. Rev. 737, 752–54 (2012). This is one of several attempts, aside from the state action doctrine, *see* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995), to classify organizations as public or private. *See* text accompanying *supra* notes 188–93 (discussing the Texas Supreme Court's description of the Boll Weevil Eradication Foundation as private for purposes of the Texas non-delegation doctrine), 208–26 (describing the test the D.C. Circuit used to classify Amtrak for purposes of the federal non-delegation doctrine).

337. *See* N.C. Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 134 S. Ct. 1491 (2014) (granting cert).

338. Earles v. State Bd. of CPAs of La., 139 F.3d 1033, 1034 (5th Cir. 1998).

339. *Id.* at 1041.

340. *Id.*

341. Porter Testing Lab. v. Bd. of Regents for the Okla. Agric. & Mech. Colls., 993 F.2d 768, 770 (10th Cir. 1993).

342. *Id.* at 772.

343. Cine 42nd St. Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032, 1047 (2d Cir. 1986).

344. Goldfarb v. Va. State Bar, 421 U.S. 773, 776 (1975).

345. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 (1985). *Goldfarb*, the case discussing the Virginia State Bar, had no occasion to discuss whether the active supervision requirement applied, as it was handed down before *Midcal* enunciated the test in 1980. But *Town of Hallie*, which announced that municipalities aren't subject to the active supervision requirement, distinguished *Goldfarb* as involving private parties, unlike the municipality at issue there. *Id.* at 45. *Town of Hallie* therefore supports the proposition that the Virginia State Bar, though statutorily defined as a state administrative agency, could be classified on the "private" side of the *Town of Hallie* distinction.

346. Hass v. Or. State Bar, 883 F.2d 1453, 1455–56 (9th Cir. 1989).

347. *Id.* at 1460.

348. *Id.*

349. Fed. Trade Comm'n v. Monahan, 832 F.2d 688, 688 (1st Cir. 1987). Pick up stations are locations where patients can "drop off, and pick up, prescriptions that the 'main office' (in the interim) would fill in batches." *Id.*

350. *Id.* at 690.

351. Interface Grp., Inc. v. Mass. Port Auth., 816 F.2d 9, 13 (1st Cir. 1987).

352. Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n, 137 F.3d 1293, 1297 (11th Cir. 1998).

353. *Id.* at 1296–97 (citing Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth., 801 F.2d 1286, 1290 (11th. Cir. 1986), Crosby v. Hosp. Auth. of Valdosta, 93 F.3d 1515, 1525 (11th Cir. 1996), and various cases from outside the Eleventh Circuit, as well as the then-current edition of the Areeda-Hovenkamp treatise, *supra* note 334) (citations omitted).

354. *See* Fuchs v. Rural Elec. Convenience Coop. Inc., 858 F.2d 1210, 1217–18 (7th Cir. 1988).

355. *In re* N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607, 612 (2011); *see also supra* Part I.B.2.

356. *Dental Exam'rs*, 151 F.T.C. at 613.

357. *Id.* at 620.

358. *Id.* at 621; *see also id.* at 620.

359. *Id.* at 623.

360. *Id.*

361. *Id.* at 626.

362. *Id.*

363. *Id.* at 621.

364. *Id.* at 626.

365. *Id.* at 628–33.

366. N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 717 F.3d 359, 368 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (2014); *see also id.* at 376 (Keenan, J., concurring) (noting that the opinion turns not on the mere presence of market participants on the Board but on the fact that the market participants are elected by other market participants). The Fourth Circuit reviewed the FTC's legal findings de novo, with due regard for the FTC's expertise, *id.* at 370 (majority opinion), which amounts to *Skidmore* deference, *see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). This case is also discussed in Alexander Volokh, *Privatized Regulation and Antitrust*, Reason. Org (July 1, 2013), http://reason.org/news/show/privatized-regulation-and-antitrust, [http://perma.cc/X924-49HZ]. For another case in the Fourth Circuit raising broadly similar issues, see First Amended Complaint at ¶¶ 120–21, *Petrie v. Va. Bd. of Medicine*, No. 1:13-cv-1486, 2014 WL 494273 (E.D. Va. Feb. 3, 2014).

367. 134 S. Ct. 1491 (2014).

368. 1A Areeda & Hovenkamp, *supra* note 334, ¶ 227b, at 209.

369. Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 696 (1991); *see also id.* at 697–708 (supporting "a process test that focuses on whether the decisionmakers controlling the restraints are financially interested," and noting that state action doctrine channels this question into "more formal, and conclusory, adjudications of whether the board is public or private").

370. *See* John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 769–73 (1986).

371. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, U. Pa. L. Rev. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384948, [perma.cc/AZ3H-THVP].

372. Hass v. Or. State Bar, 883 F.2d 1453 (9th Cir. 1989); *see also* text accompanying *supra* notes 346–48.

373. *See* 1A Areeda & Hovenkamp, *supra* note 334, ¶ 227a, at 207.

374. *Id.*

375. *Id.* ¶ 227a, at 207–08.

376. *See* Fuchs v. Rural Elec. Convenience Coop. Inc., 858 F.2d 1210, 1217–18 (7th Cir. 1988); text accompanying *supra* note 350.

377. 1A Areeda & Hovenkamp, *supra* note 334, ¶ 227a, at 208.

378. 317 U.S. 341, 351–52 (1943).

379. Miss. Code Ann. § 73-21-157(3) (West 2013).

380. *Id.* § 73-21-157(3)(b).

381. *Id.* § 73-21-75(1).

382. *Id.* § 73-21-75(4)(b)–(c). Apparently, the statute technically allows for a Board member to be a retired pharmacist, as long as he's licensed and experienced in Mississippi, so it's not technically true that all members *must* be currently practicing pharmacists.

383. *Id.* § 73-21-75(5).

384. *Id.* § 73-21-75(3), (5).

385. In the federal constitutional context, "for cause" limitations on removal have been held consistent with political accountability, *see* Morrison v. Olson, 487 U.S. 654, 687–88 (1988); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935), though such limitations might at some point go too far, *see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151–55 (2010).

386. *See* Tex. Agric. Code § 74.106(c) (West 2013) ("A cotton grower who is eligible to vote in a referendum or election under this subchapter is eligible to be a candidate for and member of the board if the person has at least seven years of experience as a cotton grower and otherwise meets the qualifications for the position."); *id.* § 74.106(f) ("An eligible voter may vote for a cotton grower whose name does not appear on the official ballot by writing that person's name on the ballot.").

387. *See* Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1016 (2013); Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 632–33 (1992); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 370 (1991); Parker v. Brown, 317 U.S. 341, 351 (1943).

388. *See, e.g.*, Warfield Phila., L.P. v. Nat'l Passenger R.R. Corp., No. 09-1022, 2009 WL 4043112, at *3–4 (E.D. Pa. Nov. 20, 2009) (entertaining, though rejecting, antitrust claims against Amtrak).

389. *See* text accompanying *supra* notes 349–50.

390. N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 717 F.3d 359 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (2014).

391. *In re* N.C. Bd. of Dental Exam'rs, Final Order, No. 9343, 2011 WL 6229615 (F.T.C. Dec. 7, 2011).

392. *Id.* at *25.

393. *Dental Exam'rs*, 717 F.3d at 374. The Fourth Circuit reviewed the FTC's factual findings under the "substantial evidence" standard, *id.* at 370; its legal findings received *Skidmore* deference, *see supra* note 366.

394. *Dental Exam'rs*, 717 F.3d at 374 n.11.

395. *See Dental Exam'rs*, 2011 WL 6229615, at *25.

396. *Id.* at *29, *34.

397. *Id.* at *30.

398. *Id.* at *34.

399. *Id.*

400. *Id.* at *35–39.

401. *See id.* at *36.

402. *Id.* at *37.

403. *Id.* at *37–38.

404. *See id.* at *38–39.

405. 15 U.S.C. § 1 (2000).

406. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2208 (2010) (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984) (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984))).

407. 15 U.S.C. § 2.

408. *See* text accompanying *supra* notes 355–77.

409. *See Copperweld*, 467 U.S. at 773 n.21.

410. *Am. Needle, Inc.*, 130 S. Ct. at 2212 (quoting *Copperweld*, 467 U.S. at 769; Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 57 (1st Cir. 2002); Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148–49 (9th Cir. 2003); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214–15 (D.C. Cir. 1986); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1462b, at 193–94 (2d ed. 2003)) (citations omitted) (second omission in original).

411. *Id.* at 2215–16 (quoting Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment)).

412. *Dental Exam'rs*, 2011 WL 6229615, at *20–21.

413. More precisely, the FTC and the Fourth Circuit may have been wrong here because the cease-and-desist letters may have been protected by *Noerr-Pennington* immunity. *See* sources cited *supra* note 89. On the applicability of *Noerr-Pennington* to demand letters, see *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 933–39 (9th Cir. 2006), *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992), and *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367–68 (5th Cir. 1983).

The Board argued it was just trying to enforce state law and that enforcement of state law isn't an antitrust violation, but the Fourth Circuit disagreed, saying "the Board was acting to regulate third parties in a manner not authorized by state law." N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 717 F.3d 359, 373 n.9 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (2014); *see also id.* at 364 ("[T]he Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental Practice Act."); *id.* at 370 ("[L]etters were sent without state oversight and without the required judicial authorization."). Presumably, though, anyone, including a state board, has a First Amendment right under the Free Speech Clause to tell people that their conduct is illegal and anyone who has a right to sue has a First Amendment right under either the Free Speech Clause or the Petition Clause to send a cease-and-desist letter before suing and thus avoid a lawsuit altogether. It's not clear whether the distinction between a cease-and-desist letter and "order[ing]" someone to stop violating the law can bear the weight the Fourth Circuit sought to place on it.

The Board apparently didn't adequately raise the *Noerr-Pennington* defense, so it was probably waived. In any case, the reasoning of the *Dental Examiners* case is far more general and would apply even in cases not covered by *Noerr-Pennington*.

414. 1A Areeda & Hovenkamp, *supra* note 334, ¶ 228b, at 214.

415. *Id.*

416. *Cf.* 13 Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 2232a, at 444 (3d ed. 2012) ("[D]irect inquiries into the 'reasonableness' of a challenged restraint [in the context of standard-setting] quickly involve the court in a morass of technical issues where neither the judge nor the jury has sufficient expertise to produce acceptable results.").

417. 1A Areeda & Hovenkamp, *supra* note 334, ¶ 228b, at 214.

418. *Id.* at 214 n.15 (citing 13 Hovenkamp, *supra* note 416, ¶¶ 2232a, 2232d, at 443–44, 452–57).

419. 13 Hovenkamp, *supra* note 416, ¶ 2232d1, at 452–54.

420. *Id.* ¶ 2232d2, at 454–56.

421. *Id.* ¶ 2232d3, at 457.

422. *See* text accompanying *supra* notes 378–82, 389.

423. *See supra* Part IV.A.4.

424. *See* text accompanying *supra* notes 378–80.

425. 15 U.S.C. § 15(a) (2012).

426. There might be some immunity when the challenged acts were

reasonably thought to be valid at the time. *See, e.g.*, Lease Lights, Inc. v. Pub. Serv. Co. of Okla., 849 F.2d 1330, 1334 (10th Cir. 1988); 1A Areeda & Hovenkamp, *supra* note 334, ¶ 228d, at 222–27 (arguing that "damages, especially treble damages, seem completely unwarranted when a reasonable actor had no substantial reason to believe that the challenged act was unlawful at the time it acted").

427. 435 U.S. 389 (1978).

428. *Id.* at 442–43 (Blackmun, J., dissenting).

429. *See id.* at 402 & n.22 (majority opinion).

430. 15 U.S.C. § 15(a).

431. Cmty. Commc'ns Co., Inc. v. City of Boulder, 455 U.S. 40, 65 n.2 (1982) (Rehnquist, J., dissenting).

432. *Id.* at 60.

433. Areeda and Hovenkamp agree with Rehnquist. *See* 1A Areeda & Hovenkamp, *supra* note 334, ¶ 223a, at 79–80; *id.* ¶ 228c, at 214–15.

434. 15 U.S.C. § 35(a).

435. *Id.* § 36(a).

436. 1A Areeda & Hovenkamp, *supra* note 334, ¶ 228c1, at 215.

437. *Id.* ¶ 227a, at 202 (emphasizing the limited scope of "the federal legislation immunizing local governments from damages liability"); *id.* ¶ 228c1, at 215; *id.* ¶ 228c2, at 220.

438. 466 U.S. 558 (1984).

439. *See id.* at 565–66.

440. *See id.* at 573.

441. *See id.* at 588–89 (Stevens, J., dissenting).

442. *Id.* at 594.

443. *See id.* at 580–81 n.34 (majority opinion); *id.* at 597–98 (Stevens, J., dissenting) (noting the majority's concern but deflecting it on other grounds); 1A Areeda & Hovenkamp, *supra* note 334, ¶ 227a, at 201–02 ("The [*Ronwin*] dissenters did not acknowledge the harshness of imposing potential treble damage liability on Committee members for the silence of the Arizona court, but perhaps they felt it fair and desirable that Committee members should be in peril of treble damages unless they took the initiative in securing more express court approval of the anticompetitive grading formula."). Eldin and Haw argue that this result is desireable. *See* Eldin & Haw, *supra* note 371, at pt. IV.A.2.

444. 421 U.S. 773 (1975).

445. *Id.* at 788–92; Edlin & Haw, *supra* note 371, at Pt. IV.A.2.

446. Shames v. Cal. Travel & Tourism Comm'n, 626 F.3d 1079, 1081–82 (9th Cir. 2010).

447. *Id.* at 1081.

448. *Id.* at 1084–85.

449. *Id.* at 1085 & n.3.

450. Shames v. Hertz Corp., No. 07-CV-2174-MMA(WMC), 2012 WL 5392159, at *3 (S.D. Cal. Nov. 5, 2012). It's not clear from the opinion how much was paid by the Commission and how much by the rental car companies.

451. *See* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47–49, 52 (1994).

452. Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996). *See generally* Jameson B. Bilsborrow, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 63 Emory L.J. (forthcoming 2014).

453. *Compare, e.g.*, Town of Smyrna v. Mun. Gas Auth. of Ga., 723 F.3d 640, 651 (6th Cir. 2013) (determining that whether the state is liable is the most important issue), *with* Benn v. First Judicial Dist. of Pa., 426 F.3d 233, 239–40 (3d Cir. 2005) (finding that financial liability is equal with other factors after *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002)).

454. *See* Tucker v. Williams, 682 F.3d 654, 659 (7th Cir. 2012) (quoting Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't, 510 F.3d, 681, 695 (7th Cir. 2007)); Gorton v. Gettel, 554 F.3d 60, 62 (2d Cir. 2009) (citing *Mancuso*, 86 F.3d at 293); Thomas v. St. Louis Bd. of Police Comm'rs, 447 F.3d 1082 (8th Cir. 2006).

455. *See* Pucci v. Nineteenth Dist. Court, 628 F.3d 752, 761 (6th Cir. 2010) (stating that although treasury concern is generally most important, there can be sovereign immunity based on other factors even when treasury concern cuts the other way).

456. *See* Ross v. Jefferson Cnty. Dep't of Health, 701 F.3d 655, 659 (11th Cir. 2012).

457. United States *ex rel.* Oberg v. Ky. Higher Educ. Student Loan Corp., 681 F.3d 575, 580 (4th Cir. 2012); *see also* S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc., 535 F.3d 300, 305–07 (4th Cir. 2008); Md. Stadium Auth. v. Ellerbe Becket, Inc., 407 F.3d 255, 261 (4th Cir. 2005); Kitchen v. Upshaw, 286 F.3d 179, 185 (4th Cir. 2002).

458. Raj v. La. State Univ., 714 F.3d 322, 329 (5th Cir. 2013); Delahoussaye v. City of New Iberia, 937 F.2d 144, 147 (5th Cir. 1991); *see also* Black v. N. Panola Sch. Dist., 461 F.3d 584, 596–98 (5th Cir. 2006); United States *ex rel.* Barron v. Deloitte & Touche, L.L.P., 381 F.3d 438, 440 (5th Cir. 2004).

459. Justin C. Carlin, *State Sovereign Immunity and Privatization: Can Eleventh Amendment Immunity Extend to Private Entities?*, 5 FIU L. Rev. 209, 212–13 (2009) (limiting this rule to the First, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits; only the Eleventh Circuit has extended sovereign immunity to a private entity contracting with the state, *see* Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp., 208 F.3d 1308, 1311 (11th Cir. 2000)).

460. *See, e.g.*, Del Campo v. Kennedy, 517 F.3d 1070, 1072 (9th Cir. 2008); *Shands*, 208 F.3d at 1311; Carlin, *supra* note 459, at 222–25.

461. *See, e.g.*, United States *ex rel.* Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 721 (10th Cir. 2006) (debating the status of a laboratory owned by University of Utah Medical Center); Takle v. Univ. of Wis. Hosp. & Clinics Auth., 402 F.3d 768, 769–71 (7th Cir. 2005) (debating the status of a hospital spun off by University of Wisconsin but retaining many institutional ties with University); Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp., 332 F.3d 56, 64, 71 (1st Cir. 2003); Sw. Bell Telephone Co. v. City of El Paso, 243 F.3d 936 (5th Cir. 2001); Carlin, *supra* note 459, at 225–29.

462. *Del Campo*, 517 F.3d at 1074 (citing United States *ex rel.* Ali v. Daniel, Mann, Johnson, & Mendenhall, 355 F.3d 1140, 1147 (9th Cir. 2004)); Carlin, *supra* note 459, at 223–25.

463. *See supra* Part IV.A.

464. 15 U.S.C. § 45 (2012); *see also* 1A Areeda & Hovenkamp, *supra* note 334, ¶ 231b, at 245.

465. 209 U.S. 123, 157 (1908).

466. 15 U.S.C. § 15a; 1A Areeda & Hovenkamp, *supra* note 334, ¶ 227a, at 202–03.

467. *Amtrak National Facts*, Amtrak, http://www.amtrak.com/ccurl/335/968/Amtrak-National-Fact-Sheet-FY2012.pdf, [perma.cc/Q4ZT-K9WX] (last visited Feb. 5, 2014).

468. Tex. Water Code Ann. § 26.179(d) (West 2013).

469. N.C. Gen. Stat. Ann. § 90-39 (West 2013).

470. *Id.* § 93B-16(b).

471. *Id.* §§ 93B-16(b), 143-299.4; *see also* Petitioner's Opening Brief at 7, N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 717 F.3d 359 (2013) (No. 12-1172), 2012 WL 2931297.

472. Miss. Code Ann. §§ 73-21-83, 73-21-103 (West 2013).

473. *Id.* § 73-21-113.

474. *Id.* § 73-21-73.

475. At least one court has considered the labeling as a state agency dispositive and held the Board immune. Claiborne v. Miss. Bd. of Pharmacy, No. 3:07-CV-2.77-HTW-LRA, 2011 WL 3684431, at *4 (S.D. Miss. Aug. 22, 2001).

476. Miss. Code Ann. § 73-21-75.

477. *See* text accompanying *supra* note 459.

478. *See, e.g.*, Garrett-Woodberry v. Miss. Bd. of Pharmacy, 300 F. App'x 289 (5th Cir. 2008); *Claiborne*, 2011 WL 3684431; Riddle v. Miss. State Bd. of Pharmacy, 592 So. 2d 37 (Miss. 1991); House v. Miss. State Bd. of Pharmacy, 592 So. 2d 946 (Miss. 1991); Duckworth v. Miss. State Bd. of Pharmacy, 583 So. 2d 200 (Miss. 1991); Miss. State Bd. of Pharmacy v. Baker, 365 So. 2d 67 (Miss. 1978); Miss. State Bd. of Pharmacy v. Steele, 317 So. 2d 33 (Miss. 1975); Miss. State Bd. of Pharmacy v. Clemer, 317 So. 2d 37 (Miss. 1975).

479. *Carter v. Mississippi Department of Human Services*, No. 3:05-CV-190 HTW-JCS, 2006 WL 2827691 (S.D. Miss. Sept. 29, 2006), states that the Mississippi Board of Nursing has been found to be an arm of the state and immune under the Eleventh Amendment. *Carter*, 2006 WL 2827691, at *2 (citing O'Neal v. Miss. Bd. of Nursing, 113 F.3d 62 (5th Cir. 1997)). But *O'Neal*, on inspection, is about official immunity for Board members, not sovereign immunity for the Board. Still, for what it's worth, *O'Neal* does briefly mention that plaintiffs conceded that the Board of Nursing had sovereign immunity. *O'Neal*, 113 F.3d at 64.

480. Tex. Agric. Code § 74.1011 (West 2013).

481. *Id.* §§ 74.101(3), 74.129.

48. *Id.* §§ 74.115, 74.108(3).

483. *Id.* § 74.107(c).

484. *Id.* § 74.116.

485. *Id.* § 74.109(h).

486. *See, e.g.*, Garza v. Tex. Boll Weevil Eradication Found., Nos. 03-11-00787-CV, 03-11-0078-CV, 03-11-00789-CV, 03-11-00790-CV, 2012 WL 6726685 (Tex. Ct. App. Dec. 19, 2012).

487. Tex. Agric. Code § 74.129; *see also id.* § 74.109(f).

488. As noted above, it's relevant in the Eleventh Circuit. *See* text accompanying *supra* note 459.

Introducing "Article V 2.0": The Compact for a Balanced Budget

*By Nick Dranias**

Note from the Editor:

This article discusses the use of interstate compacts to advance Article V amendments to the U.S. Constitution. 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 issues involved. To this end, we offer links below to other perspectives on the issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

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- Thomas H. Neale, Congressional Research Service, The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress (Apr. 2014): http://fas.org/sgp/crs/misc/R42589.pdf
- Lew Uhler, Discipline of the Federal Fisc—Article V, Human Events, Apr. 29, 2014: http://beta.humanevents.com/2014/04/29/discipline-of-the-federal-fisc-article-v/
- Robert Greenstein & Richard Kogan, Center on Budget & Policy Priorities, A Constitutional Balanced Budget Amendment Threatens Great Economic Damage (July 2011): http://www.cbpp.org/cms/?fa=view&id=3509

Our gross federal debt is approaching $18 trillion.1 That's more than twice what was owed ($8.6 trillion) when then-U.S. Senator Barack Obama opposed lifting the federal debt limit in 2006—just eight years ago.2 That's nearly as big a percentage of the American economy (107+% of Gross Domestic Product) as during the height of World War II.3 That's over $150,000 per taxpayer.4 And that is the tip of the iceberg, with unfunded federal liabilities being recently estimated at $205 trillion.5

But what if the States could advance and ratify a powerful federal balanced budget amendment in the next twelve months? It could happen with a new approach to state-originated amendments under Article V of the United States Constitution. With the stroke of their pens on April 12 and 22, 2014, respectively, Governors Nathan Deal6 and Sean Parnell,7 formed the "Compact for a Balanced Budget" among the States of Georgia and Alaska. A binding commitment to fix the national debt now exists that spans the nation from the Atlantic to the Pacific, from the far Southeast to the far Northwest.8

And that commitment means business.

Unlike any other effort to reform Washington from the States using their Article V amendment power, the formation of the Compact for a Balanced Budget changes the political game almost immediately.

I. A Persistent Platform for Reform Spins Up

Alaska and Georgia are expected to organize the Compact's Commission before the summer of 2014 ends. The Commission is an interstate agency dedicated to organizing a convention for proposing a Balanced Budget Amendment. Although it starts operating with appointees from just two states, eventually the Commission will expand to include appointees from three states—and possibly more.9 It is designed to unify the states and lead the charge for fiscal reform shoulder-to-shoulder with allied legislators, citizens and public interest groups. In doing so, it will lend instant credibility to and ignite support for the effort. It could also start immediate engagement with Congress on fulfilling its role in the amendment process, furnishing a national platform for the states to address Washington's unsustainable fiscal policies.

Think of the Compact's Balanced Budget Commission as an outside-the-beltway Erskine-Bowles Commission that can do much more than "jaw-bone" hypothetical fiscal reforms—it will marshal a state-based effort to propose and ratify a powerful Balanced Budget Amendment.

II. The Compact's Balanced Budget Amendment in a Nutshell

The Compact's proposed amendment would constitutionally codify a five point plan for fixing the national debt.10

First, it would put a fixed limit on the amount of federal debt.11

Second, it would ensure that spending by Washington cannot exceed revenue at any point in time, with the sole exception of borrowing under that fixed debt limit.12 In so doing, the amendment is designed to prevent all known forms of fiscal gaming by adopting a strictly cash-based limit on spending that uses carefully crafted definitions to prevent trust fund-raiding, sale-leaseback schemes, and no-recourse borrowing.13

Third, by compelling spending impoundments when 98% of the debt limit is reached, the proposed amendment would ensure that Washington is forced to reduce spending before borrowing reaches its debt limit—preventing any default on our obligations.14

Fourth, if new revenues are needed to avoid borrowing beyond the debt limit, the amendment would ensure that all possible spending cuts are considered first by requiring the most abusive taxing measures to secure supermajority approval from Congress, and reserving simple majority approval for completely replacing the income tax with a national sales tax, flattening the tax code, tariffs or fees.15 This would drive any push for new revenues through a narrow gap defended by powerful special interests.

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Fifth, and finally, if borrowing beyond the debt limit were truly needed, it ends the absurdity of allowing a bankrupt debtor (Washington) to unilaterally increase its credit. Instead, it gives the States and the People the power to impose outside oversight by requiring a majority of state legislatures to approve any increase in the federal debt limit within sixty days of congressional proposal of a single subject measure to that effect.16 Using the time-tested structure of dividing power between the states and the federal government, and balancing ambition against ambition, requiring a referendum of the states on any increase in a fixed constitutional debt limit would undoubtedly minimize the abusive use of debt as compared to the status quo. Moreover, any abuse of that power through quid pro quo trades of debt approval for appropriations would prevent any increase in the debt limit from having legal effect17 and would render any debt thereby incurred vo*id*.18

This powerful reform proposal, which will be advanced by an interstate agency—the Compact Commission, would certainly kick-start the fiscal discussion in Washington—especially during an election year. It has already been championed by George Will.19 And for that reason, April 2014 could go down in history as the month the States finally took charge of federal fiscal reform with the formation of the Compact for a Balanced Budget.

III. Why the Compact is the Next Generation Article V Movement

The Compact for a Balanced Budget uses an interstate agreement to vastly simplify the state-originated Article V convention process. Ordinarily, without an interstate compact—an agreement among the states, the Article V convention process would require at least 100 legislative enactments, six independent legislative stages, and five or more legislative session years to generate a constitutional amendment.

In particular, the non-compact Article V approach first requires two-thirds of the state legislatures to pass resolutions applying for a convention (34 enactments). Second, at least a majority of states must pass laws appointing and instructing delegates (26 enactments). Third, Congress must pass a resolution calling the convention. Fourth, the convention must meet and actually propose an amendment. Fifth, Congress must pass another resolution to select the mode of ratification (either by state legislature or in-state convention). And sixth, three-fourths of the states must pass legislative resolutions or successfully convene in-state conventions that ratify the amendment (at least 38 enactments).

By contrast, the compact approach to Article V consolidates everything states do in the Article V convention process into a single agreement among the states that is enacted once by three-fourths of the states20 and everything Congress does in a single concurrent resolution passed just once with simple majorities and no presidential presentment.

Specifically, the compact includes everything in the Article V amendment process from the application to the ultimate legislative ratification.21 The counterpart congressional resolution includes both the call for the convention and the selection of legislative ratification for the contemplated amendment.22

The Compact is able to pack both the front and back-end of the Article V convention process into just two overarching legislative vehicles by using the "secret sauce" of conditional enactments. For example, using a conditional enactment, the "nested" Article V application contained in the Compact only goes "live" once three-fourths of the states join the compact (three-fourths, rather than two-thirds, is the threshold for activating the Article V application because the compact is designed to start and complete the entire amendment process).23 The Compact also includes a "nested" legislative ratification of the contemplated Balanced Budget Amendment, which only goes "live" if Congress selects ratification by state legislature rather than in-state convention.24

Correspondingly, using conditional enactments, the nested "call" in the congressional counterpart resolution only goes live once three-fourths of the states join the Compact.25 Likewise, the nested selection of legislative ratification in the congressional resolution only becomes effective if, in fact, the contemplated amendment is proposed by the Article V convention organized by the Compact.26

By using an interstate agreement and conditional enactments to coordinate and simplify the state-originated Article V amendment process, the Compact approach to Article V reduces the number of necessary legislative enactments, stages and sessions from 100+ enactments to 39 (38 states joining the compact, 1 congressional resolution), from 6 legislative stages to 3 (passage of compact, convention proposal of amendment, congressional passage of resolution), and from 5 or more session years to as few as 1 (however, the current target is 3 years).

More than that, like any well-drafted contract, the Compact approach eliminates all reasonable uncertainty about process. It identifies and specifies the authority of the delegates from all of its member states.27 It specifies in advance all Article V convention ground rules, limiting the duration of the convention to 24 hours.28 It requires all member state delegates to vote into place rules that limit the agenda to an up or down vote on a specific, pre-drafted Balanced Budget Amendment.29 It disqualifies from participation any member state and the vote of any member state or delegate who deviates from that rule.30 It further bars all member states from ratifying any other amendment that might be generated by the convention.31

Thus, from the vantage points of efficiency, public policy and certainty, the Compact for a Balanced Budget is an upgrade from the non-compact approach to Article V—with one significant caveat. The requirement of such detailed and up-front agreement will probably only work for well-formed reform ideas that likely already command supermajority support among the states and the people. The list of such reform ideas is concededly short. But sustained polling data across four decades undoubtedly puts a Balanced Budget Amendment on that short list.

One would expect all "Fivers" to be rejoicing at this point. Indeed, many are. But some have instead criticized the Compact effort. All miss the mark.

IV. Article V was Not Meant to be an Insurmountable Obstacle Course

One critique is that the Compact for a Balanced Budget somehow violates the text of Article V by avoiding a difficult, multi-staged, multi-generational amendment quest. It usually

focuses this criticism on the fact that the Compact includes pre-ratification of the amendment it contemplates. But this criticism is meritless. Through the operation of conditional enactments, the Compact conforms strictly to the text of Article V. Furthermore, the "spirit" of Article V in no way requires states to originate amendments in an uncoordinated, multi-staged amendment process.

First of all, it is important to emphasize that there is perhaps no more universally accepted legislative provision than the conditional enactment. Conditional enactments are common components of congressional legislation, including legislation approving interstate compacts,32 as well as within many existing interstate and federal-territorial compacts.33 In fact, the U.S. Supreme Court and courts in 45 states and territories have recognized the viability of conditional enactments for a wide range of both state and federal legislation,34 including state laws that were enacted contingent on the passage of new federal laws.35 As explained by one typical court decision, "[l]egislation, the effectiveness of which is conditioned upon the happening of a contingency, has generally been upheld."36 Courts defer to "broad legislative discretion"37 when conditional enactments are used. Because a State's authority over whether to apply for an Article V convention or whether to legislatively ratify an amendment is as plenary as any other form of legislation, the foregoing case law sustains the use of a conditional enactment in connection with Article V applications and ratifications.

Secondly, it is also important to emphasize that there is absolutely no textual conflict between Article V and the use of a conditional enactment to pre-ratify a desired amendment. The Compact's pre-ratification is entirely contingent on Congress effectively selecting legislative ratification of the contemplated amendment, which, in turn, presumes the proposal of the amendment either by Congress or an Article V convention. Because of the foregoing conditional enactment, the pre-ratification will go live (if it ever goes live) only in the precise sequence required by the text of Article V. Hence, there is no textual conflict between Article V and the Compact's use of a conditional enactment to pre-ratify a desired amendment.

Thirdly, there is no meritorious argument that coordinating and simplifying the state-originate amendment process somehow violates the "spirit" of Article V. Simply put, the Founders never "sold" ratification of the Constitution on the basis that the Article V convention process was meant to be nearly impossible to use. They never said that the convention itself was a mysterious, autonomous body that no one controlled outside of the convention. They never said that the states had to apply for a convention without having any specific amendments in mind and without coordinating the ratification of those amendments. As against opponents of ratification, like Patrick Henry, the Founders would have never succeeded with such absurdly unpersuasive arguments.

In fact, the amendment process under Article V was neither supposed to be extraordinarily difficult nor extraordinarily easy. It was meant to strike a balance between these two extremes. We know this because, in Federalist No. 43, James Madison emphasized that Article V "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."38 If anything, the balance struck by Article V between facility and difficulty was meant to allow for amendments to be accomplished more easily than was the Founder's experience in attempting to revise the Articles of Confederation.

During the New Jersey ratification debates, for example, the New Jersey Journal wrote that the Constitution included "an easy mode for redress and amendment in case the theory should disappoint when reduced to practice."39 Similarly, at the time of the Connecticut ratification debates, Roger Sherman wrote, "[i]f, upon experience, it should be found deficient, it [the Constitution] provides an easy and peaceable mode of making amendments."40 Rebutting Patrick Henry's lengthy oration at the Virginia Ratification convention that it was too difficult for the states to use Article V, George Nicholas responded, "[i]t is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments."41 Notice that Nicholas represented that state-originated amendments would be agreed upon from application to ratification. Finally, in Federalist No. 85, Alexander Hamilton represented there was "no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution."42

These representations formed the basis of the public understanding of the Constitution as it was ratified. If anything, the targeted, streamlined, coordinated Compact approach to Article V is more consistent with the actual "spirit" of Article V as described by advocates of ratification, than the multi-staged legislative quest which a non-compact approach to Article V necessitates.

V. Consent of Congress is Not Required Before the Convention is Called

Another common objection is that the Compact approach is defective because article I, section 10, of the U.S. Constitution provides that states may not enter into compacts without the "consent" of Congress. While there is no question that the Compact approach requires some form of congressional consent for the convention to be called and for legislative ratification to be selected, such consent need not be express and it need not come in advance of the formation of an interstate compact.

The Supreme Court has held for nearly 200 years that congressional consent to interstate compacts can be given expressly or impliedly, both before or after the underlying agreement is reached.43 Moreover, under equally longstanding precedent, a binding interstate compact can be constitutionally formed without congressional consent so long as the compact does not trench on the federal government's delegated powers.44

Nothing in the Compact for a Balanced Budget trenches on any federally-delegated power because conditional enactments and express provisions ensure that all requisite congressional action in the Article V amendment process would be secured before any compact provision predicated on such action became operative. For example, no member state or delegate appointed by the Compact can participate in the convention it seeks to organize before Congress calls the convention in accordance with the Compact.45 Similarly, as discussed above, the pre-ratification of the contemplated Balanced Budget Amendment only goes live if Congress effectively selects legislative

ratification. In this way, no provision of the Compact in any way invokes or implicates any power textually conferred on Congress by Article V unless implied consent is first received from Congress exercising its call and ratification referral power in conformity with the Compact.

While it is true that the Compact Commission will operate immediately upon the membership of two states, that changes nothing in the analysis. The Compact Commission serves essentially as a unified platform for securing congressional cooperation in originating constitutional amendments by way of Article V convention. A compact does not trench on federal power necessitating prior congressional consent merely because it provides "strength in numbers" among the states for a more effective federal educational or lobbying campaign.46

To claim that the Compact trenches on powers delegated to the federal government, one would have to demonstrate that the federal government, not the states, has the exclusive power to direct and control an Article V convention by way of setting the convention agenda and delegate instructions. But there is no evidence that anyone during the Founding era or immediately thereafter—whether Federalist or Anti-Federalist—thought that the Article V convention process was meant to be exclusively controlled by Congress in these crucial respects. Rather, all of the available Founding-era and near-Founding-era evidence shows that it was the public understanding of the Framers and the Ratifiers that the states would target the Article V convention process to desired amendments.

For example, on January 23, 1788, Federalist No. 43 was published with James Madison's attributed observation that Article V "equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other."47 Similarly, George Washington wrote on April 25, 1788, "it should be remembered that a constitutional door is open for such amendments as shall be thought necessary by nine States."48 On June 6, 1788, as discussed above, George Nicholas reiterated the same points at the Virginia ratification convention, observing that state legislatures may apply for an Article V convention confined to a "few points;" and that "it is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments."49 This public understanding of Article V was further confirmed by the last of the Federalist Papers, Federalist No. 85, in which Alexander Hamilton concluded, "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority" by using their amendment power under Article V.50 Because Congress selects the mode of ratification, we know that Hamilton was speaking of the targeting of state legislature-originated Article V application, not state legislative ratification, as source of such barriers.

Indeed, at the time of the framing of the Constitution, the word "application" was a legal term of art that described a written means of petitioning a court for specific relief. The historical record of "applications" to the Continental Congress confirms that this meaning extended to legislative bodies as well, with applications being addressed to Congress by various states with very specific requests on a regular basis.51 The contemporaneous usage of "application" thus naturally supports the conclusion that state legislatures had the power to apply for an Article V convention with a specific agenda. Moreover, the usual and customary practice in response to specific applications was either to grant what was requested or to deny them.52 Given Congress' mandatory obligation to call a convention for proposing amendments in response to the requisite number of applications, any convention called in response to applications of state legislatures seeking a convention with a specific agenda is—and was53—naturally understood as adopting that specific agenda.

Consistently with this understanding of the specific agenda-setting power of an Article V application, ten years later, on February 7, 1799, James Madison's Report on the Virginia Resolutions further observed that the states could organize an Article V convention for the "object" of declaring the Alien and Sedition Acts unconstitutional.54 Specifically, after highlighting that "Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two-thirds of the whole number, in applications to Congress for the purpose," Madison wrote both that the states could ask their senators to propose an "explanatory amendment" clarifying that the Alien and Sedition Acts were unconstitutional, and also that two-thirds of the Legislatures of the states "might, by an application to Congress, have obtained a Convention for the same object."

As illustrated by Madison's Report on the Virginia Resolutions, no one in the founding era thought the states were somehow preempted or otherwise disabled by Article V in setting the agenda of the convention for proposing amendments and securing desired amendments through the convention. An Article V convention was obviously not regarded as an autonomous body following an agenda and populated by delegates selected by Congress. An Article V convention was meant to bypass Congress, as a "convention of the states." As such, it is only logical to conclude that the states would determine who will represent them at the convention, how they will represent them, how they will run the convention, what they will propose, and how the states will respond to those proposals. This basic principle further reinforces the conclusion that the Compact for a Balanced Budget does not trench on any power delegated to the federal government by fully occupying the space of convention logistics—hence there is no need for Congressional consent for the compact to be validly formed, although such consent is unavoidably necessary before the compact's contemplated convention call and ratification referral can be effective.

VI. Presidential Presentment is Not Necessary for Congressional Consent

Another concern occasionally expressed about the Compact is that the counterpart congressional concurrent resolution, which gives implied consent to the Compact by calling the convention and pre-selecting legislative ratification in accordance with its terms, would require Presidential presentment, as do ordinary bills.55 However, the Supreme Court has already ruled in Hollingsworth v. Virginia that Congress' role in the Article V amendment process does not implicate Presidential presentment.56 Although this ruling was applied specifically

to the congressional proposal of amendments, there is every reason to conclude that Congress' convention call and ratification referral powers would be treated the same way, even if exercised by way of a resolution giving implied consent to an interstate compact.

Even more so than the congressional proposal of amendments in Hollingsworth, Congress' call and ratification referral powers under Article V are purely ministerial, procedural powers of the sort not ordinarily subject to Presidential presentment. Simply put, the contemplated concurrent resolution's exercise of Congress' Article V call and ratification referral power is similar in legal effect to the direct proposal of constitutional amendments. In both cases, Congress is merely channeling a legislative proposal for further action by other bodies—it is not, itself, making federal law.

If anything, the convention call component of the contemplated resolution has an even more attenuated relationship to law-making than does the direct congressional proposal of amendments. This is because any convention call will precede both the convention's proposal of an amendment (which is not guaranteed) and the ultimate ratification referral. The exercise of such call power is far more like an exercise of the rulemaking power conferred by the Constitution exclusively upon each House of Congress,57 to which Presidential presentment clearly does not apply, than it is like ordinary law-making.

A different conclusion is not warranted by the fact that a concurrent resolution exercising such powers in accordance with the Compact would be construed as giving implied congressional consent to the Compact. There is no textual difference between the role of the President in regard to the Compact Clause (Article I, Section 10, of the U.S. Constitution) and the role of the President in regard to the congressional proposal of amendments under Article V. In both provisions, the text of the Constitution articulates no role for the President whatsoever. Where the Constitution is silent, as here, the Supreme Court has ruled that Presidential presentment applies only to congressional actions that are equivalent to ordinary lawmaking.58

As discussed above, in substance, the contemplated congressional resolution is no more like ordinary lawmaking than is the direct congressional proposal of amendments under Article V. Although congressional consent has been regarded as rendering an interstate compact the functional equivalent of federal law, this doctrine has only been applied in the context of such consent being furnished by federal statute.59 In the absence of consent being furnished by federal statute, the legal effect of any congressional consent would be entirely derivative of the member states' own underlying sovereign power, not ordinary federal law making, to which Presidential presentment obviously does not apply.60 Thus, like the direct congressional proposal of amendments, which is meant to facilitate subsequent legislative action, the contemplated counterpart congressional resolution does not implicate legislative action that is equivalent to ordinary lawmaking by exercising congressional call and ratification referral powers.61 Therefore, its passage does not require Presidential presentment.

VII. Existing Article V Applications are in the Eye of the Beholder

The last few criticisms of the Compact for a Balanced Budget come from the great and venerable Lew Uhler, a key member of the Reagan-Friedman drive for a Balanced Budget Amendment in the 1970s and 80s. Uhler criticizes the Compact for a Balanced Budget for starting the Article V application process from scratch and failing to aggregate 23 (or 24) existing Article V applications that seek a balanced budget amendment convention.62 But the claim that 23 or 24 applications exist that can be aggregated to trigger a convention call cannot be sustained if one takes the Founders at their word that the Article V convention process was meant to allow the states to obtain the amendments they desired.

The truth is that only a handful of the supposedly 23 or 24 Article V applications actually call for the same convention agenda. The remaining applications are a grab bag of resolutions that differ in significant respects. For example, one application from Mississippi, which was passed in 1979, very clearly seeks a convention agenda that would consider only one specific amendment proposal—and the text of that amendment is even specified in the application.63 If a convention were to be organized in accordance with the intent expressed by the states in their applications, it is hard to see how this application could be viewed as capable of being aggregated with applications that request the calling of a convention that could consider a broader array of balanced budget amendment proposals.

The same problem crops up with aggregating the applications that specifically call for a convention for proposing a balanced budget amendment, but with a wide variety of emergency spending exceptions.64 It is doubtful that those states intended for their applications to be aggregated with others that have no such exceptions, and thereby risk Congress calling a convention with an agenda that would include the possible proposal of a balanced budget amendment without exceptions.65 And a similar problem crops up with the applications that coyly apply for a balanced budget amendment convention "alternatively" to Congress proposing such an amendment—but without imposing a deadline on Congress to act.66 It is unclear whether those applications will ever go or stay "live" because Congress could always propose a balanced budget amendment at any time and thereby render them inactive.

In view of these substantive differences, by proclaiming that 23 or 24 Article V applications exist that Congress must aggregate, Uhler is essentially proclaiming that Congress will presume the power to mix and match applications that neither activate on the same terms nor seek the same convention agenda. Apparently, Uhler believes that the aggregation of applications would be based on Congress' sole and discretionary judgment that they are "close enough." But ascribing such discretion to Congress is contrary to the text of Article V which references "Application" in the singular, implying that two-thirds of the state legislatures would be concurring in the same application. It is also contrary to the text of Article V that indicates that Congress' role in calling the convention was meant to be ministerial, mandatory and non-discretionary; including the text in Article V stating Congress "shall call" the convention and the representation in Federalist No. 85, that Congress' role would be "peremptory." It is entirely possible that Congress would rightfully refuse to aggregate such a grab-bag of different Article

V applications because doing so would require the constitutionally impermissible exercise of a large degree of non-ministerial judgment and discretion.

But even if Congress played along with the grab-bag approach to Article V, a successful aggregation of applications that do not seek the same convention agenda on the same terms would be a disaster for the wider Article V movement. It would set a precedent that Congress is entitled to cobble together applications to produce a convention agenda, which was never actually sought by the state applicants. In other words, Congress would be empowered to call a convention with an agenda largely determined by Congress. That would tend to consolidate all amendment power in Congress, rather than allowing the states to have a parallel means of obtaining the amendments they desire—hardly what "Fivers" or originalists should want from the process.

Getting to an Article V convention should not be an end-in-itself. Hopefully, Uhler and others like him will reconsider their support for this short-sighted approach to Article V.

VIII. The Compact is Not Overly Restrictive

Uhler also contends that the Compact for a Balanced Budget deviates from constitutional requirements by pre-committing member state delegates to voting up or down the proposal of a specific balanced budget amendment. In response, it should be observed that nothing in the text of Article V requires states to organize a "black box" drafting convention. As discussed above, the founding-era evidence is replete with repeated and sustained representations that the states would have an equal power with Congress to propose desired amendments through the Article V convention process. These representations, if taken as true, imply the states would have the same ability as Congress to direct the convention process by proposing specific amendments.67

The Article V convention was meant to be an instrumentality of the states, not an independent agency with a mysterious constitutional reform agenda of its own. No Founder, after all, ever expressed the distinctly modern view that the states must first organize an Article V convention to find out what constitutional amendments it might propose. If anything, as evidenced by the arguments of Federalist No. 85, discussed above, the Founders took pains to distinguish the Article V amendment process from the secrecy-shrouded Philadelphia Convention, which many opponents of the Constitution claimed was inadequately faithful to the states that organized it.

Uhler's criticism also fails to grasp the mechanism by which the Compact sets and limits the agenda. Although the application nested in the Compact sets the agenda, it is actually the delegate instructions set out in the Compact that cause the adoption of convention rules that limit the agenda to an up or down vote on the contemplated Balanced Budget Amendment. As the first order of business, delegates are strictly instructed to adopt the Compact's contemplated convention rules, which require an up or down vote on the contemplated amendment, or else they forfeit their authority in a variety of ways.68

In other words, the scope limitations of the compact are enforced based on the agency principle that the delegates are the agents of the states that send them. Thus, the extent of targeting in the Compact only differs in degree, not kind, from the custom and practice of more than a dozen interstate and inter-colonial conventions that were organized prior to the ratification of the U.S. Constitution. Simply put, it was usual and customary for states to set the agenda for any such convention and to instruct their delegates specifically on what to advance and address at the convention.69 Delegates were regarded as "servants" of the states that sent them. As their "master," under ordinary understandings of agency law, states have every right and power to circumscribe the authority of their delegates as tightly as they wish. Because no convention is ever organized in response to the Compact before three-fourths of the states join it, this virtually guarantees that the delegates of member states will control a quorum at the convention by any reasonable measure—and the contemplated rules and limited agenda will win the day.

This last point underscores the superiority of the Compact approach for advancing and ratifying a powerful balanced budget amendment. Simply put, without an agreement in advance among the states directing the convention process, which also co-opts Congress, you have no idea what you are going to get, if anything, from the incredibly difficult process of organizing an Article V convention. Most importantly, before shouldering the heavy lift of securing convention applications from two-thirds of the states, you have no way of determining whether Congress will be friend or foe in the process.

IX. Congress Has Leverage

As the Congressional Research Service recently emphasized, Congress has never regarded its role in Article V as purely ministerial.70 As analyst Thomas Neale puts it, Congress "has traditionally asserted broad and substantive authority over the full range of the Article V Convention's procedural and institutional aspects from start to finish."71 Congress has repeatedly introduced bills that purport to give it a substantial role in delegate selection, convention rules and even setting or enforcing the convention agenda.72 All of these efforts are power grabs in view of the public understanding of the purpose of Article V discussed above, but they nevertheless pose a real and substantial political and litigation risk. Furthermore, even if Congress called a convention with no federal strings attached on the front end, there is no guarantee that Congress would not set an impossibly short ratification sunset date for any proposal it disliked on the back end.

In short, whether Fivers like it or not, Congress has significant leverage in the Article V amendment process. By fully occupying all logistical spaces and then deliberately seeking to co-op Congress at the states' time of choosing—using the platform of a Compact Commission to unite the states and enable them to parlay institution-to-institution, the Compact approach minimizes the risk that Congress will abuse that leverage. This, in turn, allows the Compact effort to neutralize the principal political and litigation risk to the Article V movement—the erroneous view that Congress, not the states, control convention logistics in significant ways.73

But even if Congress took an uncharacteristic hands-off approach to the Article V convention process, a compact-organized Article V convention remains the superior approach for a

balanced budget amendment. This is because the organization of a convention of indefinite duration populated by as-of-yet unidentified delegates governed by as-of-yet unidentified rules is as likely to produce deadlock or to generate something worthless as something worthwhile. Even if a worthwhile balanced budget amendment were proposed, the drafting convention approach would still require the subsequent step of ratification. And there is no guarantee that any amendment proposed by the convention would secure ratification from the requisite 38 states.

X. Bottom Line: You Know What You're Going to Get with the Compact Approach

By contrast, with the Compact for a Balanced Budget, you know what you are going to get. The text of the contemplated balanced budget amendment is known in advance. The identities of convention delegates are known in advance. The convention agenda and rules are known in advance. The convention itself would be limited to 24 hours, ensuring that the fiscal impact of the convention itself is minimal. The amendment would be ratified if it is approved by the convention because the Compact pre-commits each member state to ratifying the contemplated amendment. Congress' willingness to call the convention in accordance with the Compact would be known in advance because the introduction of the requisite congressional resolution could be sought whenever the political stars align (the conditional enactments utilized in the resolution would allow the resolution to lie dormant if sought early, and later activate).

The Compact's amendment payload would be worth the effort. Imposing a fixed constitutional debt limit, which requires a referendum of the states on any debt limit increase, would increase transparency and be far more likely to generate a balanced budget than the status quo of limitless debt spending.

With the Compact's balanced budget amendment in place, Washington would no longer have the ability to set its own credit limit and write itself a blank check. The states would become an active board of directors charged with keeping an eye on our wayward federal CEO and staff. Debt would finally become scarce. Priorities would have to be set. Sustainable federal programs would have to become the norm. A broad national consensus—not midnight hour panic—would have to support any further increases in the national debt.

Of course, before this crucial reform can become a reality, 36 more states must join the Compact (to reach the ratification threshold of three-fourths of the states) and simple majorities of Congress must approve it. But this can be done in as little as twelve months because the Compact for a Balanced Budget consolidates everything states do in the constitutional amendment process into a single agreement among the states that is enacted once by each state; and everything Congress does in a single resolution passed once. This greatly simplifies the cumbersome amendment process outlined in Article V of the United States Constitution, which would otherwise take more than one hundred legislative actions—a process that no one, not even Ronald Reagan, Milton Friedman or Lew Uhler, has ever successfully navigated to its conclusion despite decades of trying.

Not only is the Compact's payload worth the effort, the Compact approach is clearly a superior Article V vehicle for advancing and ratifying a balanced budget amendment.

It is time for Fivers to upgrade.

Endnotes

1 Treasury Direct, The Debt to the Penny and Who Holds It, http://www.treasurydirect.gov/NP/debt/current.

2 *Whet Moser, Remember When Barack Obama Voted Against Raising the Debt Limit?*, Chicago Magazine (July 14, 2011), http://www.chicagomag.com/Chicago-Magazine/The-312/July-2011/Remember-When-Barack-Obama-Voted-Against-Raising-the-Debt-Limit/.

3 US National Debt and Deficit History, Chart 4.02, http://www.usgovernmentdebt.us/debt_deficit_history.

4 US Debt Clock, http://www.usdebtclock.org/.

5 Laurence J. Kotlikoff, Assessing Fiscal Sustainability, Mercatus Institute, George Mason University 4 (Dec. 12, 2013), http://mercatus.org/sites/default/files/Kotlikoff_FiscalSustainability_v2.pdf.

6 Georgia General Assembly, Legislation, Enactment History of HB794, http://www.legis.ga.gov/legislation/en-US/Display/20132014/HB/794.

7 Georgia General Assembly, Legislation, Enactment History of HB284, http://www.legis.state.ak.us/basis/get_bill.asp?bill=HB%20284&session=28.

8 Although the effective date of Alaska's HB284 is July 21, 2014, the contractually binding nature of Alaska's adoption of the compact proposed by HB794 is not tethered to that effective date. Georgia's HB794 has been effective since it was signed on April 12, 2014. By its express terms, HB794 becomes contractually binding on Georgia immediately upon enactment of counterpart legislation by another state and Georgia's receipt of seasonable notice. The relevant language of the compact (Article III, section 2) provides: "in addition to having the force of law in each Member State upon its respective effective date, this Compact and each of its Articles shall also be construed as contractually binding each Member State when: (a) at least one other State has likewise become a Member State by enacting substantively identical legislation adopting and agreeing to be bound by this Compact; and (b) notice of such State's Member State status is or has been seasonably received by the Compact Administrator, if any, or otherwise by the chief executive officer of each other Member State." HB794, http://www.legis.ga.gov/Legislation/20132014/144709.pdf. In essence, Georgia invited acceptance of its offer to compact through performance without specifying a deadline for acceptance. As a result, under ordinary contractual principles, upon Alaska's part performance of the terms of acceptance (enactment of HB284), Georgia became contractually obligated thereafter to keep its offer open for a reasonable period of time—and certainly that time will not expire before the effective date of Alaska's legislation. Restatement (Second) Of Contracts, §§ 41, 45 (1981). Therefore, by enacting the counterpart compact legislation HB284 and giving seasonable notice, the State of Alaska has performed the terms of acceptance proposed by HB794; and the Compact has been formed, although its various provisions will not have the force of law in Alaska until July 21, 2014. Oklahoma v. New Mexico, 501 U.S. 221, 236 (1991) (holding contractual principles, as well as statutory interpretive principles, govern the interpretation of a compact).

9 *See* HB284/HB794, Article IV, section 9, http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF, http://www.legis.ga.gov/Legislation/20132014/144709.pdf.

10 *See id.*, Article II, section 7.

11 *Id.* (section 2).

12 *Id.* (section 1).

13 *Id.* (section 6).

14 *Id.* (section 4).

15 *Id.* (section 5).

16 *Id.* (section 3).

17 *Id.*

18 *Id.* (section 4).

19 George Will, *Amend the Constitution to Control Federal Spending*, Wash. Post (Apr. 9, 2014), http://www.washingtonpost.com/opinions/george-will-amend-the-constitution-to-control-federal-spending/2014/04/09/00fa7df6-bf3c-11e3-bcec-b71ee10e9bc3_story.html.

20 *See* HB284/HB794, http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF, http://www.legis.ga.gov/Legislation/20132014/144709.pdf.

21 Georgia General Assembly, House Bill 794, http://www.legis.ga.gov/Legislation/20132014/144709.pdf.

22 Model Congressional Resolution, http://goldwaterinstitute.org/sites/default/files/CFA%20-%20Text%20-%20Cong%20Omnibus%20Resolution%20Final%282%29.pdf.

23 HB284/HB794, Article V, section 3, http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF, http://www.legis.ga.gov/Legislation/20132014/144709.pdf.

24 HB284/HB794, Article IX, section 2, http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF, http://www.legis.ga.gov/Legislation/20132014/144709.pdf.

25 Goldwater Institute, Model Congressional Resolution, Title I, section 103, http://goldwaterinstitute.org/sites/default/files/CFA%20-%20Text%20-%20Cong%20Omnibus%20Resolution%20Final%282%29.pdf.

26 *Id.*, Title II, section 202.

27 HB284/HB794, Article VI, http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF, http://www.legis.ga.gov/Legislation/20132014/144709.pdf.

28 *Id.*, Article VII.

29 *Id.*, Article VI, section 9.

30 *Id.*, Article VI, section 10.

31 *Id.*, Article VIII, section 3.

32 *See, e.g.*, Omnibus Low–Level Radioactive Waste Interstate Compact Consent Act, Pub. L. 99-240, Title II, 99 Stat. 1842, 1859 (1986), *available at* http://www.gpo.gov/fdsys/pkg/STATUTE-99/pdf/STATUTE-99-Pg1842.pdf; Northeast Interstate Dairy Compact, 7 U.S.C. § 7256 (1996).

33 *See, e.g.*, Compact of Free Association Act of 1985, Pub. L. 99-239, Title II, 99 Stat. 1770, 1800, *available at* http://www.gpo.gov/fdsys/pkg/STATUTE-99/pdf/STATUTE-99-Pg1770.pdf; Jennings Randolph Lake Project Compact authorized, W. Va. Code § 29-1J-1 (1994); Interstate Compact on Licensure of Participants in Live Racing with Parimutuel Wagering, Ky. Rev. Stat. § 230.3751 (2001); Interstate Compact on Juveniles, Wyo. Stat. § 14-6-102 (1977).

34 *See, e.g.*, Marshall Field & Co. v. Clark, 143 U.S. 649 (1892); Opinion of the Justices, 287 Ala. 326 (1971); Thalheimer v. Board of Supervisors of Maricopa County, 11 Ariz. 430, 94 P. 1129 (Ariz. Terr. 1908); Thomas v. Trice, 145 Ark. 143 (1920); Busch v. Turner, 26 Cal. 2d 817 (1945); People ex rel. Moore v. Perkins, 56 Colo. 17 (1913); Pratt v. Allen, 13 Conn. 119 (1839); Rice v. Foster, 4 Harr. 479 (De. 1847); Opinion to the Governor, 239 So. 2d 1 (Fla. 1970); Henson v. Georgia Industrial Realty Co., 220 Ga. 857 (1965); Gillesby v. Board of Commissioners of Canyon County, 17 Idaho 586 (1910); Wirtz v. Quinn, 953 N.E.2d 899 (Ill. 2011); Lafayette, M&BR Co. v. Geiger, 34 Ind. 185 (1870); Colton v. Branstad, 372 N.W. 2d 184 (Iowa 1985); Phoenix Ins. Co. of N.Y. v. Welch, 29 Kan. 672 (1883); Walton v. Carter, 337 S.W. 2d 674 (Ky. 1960); City of Alexandria v. Alexandria Fire Fighters Ass'n, Local No. 540, 220 La. 754 (1954); Smigiel v. Franchot, 410 Md. 302 (2009); Howes Bros. Co. v. Mass. Unemployment Compensation Commission, 296 Mass. 275 (1936); Council of Orgs. & Ors. For Educ. About Parochiaid, Inc. v. Governor, 455 Mich. 557 (1997); State v. Cooley, 65 Minn. 406 (1896); Schuller v. Bordeaux, 64 Miss. 59 (1886); In re O'Brien, 29 Mont. 530 (1904); Akin v. Director of Revenue, 934 S.W.2d 295 (Mo. 1996); State v. Second Judicial Dist. Ct. in & for Churchill County, 30 Nev. 225 (1908); State v. Liedtke, 9 Neb. 490 (1880); State ex rel. Pearson, 61 N.H. 264 (1881); In re Thaxton, 78 N.M. 668 (1968); People v. Fire Ass'n of Philadelphia, 92 N.Y. 311 (1883); Fullam v. Brock, 271 N.C. 145 (1967); Enderson v. Hildenbrand, 52 N.D. 533 (1925); Gordon v. State, 23 N.E. 63 (Ohio 1889); State ex rel. Murray v. Carter, 167 Okla. 473 (1934); Hazell v. Brown, 242 P.3d 743 (Or. App. 2010); Appeal of Locke, 72 Pa. 491 (1873); Joytime Distributors & Amusement Co. v. State, 338 S.C. 634 (1999); Clark v. State ex rel. Bobo, 113 S.W.2d 374 (Tenn. 1938); State Highway Dept. v. Gorham, 139 Tex. 361 (1942); Bull v. Reed, 54 Va. 78 (1855); State v. Baldwin, 140 Vt. 501 (1981); State ex rel. Zilisch v. Auer, 197 Wis. 284 (1928); Brower v. State, 137 Wash. 2d 44 (1998); Le Page v. Bailey, 114 W. Va. 25 (1933).

35 *See, e.g.*, State v. Dumler, 559 P.2d 798 (Kan. 1977); Bracey Advertising Co. v. North Carolina Dept. of Transportation, 241 S.E.2d 146 (N.C. Ct. App. 1978).

36 Helmsley v. Borough of Ft. Lee, 394 A.2d 65, 82 (N.J. 1978). Of course, this robust general rule is not totally without exception. In a case of first impression, the Missouri Supreme Court recently rejected the use of contingent effective dates where a legislative act was made contingent on the passage of another act on a "completely different matter" because doing so violated a state constitutional single subject rule. Missouri Roundtable for Life, Inc. v. State, 396 S.W.3d 348 (Mo. 2013). The Compact's contingent effective dates, however, do not pose a single subject rule violation. The contingencies are subject to the passage of legislation that obviously relates to the same purpose as the Compact; specifically, the passage of substantially identical compact language in other states and the congressional components of the Article V process the Compact invokes. Thus, the contingent effective dates in the Compact are exactly like the contingency upheld in Akin v. Dir. of Revenue, 934 S.W.2d 295, 299 (Mo. 1996), in which the Missouri Supreme Court ruled the "legislature may constitutionally condition a law to take effect upon the happening of a future event."

37 *Helmsley*, 394 A.2d at 83.

38 Federalist No. 43 in The Federalist (The Gideon Edition), Edited with an Introduction, Reader's Guide, Constitutional Cross-reference, Index, and Glossary by George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27

39 Reply to George Mason's Objections to the Constitution, New Jersey Journal, (December 19, 26, 1788) in The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009, *available at* http://history.wisc.edu/csac/documentary_resources/ratification/attachments/nj%20a%20reply%20to%20george%20mason.pdf.

40 Letters of a Citizen of New Haven in Friends of the Constitution: Writings of the "Other" Federalists, 1787-1788, edited by Colleen A. Sheehan and Gary L. McDowell, p. 271 (Indianapolis: Liberty Fund, 1998), *available at* http://files.libertyfund.org/files/2069/Sheehan_0118_Bk.pdf.

41 Jonathan Elliot, The Debates in the Several State Conventions of the Adoption of the Federal Constitution, vol. 3, pp. 101-02 (Virginia) (1827), *available at* http://files.libertyfund.org/files/1907/1314.03_Bk.pdf.

42 Federalist No. 85 in *id.*, *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108727&layout=html&Itemid=27.

43 Cuyler v. Adams, 449 U.S. 433, 441 (1981); Wharton v. Wise, 153 U.S. 155 (1894); Virginia v. Tennes*See*, 148 U.S. 503, 521 (1893); Green v. Biddle, 21 U.S. 1, 39-40 (1823).

44 *Cuyler*, 449 U.S. at 440; U.S. Steel v. Multistate Tax Commission, 434 U.S. 452, 459 (1978) (holding congressional consent is only required for an interstate compact that attempts to enhance "states power quoad [relative to] the federal government").

45 HB284/HB794, Article VI, section 4, Article VIII, section 1, http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF, http://www.legis.ga.gov/Legislation/20132014/144709.pdf.

46 *U.S. Steel*, 434 U.S. at 479 n. 33.

47 Federalist No. 43 in The Federalist (The Gideon Edition), Edited with an Introduction, Reader's Guide, Constitutional Cross-reference, Index, and Glossary by George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27.

48 The Writings of George Washington, collected and edited by Worthington Chauncey Ford, Vol. XI (1785-1790), p. 249 (New York and London: G. P. Putnam's Sons, 1890), *available at* http://files.libertyfund.org/files/2415/Washington_1450-11_Bk.pdf.

49 Jonathan Elliot, The Debates in the Several State Conventions of the Adop-

tion of the Federal Constitution, vol. 3, pp. 102 (Virginia) (1827), *available at* http://files.libertyfund.org/files/1907/1314.03_Bk.pdf

50 Federalist No. 85 in The Federalist (The Gideon Edition), Edited with an Introduction, Reader's Guide, Constitutional Cross-reference, Index, and Glossary by George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=788&chapter=108727&layout=html&Itemid=27

51 *See, e.g.*, Journals of the Continental Congress, Proceedings, vol. VI, at 189 (June 1780) (application from New Hampshire); *id.* at 331 (October 1780) (application from New York), *available at* https://play.google.com/store/books/details?id=QmgFAAAAQAAJ&rdid=book-QmgFAAAAQAAJ&rdot=1

52 *See, e.g.*, *id.*

53 Robert Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Institute Policy Report No. 241, at 15-18 (Sept. 16, 2010).

54 The Writings of James Madison, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed, Vol. 6, pp. 403-04 (ed. Gaillard Hunt, New York: G.P. Putnam's Sons, 1900), *available at* http://files.libertyfund.org/files/1941/1356.06_Bk.pdf.

55 U.S. Const. art. I, § 7, cl. 2.

56 Hollingsworth v. Virginia, 3 U.S. 378 (1798); Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 460 (D.C. Cir. 1982); Special Constitutional Convention Study Committee, American Bar Association, Amendment of the Constitution by the Convention Method under Article V 25 (1974).

57 U.S. Const. art. I, § 5 cl. 2.

58 Ins v. Chadha, 462 U.S. 919, 951 (1983); Myers v. United States, 272 U.S. 52, 123 (1926).

59 *See, e.g.*, New Jersey v. New York, 523 U.S. 767, 811 (1988) (holding that congressional approval "transforms an interstate compact within [the Compact Clause] into a law of the United States"); Bryant v. Yellen, 447 U.S. 352, 369 (1980); McKenna v. Washington Metropolitan Area Transit Authority, 829 F.2d 186 (D.C. Cir. 1987).

60 *See, e.g.*, Poole v. Fleeger's Les*See*, 36 U.S. 185, 1837 Westlaw 3559, *24 (1837) (Baldwin, J., concurring) ("[t]he effect of such consent is, that thenceforth, the compact has the same force as if it had been made between states who are not confederated . . . or as if there had been no restraining provision in the constitution. Its validity does not depend on any recognition or admission in or by the constitution, that states may make such compacts with the consent of congress; the power existed in the states, in the plenitude of their sovereignty, by original inherent right; they imposed a single restraint upon it, but did not make any surrender of their right, or consent to impair it to any greater extent. Like all other powers not granted to the United States, or prohibited to the states, by the constitution, it is reserved to them, subject only to such restraints as it imposes, leaving its exercise free and unlimited in all other respects, without any auxiliary by any implied recognition or admission of the existence of the general power, consequent upon the particular limitation").

61 *Compare* Ins v. Chadha, 462 U.S. 919, 951 (1083), with Hollingsworth v. Virginia, 3 U.S. 378 (1798).

62 Lew Uhler, *Discipline of the Federal Fisc—Article V*, Human Events, Apr. 29, 2014, http://www.humanevents.com/2014/04/29/discipline-of-the-federal-fisc-article-v.

63 125 CR 2111 (HCR51 (MS 1979)).

64 *See, e.g.*, HJR548 (TN 2014); SJR5 (OH 2013); 125 CR 3007 (R5 (NC 1979)); 125 CR 2112 (SJR (NM 1979)); 126 CR 1104 (SJR8 (NV 1980)); SR371 (GA 2014); 125 CR 9188 (SJR1 (IN 1979)); 125 CR 2110 (SCR1661 (KS 1979)); SJR4 (MD 1977); SJRV (MI 2013).

65 *See, e.g.*, 129 CR 20352 (SCR3 (MO 1983)); 125 CR 15227 (SJR1 (IA 1979)).

66 *See, e.g.*, 125 CR 2112 (LR106 (NB 1979)); 125 CR 2113 (R236 (PA 1979)); 125 CR 5223 (HCR31 (TX 1979)).

67 A similar conclusion has been reached by numerous experts. *See, e.g.*, Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, Constitutional Commentary, Vol. 81, p. 53 (2012); Mike Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 Tenn. L. Rev. 765 (2011); Note, The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process, 30 Harv. J. Law & Pub. Pol'y 1005, 1022 (2007).

68 First, the Compact's limitations on delegate authority and instructions are enforced by automatic forfeiture of the appointment of all delegates for that Member State if any delegate violates such limitations and instructions (*See* HB284/HB794, Article VI, section 10, http://www.legis.state.ak.us/PDF/28/Bills/HB0284Z.PDF, http://www.legis.ga.gov/Legislation/20132014/144709.pdf). Second, the legislature of the respective member state could also immediately recall and replace the runaway delegate (*See id.*, sections 3 and 4). Third, if such behavior were disorderly, in addition to all other standard means of maintaining order and enforcing the rules furnished under Robert's Rules of Order and the American Institute of Parliamentarians Standard Code of Parliamentary Procedure, the Chair of the Convention could suspend proceedings and the Commission could relocate the Convention as needed to resume proceedings with a quorum of states participating (*See id.*, Article VII, Sections 2, 7 and 8). Fourth, a declaratory judgment ruling all actions of the runaway delegate "void ab initio" and an injunction or temporary restraining order forcing the delegate to cease participation and to return to his or her state capitol would be another option because attorneys general of each member state are required to *See*k injunctions to enforce the provisions of the Compact (compare *id.*, Article X, section 3, with *id.*, Articles VI, sections 6, 7, 10). These delegate-specific direct enforcement mechanisms are in addition to the following backstop "kill-switches" (which every member state attorney general must also enforce): 1) the prohibition on Member States participating in the Convention unless the Compact rules are adopted as the first order of business (*id.*, Article VIII, section 1(b)); 2) the prohibition on transmission of any amendment proposal from the Convention other than the contemplated amendment (*id.*, Article VII, section 9); 3) the nullification of any Convention proposal other than the contemplated amendment (compare *id.*, Article VIII, section 2(a), with *id.*, Articles VI, sections 6, 7, 10, and *id.*, Article VII, section 2); and 4) the disapproval of ratification of any amendment by all Member States other than the contemplated amendment (*id.*, Article VIII, section 3).

69 *See*, inter alia, Robert Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan*, Goldwater Institute Policy Report No. 241 (Sept. 16, 2010).

70 Thomas H. Neale, Congressional Research Service, The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress 18 (Apr. 11, 2014), www.fas.org/sgp/crs/misc/R42589.pdf.

71 *Id.*

72 *Id.* at 36 ("Between 1973 and 1992, 22 bills were introduced in the House and 19 in the Senate that sought to establish a procedural framework that would apply to an Article V Convention. Proponents argued that constitutional convention procedures legislation would eliminate many of the uncertainties inherent in first-time consideration of such an event and would also facilitate contingency planning, thus enabling Congress to respond in an orderly fashion to a call for an Article V Convention. The Senate, in fact, passed constitutional convention procedures bills, the "Federal Constitutional Convention Procedures Act," on two separate occasions: as S. 215 in 1971 in the 92nd Congress, and as S. 1272 in 1983, in the 98th Congress").

73 Congressional implied consent could be construed as transforming the Compact's terms and conditions relating to the Article V convention it organizes into the functional equivalent of federal law for procedural purposes under current precedent, if Congress' call power were wrongly regarded as entailing such power. *See, e.g.*, *New Jersey*, 523 U.S. at 811; Bryant, 447 U.S. at 369; McKenna, 829 F.2d 186.

Labor & Employment Law

Religious Accommodation in the Workplace: Current Trends Under Title VII

By J. Gregory Grisham & Robbin W. Hutton***

A recent survey of American workers suggests that religious discrimination is a growing workplace concern.[1] Indeed, there has been an eighty-seven percent increase in the number of religious discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) over the past ten years.[2] Increasing religious diversity[3] in the workplace is just one reason for this trend. When conflicts arise between employer policies and employees' exercise of religious beliefs, employers must be aware of their rights and obligations with respect to providing religious accommodation. The EEOC recognized this conflict and in March 2014 issued "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," which focuses on how Title VII applies to religious dress and grooming practices.[4] This guidance outlines the Commission's view of the employer's legal responsibility,[5] and offers examples of proper employer conduct.[6]

This article will review how religious accommodation came to be in Title VII of the Civil Rights Act and how courts are interpreting employers' accommodation duties.

I. Religious Accommodation and Title VII

Religious freedom is a foundational civil liberty enshrined in the First Amendment to The United States Constitution.[7]

Title VII of the Civil Rights Act of 1964 (Title VII) makes it unlawful to discriminate against employees on the basis of religion, in addition to race, color, national origin, and sex.[8] However, Title VII in its original form did not extend this protection to the accommodation of religious beliefs.[9] This omission was highlighted in the case of *Dewey v. Reynolds Metals Co.*[10]

Robert Kenneth Dewey began working for Reynolds Metals Company in 1951.[11] In 1961, Dewey became a member of the Faith Reformed Church.[12] His religious beliefs prevented him from working on Sundays.[13] The company and the union representing the workers had a collective bargaining agreement that, among other things, provided that all bargaining unit employees, "shall be obligated to perform all straight time and overtime work required of them by the company except when an employee has a substantial and justifiable reason for not working."[14] Dewey never volunteered for overtime work on Sundays.[15] Dewey refused to work on Sunday, November 21, 1965, because of his religious beliefs.[16] At that time, Dewey received a warning and was reminded that it was necessary for the company to maintain a seven-day work week.[17]

Dewey was able to avoid overtime work by seeking replacements to work for him between January and August of 1966, when he was scheduled to work on Sundays.[18] On August 28, 1966, and for the following two Sundays, Dewey declined to work and declined to seek a replacement due to his religious beliefs.[19] Consequently, Dewey was fired for violation of plant rules.[20] Dewey filed suit against Reynolds Metals for religious discrimination.[21]

Approximately ten months after Dewey's termination, the EEOC issued regulations that, for the first time, stated that Title VII's religious discrimination prohibition included the failure of an employer to reasonably accommodate the religious needs of employees where accommodations can be made without undue hardship on the conduct of the employer's business.[22]

After a bench trial, the federal district judge ruled in favor of Dewey.[23]

On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the district court's decision finding that the legislative history of Title VII was clear that it was aimed only at discriminatory practices.[24] The Sixth Circuit found that the collective bargaining agreement was not discriminatory, nor was it discriminatory in application.[25] A petition for Rehearing en banc was denied by the Court of Appeals. The United States Supreme Court affirmed the Sixth Circuit decision in a per curiam decision by an equally divided Court.[26]

As a result of *Dewey*, an amendment to Title VII was proposed by Senator Jennings Randolph (D-W. Va.). The Senator was a member of the Seventh Day Baptist Church whose Saturday Sabbath often conflicted with work requirements.[27] The 1972 amendment to Title VII required employers to reasonably accommodate an employee's religious practices.[28] Congress included the following definition of religion in its 1972 amendments to Title VII:

> The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[29]

The amendment remains the law, but has been interpreted by Supreme Court decisions.

II. Supreme Court Religious Accommodation Decisions

Subsequent to *Dewey* and the enactment of the 1972 amendment to Title VII, the United States Supreme Court addressed the issue of religious accommodation in two seminal cases: *Trans World Airlines Inc. v. Hardison*[30] and *Ansonia Board of Education v. Philbrook*.[31]

In *Hardison*, after a detailed review of the legislative history of the 1972 amendment, the Court determined that the intent and effect of the amendment was to make it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious

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practices of employees and prospective employees.[32] The Court noted that the text of the 1972 amendment did not provide guidance in making a determination as to what constituted a reasonable accommodation; thus it was left to the Court to fashion a definition of what constitutes reasonable accommodation efforts.[33]

In the first case, Larry Hardison was hired by Trans World Airlines (TWA) at its maintenance and overhaul base in Kansas City, Missouri, on July 5, 1967, to work as a clerk in the Store Department.[34] The Store Department played an essential role in the operation of the TWA Kansas City Operation and it operated 24/7, 365 days per year.[35] The employees at the TWA Kansas City base were subject to a seniority system in a collective bargaining agreement.[36] In the spring of 1968, Hardison began studying the religion known as the Worldwide Church of God.[37] One of the tenets of that religion required observance of the Sabbath by refraining from performing any work from sunset Friday until sunset on Saturday and on certain specified religious holidays.[38] In April 1968, Hardison first advised his supervisor, Everett Kussman, of his religious beliefs and his need for accommodation for his religious observances.[39] Kussman agreed that the union steward should seek a job swap for Hardison or change his days off; that Hardison would have his religious holidays off whenever possible, if Hardison agreed to work the traditional holidays when asked; and that the supervisor would try to find Hardison another job that would be more compatible with his religious beliefs.[40] The issue was temporarily resolved when Hardison was transferred to the 11:00 p.m. -7:00 a.m. shift, which permitted him to observe his Sabbath.[41] This situation changed when Hardison bid into a day-shift position.[42] TWA agreed to allow the union to seek a change of work assignments for Hardison, but the Union was not willing to violate the seniority provisions of the collective bargaining agreement.[43] TWA rejected a proposal to allow Hardison to work four days per week, since his position was essential and he was the only available person on his shift to perform the job on weekends, thus leaving the position empty would impair the supply shop functions.[44] When an accommodation could not be reached, Hardison refused to report to work on Saturdays.[45] After a discharge hearing, Hardison was terminated on grounds of insubordination for his refusal to work during his designated shift.[46]

Hardison invoked the administrative remedy provided by Title VII and filed a charge with the EEOC for religious discrimination. He later sought injunctive relief in the United States District Court against TWA and the union, claiming his discharge by TWA constituted religious discrimination and that he was entitled to reasonable accommodation of his religious needs whenever such accommodation would not work undue hardship on the employer.[47] Hardison and the EEOC argued that the statutory obligation to accommodate religious needs took precedence over both the collective bargaining agreement and the seniority rights of TWA's other employees. [48]

The Supreme Court agreed that neither a collective bargaining contract, nor a seniority system may be employed to violate Title VII, but declined to hold that the duty to accommodate required TWA to take steps inconsistent with the otherwise valid collective bargaining agreement. The Court found that collective bargaining aimed at effecting workable and enforceable agreements between management and labor lies at the core of our national labor policy, and seniority provisions are universally included in these contracts.[49] It stated that without a clear and express indication from Congress that "we do not agree that an agreed-upon seniority system must give way when necessary to accommodate religious observances."[50]

The Court also found TWA made reasonable efforts to accommodate Hardison and that TWA established as a matter of fact that it took appropriate action to accommodate as required by Title VII. [51] It noted TWA held several meetings with Hardison in an attempt to find a solution to his religious conflict with TWA's business needs.[52] The Court found TWA accommodated Hardison's observance of his special religious holidays and authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure.[53]

The Court further found that based on the repeated, unequivocal emphasis in the statutory language and the legislative history of Title VII on eliminating discrimination in employment, that such discrimination is proscribed when it is directed against majorities as well as minorities.[54] Therefore, the Court found TWA was not required by Title VII to carve out a special exception to its seniority system to help Hardison to meet his religious obligations.[55] Moreover, the Court reasoned that to require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off would impose an undue hardship.[56] It further reasoned that like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want, would involve unequal treatment of employees on the basis of their religion.[57] The Court concluded that an accommodation causes "undue hardship" whenever that accommodation results in "more than a de minimis cost" to the employer.[58]

The Supreme Court revisited the issue nearly ten years later. In *Philbrook*, Ronald Philbrook was a schoolteacher and his religious beliefs required him to refrain from secular employment on certain holy days. He missed approximately six school days each year, whereas the collective bargaining agreement under which the teacher worked allowed only three days' annual leave for religious observances and barred the use of additional personal business leave for religious observances or other specified purposes.[59] The local school board rejected Philbrook's suggestions that he be allowed to use personal business leave for religious observances or that he be paid for his additional leave days on the condition that he pay for a substitute teacher. Philbrook was forced to take unauthorized leave without pay or to schedule required hospital visits on his holy days to fully observe those days.[60] After exhausting available avenues of administrative relief, the teacher filed suit against the school board and others in the United States District Court for the District of Connecticut, alleging that prohibiting the use of personal leave for religious purposes violated Title VII.[61]

After a trial on the merits, the district court ruled in favor of the defendants, holding that Philbrook had failed to prove religious discrimination because he had not been forced

to choose between violating his religion and losing his job.[62]

The U.S. Court of Appeals for the Second Circuit reversed the district court. It held that (1) the teacher had established a prima facie case by showing that the conflict between his religious beliefs and the board's attendance requirements had led to a loss of pay; and (2) that where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business.[63] The Second Circuit also assumed that the Board's leave policy constituted a reasonable accommodation to the teacher's belief.[64]

In *Philbrook*, the United States Supreme Court affirmed the judgment of the Second Circuit, but after examining the terms and legislative history of Title VII, the Court found that the Second Circuit's conclusion that an employer's accommodation obligation includes a duty to accept the employee's proposal unless that accommodation causes undue hardship on the conduct of the employer's business was incorrect.[65] Since both the disctrict court and the Second Circuit applied erroneous views of the law, neither considered the question of whether the the Board's leave policy constituted a reasonable accommodation of the teacher's beliefs. The Court instructed the district court on remand to make the necessary findings as to past and existing practice in the administration of the collective bargaining agreement.[66]

The Court in *Philbrook* reaffirmed its holding in *Hardison* that an employer satisfies its obligations under Title VII when it demonstrates that it has offered a reasonable accommodation to the employee in an attempt to resolve a religious conflict with workplace needs.[67] Examining the statutory language and the legislative history of Title VII, the Court found that there is no basis for requiring an employer to choose any particular reasonable accommodation.[68] It stated the terms of Title VII directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation and the employer violates the statute unless it "demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[69] The Court reasoned that the statutory inquiry ends where the employer already has reasonably accommodated the employee's religious needs.[70] Thus, according to the Court, an employer need not further show that each of the employee's alternative accommodations would result in undue hardship.[71] The Court reaffirmed its decision in *Hardison* that the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without undue hardship.[72]

Hardison and *Philbrook* define the criteria for an employer in making an assessment of whether a religious accommodation is reasonable and whether the employer can make the accommodation without undue hardship.

III. Religious Accommodation in Context: Illustrative Recent Decisions

A. Work Schedules and Leave Requests

A common request for religious accommodation is modification of a work schedule due to conflicts with religious beliefs or practices. The lower courts, following the guidance of the Court in *Hardison* and *Philbrook*, sometimes struggle with the determination of what constitutes a reasonable accommodation and undue hardship given the fact-specific nature of the inquiry.

Recently, the U.S. Court of Appeals for the Seventh Circuit ruled in *Adeyeye v. Heartland Sweeteners, LLC*, that two written requests from an employee for unpaid leave to attend funeral rites for his father in Africa created a genuine issue of material fact regarding notice of the religious nature of the request for accommodation purposes under Title VII.[73]

On July 19, 2010, Sikiru Adeyeye, a native of Nigeria who moved to the United States in 2008, provided a written request to Heartland Sweeteners of his need for five weeks' unpaid leave to participate in the funeral rites for this father in Africa according to his custom and tradition.[74] Adeyeye's request for leave included a chronology of events that would occur in Nigeria during the time requested for leave.[75] He also stated that if he failed to lead the burial rites, he and his family members would suffer at least spiritual death.[76] Heartland denied the request.[77] On September 15, 2010, Adeyeye made a second request for one week of his earned vacation and three weeks of unpaid leave.[78] In the second request, Adeyeye again stated the leave was to attend the "funeral ceremony of my father in my country, Nigeria—Africa[.]"[79] He also detailed, "I have to be there and involved totally in this burial ceremony being the first child and the only son of the family."[80] Heartland again denied his request.[81] Notwithstanding the denial of the leave request, Adeyeye traveled to Nigeria for the ceremony.[82] Upon Adeyeye's return to work, Heartland terminated his employment.[83]

Adeyeye later filed a lawsuit alleging Heartland's denial of his leave request and his subsequent termination violated Title VII. The District Court granted summary judgment in favor of Heartland, finding the two written leave requests did not present evidence sufficient for a reasonable jury to find that Adeyeye had provided Heartland with notice of the religious character of his request for unpaid leave. The case was then appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit disagreed with the district court and reversed the summary judgment ruling.

The Seventh Circuit noted the statutory definition of religion in Title VII is an unusual blend, combining a broad substantive definition of religion with an implied duty to accommodate an employee's religious beliefs and practices.[84] Further, the Seventh Circuit examined the Supreme Court's decision in *United States v. Seeger*, which held the key inquiry in a religious accommodation case "is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[85] The Seventh Circuit found a genuinely held belief that involves matters of the afterlife, spirituality, or the soul among other possibilities, qualifies as religion under Title VII.[86] Further, these protections are not limited to familiar religions, it explained.[87]

The Seventh Circuit described three factors to consider when determining whether a belief is in fact religious for purpose of Title VII: "(1) the belief necessitating the accommoda-

tion must actually be religious, (2) that the religious belief must be sincerely held, and (3) accommodation of the sincerely held belief must not impose an undue hardship."[88]

The court specifically noted that Adeyeye in his two requests for leave referenced the "funeral ceremony" and "funeral rite," as well as the animal sacrifices and spiritual repercussions of his failure to attend.[89] These references, it said, would allow a reasonable jury to find that Adeyeye gave sufficient notice of the religious nature of his request for unpaid leave. The Seventh Circuit also found that the information provided by Adeyeye evidenced his own personal and sincerely held religious beliefs.[90] Further, it explained, the issue of undue hardship depends on close attention to the specific circumstances of the job and the leave schedule the employee believes is needed.[91] The Seventh Circuit's decision in *Adeyeye* illustrates the challenge that employers face in accommodating employee religious practices where non-traditional religions are increasing in the workplace.

The sincerity of employee's religious beliefs, was recently addressed by the Fifth Circuit in *Davis v. Fort Bend County*.[92] The plaintiff, Lois Davis, was a Desktop Support Supervisor and her team was assigned on the weekend of July 4, 2011 to assist with testing of computers to ensure that all the computers had been properly installed in the newly built Fort Bend County Justice Center.[93] Davis informed her supervisor that she would not be available to work during the morning of Sunday, July 3, 2011, due to a previous religious commitment.[94] Davis indicated that this was a special church service for the Church Without Walls because her church was breaking ground for a new church, and she "needed" to be at church that day.[95] Davis also stated that she would come in to work after the service and would find a replacement for her morning absence.[96] The absence was not approved and she was subsequently terminated.[97]

The district court granted summary judgment to Fort Bend on Davis's claims of retaliation and religious discrimination under Title VII by finding that the absence from work was due to a personal commitment, not a religious conviction because she described the obligation as a request from her pastor.[98]

The Fifth Circuit reversed the grant of summary judgment on the religious claim finding that neither Fort Bend nor the district court addressed whether Davis' belief was sincere and focused upon the nature of the activity itself.[99] The Fifth Circuit specifically stated that a showing of sincerity does not require proof that the July 3rd church event was in itself a true religious tenet, but only that Davis sincerely believed it to be religious in her own scheme of things.[100] The court of appeals further stated that even if attendance at the event was not a religious tenet, but a mere request of the pastor, these arguments address an issue that is not for the federal courts, powerless as they are to evaluate the logic or validity of beliefs found religious and sincerely held.[101] The Fifth Circuit concluded by stating that if the focus had been on the sincerity of Davis' belief then she would have satisfied the prima facie standard to survive summary judgment.[102]

In *Crider v. University of Tennessee at Knoxville*, the U.S. Court of Appeals for the Sixth Circuit found that the district court's granting of summary judgment in favor of the employer was inappropriate, since there existed a dispute of fact as to whether the offered accommodation related to a work schedule conflict was reasonable and whether the University was able to accommodate the plaintiff without undue hardship.[103] The University of Tennessee at Knoxville (UTK) hired Kimberley Crider in May 2008 as a Programs Abroad Coordinator.[104] Crider's job responsibilities included attending conferences on behalf of her department, traveling internationally on "site visits," and monitoring an emergency cell phone on a rotating basis, including weekends.[105] The emergency phone is the means for a student studying abroad to reach UTK in the event of an emergency.[106]

Four days after starting her employment with UTK, Crider notified her supervisor that she is a Seventh Day Adventist and her religious beliefs prevented her from performing work-related tasks from sundown on Fridays until sundown on Saturdays.[107] One of the tasks she could not perform would be monitoring the emergency cell phone on Friday nights and Saturdays.[108] Crider's supervisor referred this matter to UTK's Office of Equity and Diversity.[109] Crider then was requested to put her request for religious accommodation in writing.[110] In June 2008, Crider learned that she was to carry the emergency phone on the upcoming Saturday.[111] Crider devised her own accommodation, which required the other two coordinators to cover the weekends, reducing the total number of days but increasing the number of weekends the others must work.[112] This proposal was provided to the other two coordinators who indicated they were unwilling to accept the arrangement because it prevented them from travel on the weekend and from disengaging from work.[113] UTK asked Crider whether she would be willing to carry the emergency phone on weekends if one of the other coordinators were out of town or had a family crisis.[114] Crider refused to monitor the phone on her Sabbath.[115] UTK rejected other proposals by Crider.[116] On June 20, 2008, UTK terminated Crider's employment because she was unable to fulfill her job duties.[117]

Finding summary judgment inappropriate, the Sixth Circuit stated that it was "debatable whether UTK had fulfilled its duty of reasonable accommodation."[118] The accommodation offered by UTK to Crider required her to be flexible and agree to carry the emergency phone on weekends in an emergency situation or when the other two coordinators were out of town, with which Crider disagreed.[119] The court also questioned whether the request would cause an undue hardship on UTK and indicated that the district court gave an inaccurate interpretation of the protections identified in *Hardison*. It stated that Title VII does not exempt accommodation which creates an undue hardship on the employees; rather Title VII requires reasonable accommodation "without undue hardship on the conduct of the employer's business.[120] The Sixth Circuit returned the case to the district court to explore whether the accommodation would create an undue hardship for UTK.

The U.S. Court of Appeals for the Seventh Circuit also addressed religious accommodation for a work schedule conflict in *Porter v. City of Chicago*.[121] The court noted that cooperation between the employee and employer was essential to address conflict and recognized that an employer must engage in dialogue with the employee in seeking accommodation.[122] The

plaintiff, Latice Porter, was a practicing Christian who sought religious accommodation to attend church services on Sunday morning. Porter was placed in work group with a schedule that provided for Sunday/Monday days off.[123] After Porter returned from Family Medical Leave and personal medical leave, she was placed in a work group with Friday/Saturday days off.[124] She sought a religious accommodation to attend Sunday services.[125] Porter's supervisor advised her that she could switch from day watch to the evening watch, which would allow her to attend Sunday morning services.[126] Porter did not demonstrate an interest in this option and did not pursue the watch change.[127] Subsequently, Porter went out on another leave of absence and never returned to work.[128] Porter later sued the employer, alleging, among other claims, religious discrimination for failure to accommodate her religious beliefs.

The Seventh Circuit reiterated that reasonable accommodation of an employee's religious practices is "one that eliminates the conflict between employment requirements and religious practices."[129] The Court of Appeals further stated that reasonable accommodation is intended to assure the employee an additional opportunity to observe religious practices, but it does not impose a duty on the employer to accommodate at all costs.[130]

Relying on this, the Seventh Circuit found that the City of Chicago had discharged its obligation under Title VII by offering Porter an accommodation (i.e., switch to evening watch) that would have eliminated the conflict between her work schedule and her religious practices of attending church on Sunday morning.[131]

The Eleventh Circuit in *Telefair v. Federal Express Corporation*[132] also found that offering the employee a different position even at a lower rate of pay was a reasonable accommodation if the transfer eliminated the scheduling conflict between the religious practice and the employment requirements.

Here, two African-American employees were practicing Jehovah Witnesses and alleged that their employer discriminated against them due to their race and religious beliefs when they were redeployed from a Monday through Friday shift to a Tuesday through Saturday work schedule.[133] Before the redeployment, the employees advised FedEx that they could not work on Saturdays due to their religious observation.[134] They both offered to work Tuesday through Friday which was denied by FedEx.[135] However, FedEx offered both a handler position that had a Monday through Friday schedule at a lower rate of pay.[136] They were also given the opportunity to apply for any open positions with the organization.[137] The employees did not apply for any positions nor did they accept the handler position.[138] Both employees were deemed to have resigned voluntarily.[139]

The district court granted summary judgment on all claims. The employees appealed only the religious accommodation claims arguing that the proffered religious accommodations were not reasonable due to less pay, commute times, loss of seniority for six months, and impacted prospects for promotion.[140]

The Eleventh Circuit affirmed the district court decision and reiterated that the employee need not give the employee a choice among several accommodations, nor is the employer required to provide the employee with the employee's preferred accommodation or show undue hardship resulting alternative accommodations proposed by the employer.[141]

In *EEOC v. Thompson Contracting, Grading, Paving, and Utilities, Inc.*,[142] the U.S. Court of Appeals for the Fourth Circuit found that the employer was not obligated to offer an employee a transfer to the position of general equipment operator and that it had satisfied its burden under the undue hardship prong by showing the other proposed accommodations would have resulted in more than de minimis cost to the employer, thus causing an undue hardship on the conduct of its business.[143]

Banayah Yisrael was hired twice by Thompson as a dump truck driver.[144] Yisrael is an adherent of the Hebrew Israelite faith that observes its Sabbath on Saturday, which prohibits work from sunrise and sunset.[145] On the first Friday after being re-hired for the second time, Yisrael advised his supervisor that he could not work on Saturday because of his religious obligations.[146] All of the Thompson dump truck drivers worked that Saturday.[147] This occurred two other times before Yisrael's employment was terminated for failing to have regular and dependable attendance.[148]

The EEOC filed suit against Thompson alleging, among other claims, that the company discriminated against Yisrael when it failed to accommodate his religious beliefs and ultimately terminating him because of his religion.[149]

The Fourth Circuit analyzed each of the EEOC's proposed accommodations, but found they would have resulted in more than a de minimis cost to Thompson, thus causing an undue hardship on the conduct of its business. The court stated accommodation does not require the employer to offer employment arrangements that, based on the employee's own actions, it reasonably believes will be refused.[150] Thus, the Fourth Circuit found Thompson was not obliged to offer Yisrael a transfer to general equipment operator.[151]

As evidenced by the analysis of the cases, while the standards of *Hardison* and *Philbrook* are alive and well, courts are reaching decisions based on a fact-driven analysis under these standards.

B. Dress and Grooming

Religious dress and grooming cases are on the rise and challenge the limits of employer dress codes. Lower court decisions are mixed on what constitutes reasonable accommodation.[152] It is instructive to contrast a recent California district court case and the Tenth Circuit's recent decision on an unsuccessful applicant for employment who claimed she was denied employment in violation of Title VII because she wore a hijab.[153]

The U.S. Court of Appeals for the Tenth Circuit, in *EEOC v. Abercrombie & Fitch Stores*, found that the retailer's failure to hire a Muslim woman who wore a religious headscarf (i.e., hijab) was not an act of religious discrimination since the applicant never requested a religious accommodation and, thus, notice was lacking.[154]

Samantha Elauf, a Muslim, applied for a sales associate position with Abercrombie Kids (owned by Abercrombie & Fitch).[155] Elauf was familiar with the type of clothing Abercrombie sold and knew she would be required to wear similar

clothing if she became an employee.[156] During the interview, Elauf wore an Abercrombie-like T-shirt, jeans, and her headscarf/hijab.[157] Elauf acknowledged discussing the dress requirements for Abercrombie employees during the interview. The interviewer also informed Elauf she would be required to wear clothing similar to that sold by Abercrombie and, specifically, no heavy makeup or nail polish.[158] Abercrombie relies upon its Look Policy as being critical to the health and vitality of its "preppy" and "casual" brand. During the interview, Elauf never informed the interviewer she was Muslim, never mentioned she wore the headscarf for religious reasons and would need an accommodation to address the conflict between her religious practice and Abercrombie's clothing policy. The interviewer assumed Elauf was Muslim, but was uncertain of the requirements regarding the headscarf.[159] Abercrombie did not extend an offer of employment to Elauf.[160] Elauf learned from an employee of Abercrombie that she was not hired because of her headscarf.[161]

The EEOC filed suit against Abercrombie for religious discrimination and failure to accommodate Elauf's religious beliefs in violation of Title VII.[162] The district court granted summary judgment to the EEOC and denied summary judgment to Abercrombie. The Tenth Circuit, in a lengthy opinion, disagreed with the district court and reversed the decision. It ordered the case back to the district court with instructions to vacate its judgment and enter judgment in favor of Abercrombie.

The Tenth Circuit noted the EEOC had the burden of proving that Elauf had a bona fide religious belief that conflicted with the employer's requirements, that she informed her prospective employer of the conflicting belief, and that she was not hired because of the conflict.[163] Here, it found the EEOC failed to establish that Elauf informed the interviewer of her religious belief that conflicted with Abercrombie's Look Policy. The court reviewed the summary judgment record and the analysis used in cases under the Americans with Disabilities Act (ADA) and found the notice element was lacking, since Elauf failed to inform Abercrombie of her religious beliefs and her need for accommodation. The Tenth Circuit placed the burden on applicants or employees to initially inform employers of the religious nature of their conflict in practice and of the need for an accommodation to implicate the accommodation dialogue. The Supreme Court has has granted certiorari and will decide the case during its October 2014 Term.

By comparison, in a similar case against the same employer, a district court in California applied the same standards, but used a different basis for an opposite result.

In the California district court case, the EEOC and Umme-Hani Khan brought suit against Hollister (an Abercrombie & Fitch brand) alleging that Abercrombie failed to accommodate Khan's religious beliefs.[164] Khan is Muslim and believes that Islam dictates she wear clothes she considers modest, and further believes that Islam requires her to wear a headscarf, also known as a hijab, when in public or in the presence of men who are not immediate family members.[165] When Abercrombie hired Khan in October 2009, the 19-year-old had fully adopted the practice of wearing a hijab in public or when in the presence of males outside of her immediate family.[166] She wore a headscarf when she was interviewed for her position.[167] When hired, Khan acknowledged the Look Policy and agreed to abide by it.[168] As an "impact associate," the Muslim teen worked primarily in the stockroom and she was requested to wear headscarves in Hollister colors, which she agreed to do.[169] However, in mid-February 2010, Management advised Khan that her hijab violated the Look Policy and that she would be removed from the work schedule unless she removed her headscarf while at work.[170] Khan refused to remove her hijab because her religious beliefs compelled her to wear it.[171] Abercrombie terminated Khan's employment on February 23, 2010, for refusing to comply with the Look Policy.[172]

It was undisputed that a prima facie case was established, but Abercrombie argued it could not accommodate Khan's religious beliefs without undue hardship.[173] The district court rejected Abercrombie's argument and found it offered only unsubstantiated opinion testimony of its own employees to support its claim of undue hardship. Something more than subjective belief was necessary to meet its undue hardship burden, the court said.[174]

The district court granted the EEOC's and Khan's motion for partial summary judgment and dismissed other claims, leaving for trial only the issue of damages and injunctive relief.

By contrast, in *EEOC v. Regency Health Associates*, a jury in Georgia found for the employer and rejected the employee's religious discrimination claims regarding her dress.[175]

In this case, a medical assistant in a pediatric health clinic started wearing a hijab after she was hired. She told management that she planned to eventually wear a full headpiece, with only her eyes showing. The clinic's management objected, explaining to her that given the nature of the pediatric practice and the reasonable desire of child patients and parents to see the face of the medical staff providers, it could not approve the wearing of a full headpiece.[176] Management told the employee that it would consider what reasonable accommodations could be made to its dress code policy.[177] Before it could do so, the plaintiff resigned and filed a lawsuit against the clinic.

The employer argued that the plaintiff had not given it sufficient time to consider her accommodation request nor provided enough information about her request for a reasonable accommodation to be made before she resigned.[178] The jury agreed and rejected the employee's claim.

C. Religious Beliefs and Job Duties

Religious beliefs that conflict with the actual work performed by the employee also create religious accommodation issues.

For example, in *Nobach v. Woodland Village Nursing Home Center, Inc.*,[179] the plaintiff, Kelsey Nobach, brought a claim for religious discrimination against the employer, asserting that she was discriminated against when she refused to pray the rosary with a patient at the nursing home, because it was against her own sincerely held religious beliefs.[180]

Nobach was hired as an activity aide for the residents of Woodland Village Nursing Home Center.[181] Her duties encompassed carrying out daily routines, including perform-

ing a devotional reading, which, according to Nobach was non-denominational, reading the newspaper to the residents, playing games with them, and generally keeping the residents entertained.[182] In September 2009, Nobach was called in to work to fill in at a different building.[183] During the shift, Nobach was requested by her supervisor to pray the rosary with a Catholic resident.[184] Nobach advised the supervisor that she was not Catholic and it was not her religion and if the supervisor wanted to conduct the rosary, "then she was welcome to it."[185] Nobach was subsequently issued a formal write-up for insubordination for not performing the rosary, and was terminated at that time and told that "it doesn't matter if its [sic] against your religion, if you refuse it's insubordination."[186]

The district court found that a material issue of fact was presented as to Nobach's religious belief conflicting with the praying of the rosary. It stated, "[T]he area of personal and sincerely held religious beliefs is exceedingly broad and courts . . . are not free to reject beliefs because they consider them incomprehensible. Their task is then decide whether the beliefs professed by the registrant are sincerely held and whether they are, in his own scheme of things, religious."[187] The district court also found, like the Tenth Circuit in *Abercrombie*, that there were disputed issues of fact regarding Woodland's knowledge of Nobach's religious beliefs, Nobach's lack of request for religious accommodation, and Woodland's lack of knowledge regarding her religious beliefs.[188] The district court, in utilizing a balancing test regarding undue hardship to Woodland, found that whether Woodland could accommodate the religious conflict without experiencing undue hardship was a question of fact and denied summary judgment.[189]

Conflict with religious beliefs and job duties also can arise where Muslims work in meat processing plants given the Quran's prohibition against the consumption and touching of pork.

In *Al-Jabery v. ConAgra Foods, Inc*., the plaintiff, Naim H. Al-Jabery, was a Muslim who emigrated from Iraq. Al-Jabery applied for employment at ConAgra and submitted an employment application stating he wanted to be considered for "[s]anitation/or any" position at the plant.[190] On August 26, 2003, the plaintiff was hired for a sanitation position, working as an "Equipment Cleaner."[191] He was to clean machines that processed pork, and it is undisputed that the plaintiff actually performed that work.[192] Al-Jabery claimed he was not compelled to actually pick up pork as a part of his sanitation job while working the evening shift.[193] Other Muslims work at the plant and some of them have worked on the production line.[194] No Muslim workers "have ever indicated" to the human resources manager "that their religion precludes them from touching pork."[195] ConAgra endeavored to accommodate the religious beliefs of its Muslim employees.[196] For example, Muslims were allowed to pray at work, to clean up before prayers, to extend their rest periods during Ramadan in order to break their fast, and, during Ramadan, not to work with exposed meat while they were fasting if they preferred not to do so.[197]

For about three weeks prior to June 14, 2005, the plaintiff had been supervised by Chasity Rutjens.[198] On June 14, 2005, Rutjens advised human resources manager Kevin Bartels that Al-Jabery was taking unauthorized breaks and his direct supervisor had been unable to locate him for approximately one hour.[199] After Rutjens had confirmed with two Vietnamese employees who worked on the sanitation crew that Al-Jabery had been missing from an area the sanitation crew was expected to clean and two other supervisors had told her that "Al-Jabery had a pattern of wondering off and taking excessive breaks," she told Al-Jabery that she was transferring him to the pork production line.[200] Al-Jabery protested, and Rutjens took him to Bartels, who supported Rutjens and told Al-Jabery that he must report to the pork production line, but that he would receive the same pay, hours, and benefits.[201] There is no evidence that Al-Jabery told Bartels or Rutjens that he could not work on the pork line because of his religious beliefs.[202] On June 15, 2005, Al-Jabery refused to report to the pork production line, left the facility and was termed a "voluntary quit" by ConAgra for refusing the transfer.[203] Suing the employer, Al-Jabery alleged, among other things, that ConAgra discriminated against him because of his religion.

The district court found Al-Jabery failed to present competent evidence that he informed ConAgra that he could not touch pork, thus failing to establish a prima facie case of religious discrimination.

In *Mitchell v. University Medical Center*, a Kentucky district court found that the defendant Hospital could not reasonably accommodate plaintiff Claudette Mitchell without undue hardship.[204] Mitchell, who is Christian, sought to have religious conversations with co-workers about the dates God sent her and whether they could be the date for the end of the world or the Antichrist.[205] This conduct was purportedly offensive and troubling to Mitchell's co-workers and violated the Hospital's harassment policies.[206] The district court found that any accommodation of Mitchell would infringe on the rights of other employees, thus imposing on undue hardship on the Hospital.[207]

The Eighth Circuit affirmed summary judgment in favor of the defendant in *Wilson v. U.S.W. Communications*, because the employer had provided a reasonable accommodation to the plaintiff.[208] Christine Wilson, a devout Roman Catholic, made a religious vow to wear an anti-abortion button.[209] The button depicted a graphic color photograph of a fetus.[210] Many of Wilson's co-workers found the button offensive, and the button caused work disruptions.[211] U.S.W. Communications (USW) offered three accommodations, including covering the button while at work.[212] Wilson was ultimately fired when she continued to wear the uncovered button.[213] Wilson brought an action against USW and her supervisors for religious discrimination.[214]

The Eighth Circuit upheld the district court decision, finding that USW's accommodation proposal allowed Wilson to comply with her vow while respecting the desire of her co-workers not to look at the button, thus USW provided a reasonable accommodation to Wilson's religious beliefs.[215] Because USW offered a reasonable accommodation, the employer did not have to show that Wilson's proposed accommodations would cause an undue hardship.[216]

IV. Conclusion

As the decisions discussed above show, lower courts con-

tinue to apply the standards set forth by the Supreme Court in *Hardison* and *Philbrook* in determining what constitutes reasonable accommodation and undue hardship in religious discrimination cases under Title VII. However, the fact-specific nature of the religious accommodation and undue hardship inquiry arguably makes it difficult to apply bright-line rules in individual cases. The notice component appears to have become a focal point for courts, where the existence of a religious conflict with the employer's workplace policies or job duties arises and an adverse employment action is taken. Courts appear willing to infer notice if an employee makes reference to religion or religious belief in workplace discussions with the employer over job requirements or employer policies. Another trend arguably present in more recent religious accommodation cases is the subtle redefining of the de minimis standard to place a more onerous burden on the employer to justify undue hardship than that originally contemplated in *Hardison* and *Philbrook*. The tension between religious accommodation and undue hardship will continue to grow and the case law will evolve in step with changes in the religious diversity of the American workplace.

Endnotes

1 Tanenbaum Center for Interreligious Understanding, What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion 5 2013), *available at* http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf.

2 Note, *Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation*, 67 Vand. L. Rev. 239, 259 (2014) (citing Courtney Rubin, *Religious Discrimination Complaints on the Rise at Work*, Inc., Oct. 20, 2010, http://www.inc.com/news/articles/2010/10/complaints-of-religious-discrimination-onthe-rise.html).

3 Society for Human Resource Management, Religion and Corporate Culture: Accommodating Religious Diversity in the Workplace (2008).

4 *Best Practices for Eradicating Religious Discrimination in the Workplace*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last modified July 23, 2008).

5 *Id.* The EEOC's guidance is not binding on courts, but is intended to assist employers with their legal responsibilities regarding religious accommodation issues that often arise in the workplace, which has been the focus of several recent religious discrimination lawsuits. The EEOC guidance focuses on several areas to include: 1) religious observation; 2) sincerely held belief; 3) undue hardship; 4) uniforms; and 5) workplace safety or health concerns. The issuance of the EEOC guidance reflects the EEOC's intent to hold employers responsible for accommodating a religious practice due to a conflict between the religious practice and the employer's neutral work rule.

6 *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited Sept. 23, 2014).

7 U.S. Const. amend. I. The First Amendment provides in pertinent part:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of . . . ."

8 42 U.S.C. § 2000e-2(a)-(d).

9 "No order of the court shall require . . . the hiring, reinstatement or promotion of an individual employee, or the payment to him of any back pay, if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title." 42 U.S.C. § 2000e-5(g).

10 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971).

11 *Dewey*, 429 F. 2d at 329.

12 *Id.*

13 *Id.*

14 *Id.* at 328.

15 *Id.* at 329.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Dewey*, 429 F.2d at 331.

23 *Id.* at 328.

24 *Id.*

25 *Id.* at 329

26 402 U.S. 689 (1971).

27 Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. Cin. L. Rev. 1411, 1428 (2009).

28 Corrada, *supra* note 27 (citing 42 U.S.C. §2000-e2(a)(1)(2006)).

29 § 701(j), 42 U.S.C. § 2000e(j) (1970 ed., Supp. V).

30 432 U.S. 63 (1977).

31 479 US 60 (1986).

32 *TWA*, 432 U.S. at 74.

33 *Id.*

34 *TWA*, 432 U.S. at 66.

35 *Id.*

36 *Id.* at 67.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 68.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *TWA*, 432 U.S. at 69.

47 *Id.*

48 *Id.*

49 *Id.* at 79.

50 *Id.*

51 *Id.*

52 *Id.* at 77 (citing Hardison v. Trans World Airlines, Inc., 375 F. Supp. at 890-891 (W.D. Mo. 1974)).

53 *TWA*, 432 U.S. at 77 (citing Hardison v. Trans World Airlines, Inc., 375 F. Supp. at 890-891 (W.D. Mo. 1974)).

54 *Id.* at 81.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 63 (1986).

60 *Id.*

61 *Id.*

62 *Id.* at 65.

63 *Id.* at 61.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 68-69.

68 *Id.*

69 *Id.* (citing 42 U. S. C. § 2000e(j)).

70 *Id.*

71 *Id.* at 68.

72 *Id.*

73 721 F.3d 444 (7th Cir. 2013).

74 *Id.* at 447.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 450.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 447.

83 *Id.*

84 *Id.* at 448.

85 *Id.* (citing United States v. Seeger, 380 U.S. 163, 165-66 (1965)).

86 *Id.* at 448.

87 *Id.*

88 *Id.*

89 *Id.* at 451.

90 *Id.*

91 *Id.*

92 __F.3d __ , No. 13-20610 (5th Cir. Aug. 26, 2014).

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*; *see* Cooper v. Gen. Dynamics, 533 F.2d 163, 166 n.4 (5th Cir. 1976) (chastising a district court for having "evaluated the tenet and concluded that it was irrational and specious").

102 *Id.*

103 492 Fed. Appx. 609 (6th Cir. 2012) (unpublished).

104 *Id.* at 610.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at 611.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at 613.

119 *Id.*

120 *Id.* at 614 (citing 42 USC § 2000e(j) (emphasis added)).

121 700 F. 3d 944 (7th Cir. 2012).

122 *Id.* at 953 (citing, Rodriguez v. City of Chicago, 156 F.3d 771,777 (7th Cir. 1998)).

123 *Id.* at 949.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* at 952.

128 *Id.* at 951.

129 *Id.*

130 *Id.*

131 *Id.* at 953.

132 __ Fed. Appx. __ (11th Cir. 2014)

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 499 Fed. Appx. 275 (4th Cir. 2012) (unpublished).

143 *Id.*

144 *Id.* at 277.

145 *Id.* at 277.

146 *Id.* at 278.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 285.

151 *See* Farah v. A-1 Careers, No. 12-2692 (D. Kan. Nov. 20, 2013), *appeal docketed*, No. 13-3317 (10th Cir. Aug. 12, 2014). The Court found that it was an undue hardship on the defendants, who were tenants in multi-office building, to allow plaintiff, who is Muslim to pray in the lobby, since the complaints had been received that plaintiff's noon prayers were disrupting others. Defendants

and plaintiff had engaged in interactive process about the noon prayers, with defendants permitting plaintiff to go off-site for the prayers. The Court found this to be a reasonable accommodation.

152 *See* Tagore v. United States, 735 F.3d 324 (5th Cir. 2013). The Fifth Circuit found that a federal employer's termination of an employee, who wanted to wear a Sikh ceremonial sword at work, did not violate the employee's religious rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e *et seq.*, because accommodations by the employer would have violated the law and imposed more than de minimis costs on the employer.

153 Hijab or headscarf is for many Muslims females a visible expression of their faith, piety or modesty, and represents a tangible manifestation of their religious identity.

154 EEOC v. Abercrombie & Fitch Stores, No. 11-5110, 2013 App. LEXIS 20028 (10th Cir. Oct. 1, 2013), *cert granted*, (Oct. 2, 2014) (No. 14-86).

155 *Id.* at *6.

156 *Id.*

157 *Id.* at *9.

158 *Id.*

159 *Id.* at *11.

160 *Id.* at *12.

161 *Id.*

162 *Id.*

163 *Id.* at *16.

164 EEOC & Umme-Hani Khan v. Abercrombie & Fitch Stores, 2013 U.S. Dist. LEXIS 125628 (N.D. Cal. Sept. 2013).

165 *Id.* at *7-8.

166 *Id.* at *8.

167 *Id.*

168 *Id.*

169 *Id.* at *9.

170 *Id.* at *10.

171 *Id.*

172 *Id.* at *11.

173 *Id.* at *28.

174 *Id.* at *40.

175 No. 1:05-CV-2519 (N.D. Ga. *filed* Aug. 2, 2007).

176 Robert I. Gosseen, *Accommodating Islam in the Workplace: A Work in Progress*, Primerus, http://www.primerus.com/business-law-articles/accommodating-islam-in-the-workplace-a-work-in-progress-332011.htm (last visited Sept. 23, 2014).

177 *Id.*

178 *Id.*

179 2012 U.S. Dist. LEXIS 125037 (S.D. Miss. 2012).

180 *Id.* at *7.

181 *Id.* at *1.

182 *Id.* at *2.

183 *Id.*

184 *Id.*

185 *Id.*, at *3.

186 *Id.*

187 *Id.* at *8 (citing United States v. Seeger, 380 U.S. 163, 184-85, 85 (1965)).

188 *Id.* at *14.

189 *Id.* at *15.

190 2007 U.S. Dist. LEXIS 79080 (D. Neb. Oct. 24, 2007).

191 *Id.* at *3.

192 *Id.*

193 *Id.* at *3.

194 *Id.* at *6.

195 *Id.*

196 *Id.*

197 *Id.* at *7.

198 *Id.*

199 *Id.*

200 *Id.* at *8.

201 *Id.*

202 *Id.* at *9.

203 *Id.*

204 2010 U.S. Dist. LEXIS 80194, at *22 (W.D. KY 2010).

205 *Id.*

206 *Id.*

207 *Id.*

208 58 F.3d 1337 (8th Cir. 1995).

209 *Id.* at 1339.

210 *Id.*

211 *Id.*

212 *Id.* at 1340.

213 *Id.*

214 *Id.*

215 *Id.* at 1342.

216 *Id.*

Telecommunications & Electronic Media

Congress Begins to Consider a New Communications Act

*By Randolph J. May**

Introduction

On December 3, 2013, House of Representative Energy and Commerce Committee Chairman Fred Upton and House Communications and Technology Subcommittee Chairman Greg Walden announced plans for the Commerce Committee to review and update the Communications Act of 1934. This is a welcome and timely development, for as Chairman Walden stated at the time of the announcement:

> When the Communications Act was updated almost 18 years ago, no one could have dreamed of the many innovations and advancements that make the Internet what it is today. Written during the Great Depression and last updated when 56 kilobits per second via dial-up modem was state of the art, the Communications Act is now painfully out of date. We plan to look at the Communications Act and all of the changes that have been made piecemeal [since 1934] and ask the simple question: Is this working for today's communications marketplace?[1]

Initially, the review and update process, which the Committee ubiquitously refers to by its Twitter handle, #CommActUpdate, is expected to be a multiyear project. The process is being conducted primarily through the issuance of a series of White Papers that frame issues and seek responses from interested parties. At the time of this writing, the Commerce Committee has issued four White Papers. In this brief essay, I wish to highlight the issues raised in these White Papers and offer my perspective concerning the questions raised.[2] Of course, updating a regulatory regime that is as comprehensive and outdated as the Communications Act is a project that raises a multitude of significant issues, some of which are quite complicated and technical. These issues can be addressed—and, in fact, are being addressed—in the review process at various levels of detail. Here, given the space constraints, I necessarily must address them at a fairly high level. But an essential point to understand is this: Since the Communications Act was last revised in any meaningful way in 1996, the communications and information services marketplace environment, driven in significant part by rapid technological advances, has changed dramatically. Thus, the review and updating process is not only timely but necessary.

In the first White Paper, "Modernizing the Communications Act,"[3] the Committee wisely sought responses that, as the White Paper put it, "address thematic concepts" for updating the Communications Act. The questions asked in the first White Paper are directed broadly to the structure of a new act, the jurisdiction of the FCC, the need for flexibility, and the role technology should play in classifying services for regulatory purposes. Indeed, the way the Committee framed one question: "What should a modern Communications Act look like?" captured the essence of the response sought by first White Paper.

I. The Guiding Foundational Principles for Updating the Communications Act

The answer to the question "What should a new Communications Act look like?" should be grounded in certain foundational principles that should guide the reform effort. Here are those principles in summary fashion.

• *A clean slate approach is needed rather than an approach that takes the current act as a starting point.*

In other words, a "replacement" regime is needed—a new "Digital Age Communications Act," if you will—because the new act should be very much different in concept and structure than the existing one. There are two primary reasons for this. First, the conceptual changes in communications law and policy that are warranted, indeed required, by the dramatic technological and marketplace changes described in the Committee's White Paper, are major. The governing concepts and philosophical principles embodied in the new act should be very different from the governing concepts and philosophical principles embodied in the current statute. After all, in many important respects, the current statute remains intact as adopted in 1934. And the 1934 Act itself closely resembled, in significant respects, the Interstate Commerce Act of 1887 (ICA). The ICA's very purpose was to tame what were considered to be static common carriers—the railroads—exercising monopolistic power, not to oversee a technologically dynamic, increasingly competitive marketplace. Because the Communications Act is derived directly from the ICA's framework, the "clean slate" approach simply makes more sense. Second, and relatedly, the clean slate approach is more likely to achieve the goal of simplicity because adopting a replacement regime is much more likely to result in a governing statute that is shorter, better organized, more intelligible, with fewer unintended conflicts and consequences, than a statute that takes the current act as its starting point.

• *Generally, the broad delegation of indeterminate authority to the FCC to regulate "in the public interest" should be replaced with a competition-based standard, so that, except in limited circumstances, FCC regulation will be required to be tied to findings of consumer harm resulting from lack of sufficient marketplace competition.*

In the current act, Congress has delegated authority to the FCC to act "in the public interest" nearly a hundred times.[4] These inherently vague delegations of authority confer too much unbridled discretion on the agency. A new act

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should replace most of these "public interest" delegations with a governing competition standard that requires the FCC, in deciding whether and how to regulate, to rely on antitrust-like jurisprudence that focuses on rigorous marketplace analysis.

• *With a competition regulatory standard in place that is generally applicable to all entities providing electronic communications subject to the Commission's jurisdiction, the existing so-called "silo" regime, which results in disparate regulation of entities providing comparable services, should be eliminated in favor of carefully-circumscribed FCC authority over all electronic communications networks.*

Under the current silo regime, regulatory classifications are based on certain techno-functional constructs that are largely now outdated in a digital broadband environment in which "byte is a byte is a byte." In other words, in today's marketplace, in which traditional service distinctions such as "cable" or "wireless" or "telecommunications " or "broadcasting" are disappearing, disparate regulation based on different technological platforms or functional distinctions makes no sense.[5] In today's "converged" broadband marketplace, voice, data, and video services generally are offered in bundles which consumers find attractive. Trying to fit the new digital services, or bundles of services, into legacy service classifications means that products that are comparable from a consumer's perspective are subject to different regulatory burdens and obligations.

• *The FCC's authority to adopt broad anticipatory rules on an* ex ante *basis should be substantially circumscribed, and agency rules should be sunset after a fixed number of years absent a strong showing at the sunset date that they should be continued.*

The Commission should be required to rely more heavily than is presently the case on adjudicating individual complaints alleging specific abuses of market power and consumer harm in a particular market. Presently, much of the agency's regulation takes place through anticipatory *ex ante* rulemakings. Because the Commission conjectures concerning future potential harms, these rulemakings often lead to overly broad regulation. While a new act should not eliminate the agency's authority to adopt generic rules, such authority should be circumscribed. Regulations should be sunset after a fixed number of years absent a strong showing that they should be continued.

• *To a significant extent, the FCC's structure as a matter of form in an institutional sense will be dictated by the structure of the new act and the fundamental decisions made regarding the agency's role.*

The new act should require that the agency adhere to certain process reforms such as those contained in H. R. 3675, the "Federal Communications Commission Process Reform Act of 2013." With respect to jurisdiction, certain matters (for example, privacy and data security regulation) currently under the FCC's jurisdiction should be transferred to the FTC because those matters are closer to the FTC's core institutional expertise and because consolidating such jurisdiction in the FTC makes it less likely that various providers of comparable services in the overall Internet ecosystem will be regulated in a disparate fashion. Finally, the present authority of the states to engage in economic regulation of service providers should be circumscribed in the new act.

So, in drafting a new act, on an overall basis Congress should be guided by the foregoing foundational principles. And the concept of "simplicity" should remain a foremost objective. In the Fourteenth Century, William of Ockham wrote: "What can be explained on fewer principles is explained needlessly by more." This theorem became know as Ockham's Razor. The Razor should be kept close at hand in drafting a new act.

The three succeeding White Papers focused somewhat more narrowly on particular communications policy topics, although, given the technological and marketplace convergence of today's era, each paper necessarily invited responses that contain some overlap with the other papers. Here I will only touch briefly on the questions raised in these three White Papers and my own perspective.

II. Spectrum Policy

The second White Paper, "Modernizing U.S. Spectrum Policy,"[6] invited comment on a number of discrete spectrum policy issues, ranging from fundamental questions concerning the nature and purpose of requiring spectrum licenses at all to different methods of allocating and assigning frequencies to topical questions such as the best way to encourage sharing of government frequencies. At the most fundamental level, a new act should abandon the current administrative fiat approach of allocating and assigning frequencies, which has its roots in the Radio Act of 1912. This cumbersome administrative regime relies on the FCC proceedings to allocate particular frequency bands for particular pre-specified uses in accordance with particular pre-specified technical parameters. This administrative "command-and-control" regulatory regime fails to promote, or even allow, flexible use of spectrum so that, as consumer demand for spectrum-based services shifts and/or technology advances, spectrum can be put to its highest and best use. Thus, in a new act, the existing administrative fiat regime should be replaced with a system that fosters a robust market in which spectrum rights can be initially awarded and then freely traded largely independent of FCC administrative controls.

III. Competition Policy

The third White Paper, "Competition Policy and the Role of the Federal Communications Commission," explained:

> The evolution of technology from analog to digital and narrowband to broadband has brought about the integration of voice, video, and data services across multiple platforms employing various technologies. The ongoing shift away from single-purpose technologies toward Internet Protocol packet-switching has rapidly called into question the adequacy of the current Communications Act and the monopolistic assumptions on which it is based.[7]

This statement really goes to the heart of the matter regarding formulation of proper competition policy. While new technologies continue to emerge and older technologies evolve in unpredictable ways, presently the communications market-

place is impacted positively by competition among cable firms, telephone companies, satellite operators, fiber providers, and various sorts of wireless companies, each employing their own facilities. In order to encourage the continued development of this intermodal platform competition on a long-run sustainable basis, the Commission must avoid adopting policies that, in effect, seek to "manage" competition through resale, sharing, and access regulatory mandates. Instead, a principled competition policy framework must be premised on facilitating free entry and exit as the basic rule, which should then be qualified by targeted *ex post* remedies in the event market failure and consumer harm are proven by clear and convincing evidence. Prescriptive *ex ante* regulation should be carefully circumscribed as discussed above.

IV. Network Interconnection Policy

The Committee's Fourth White Paper, "Network Interconnection," begins by stating that, "[t]he interconnection of telecommunications networks has been at the heart of communications policy since the Kingsbury Commitment of 1913 when AT&T guaranteed interconnection with independent companies . . . ."[8] I agree that interconnection policy will be an important aspect of the Communications Act update.

As twentieth-century analog narrowband communications networks give way to the all-IP-based broadband networks of the future, there is still a role for the FCC to play in overseeing the interconnection of the various privately-operated networks that comprise the nation's communications infrastructure. But going forward, consistent with the transition to more competitive communications and information services markets, this oversight role should be presumptively less interventionist in scope than it is under the current act. Rather than overseeing enforcement of a general duty to interconnect, as the current statute requires, the new law should presume that interconnection agreements between IP-based networks will be negotiated on a voluntary basis, as they have been throughout the Internet's history with minimal disruption. The Commission should intervene only upon a finding that denial of interconnection poses a substantial, non-transitory risk to consumer welfare, and that marketplace competition is inadequate to correct the problem. And in those rare instances when intervention is determined to be necessary, the Commission should solve the impasse without undue delay by employing some means of dispute resolution mechanism, such as mediation or some form of arbitration, rather than by resorting to current rate case-like adjudicatory procedures that result in drawn out administrative proceedings.

V. Conclusion

The House Commerce Committee should be commended for initiating the process to review and update the current Communications Act. Given the widely-acknowledged marketplace and technological changes that have occurred in the past two decades since the last significant changes in the act, there definitely is a need for a new act. And as discussed, the new act should be much more than one that tinkers around the edges of the existing act. Tinkering around the edges of the existing act will not produce a statutory framework that works in today's competitive digital broadband environment. What's needed is a replacement regime grounded in the principles and perspectives set forth here— in other words, what is needed is a new "Digital Age Communications Act."

Endnotes

1 News Release, House Committee on Energy and Commerce, Upton and Walden Announce Plans to Update the Communications Act (Dec. 3, 2013), http://energycommerce.house.gov/press-release/upton-and-walden-announce-plans-update-communications-act.

2 At the outset, I want to acknowledge that much of what I say here is adapted from the Free State Foundation's responses to the four White Papers, and these papers, in turn, benefitted greatly from the participation and input on the various responses of the following scholars who are members of the Foundation's Board of Academic Advisors: Michelle Connolly, Richard Epstein, Justin (Gus) Hurwitz, Daniel Lyons, Bruce Owen, Richard Pierce, James Speta, and Chrsitopher Yoo, along with Free State Foundation Senior Fellow Seth Cooper. I am grateful to all for their contributions to this important FSF work responding to the Committee's White Papers. But the views expressed herein should be attributed to me alone.

3 House Committee on Energy & Commerce, Modernizing the Communications Act [First White Paper] (2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf.

4 See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 Fed. Comm. L.J. 427, at 456–67 (2001) (listing provisions in the Communications Act that pertain to the public interest standard).

5 See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 Fed. Comm. L. J. 103, 106 (2006)(referring to the need for a new regulatory framework that reflects today's digital age competitive marketplace realities).

6 House Committee on Energy & Commerce, Modernizing U.S. Spectrum Policy [Second White Paper] (2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140401WhitePaper-Spectrum.pdf.

7 House Committee on Energy & Commerce, Competition Policy and the Role of the Federal Communications Commission [Third White Paper] 1 (2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140519WhitePaper-Competition.pdf.

8 House Committee on Energy & Commerce, Network Interconnection 1 [Fourth White Paper] (2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140715WhitePaper-Interconnection.pdf.

Disparate Regulation of Television Broadcasters Will Harm Local Communities

*By Jane Mago**

Note from the Editor:

This article is a discussion about the Federal Communication Commission's rules regarding local television ownership. 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 further discussion on media ownership and the FCC. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Testimony of William T. Lake, Media Bureau Chief, Federal Communications Commission before the House Committee on Energy and Commerce, June 11, 2014: http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Lake-CT-Media-Ownership-21st-Century-2014-6-11.pdf
- Brendan Sasso, *FCC to Break Up Big TV Stations*, National Journal, Mar. 31, 2014: http://www.nationaljournal.com/tech/fcc-to-break-up-big-tv-stations-20140331
- *FCC Vote Praised as Saving Jobs, Ownership Diversity*, Maynard Institute for Journalism Education (Mar. 31, 2014): http://mije.org/richardprince/fcc-vote-praised-saving-jobs-ownership-diversity

Television broadcasters face a difficult economic and political environment. Despite undeniable changes in the media marketplace, TV broadcasters are saddled with outdated regulations that do not apply to other video services now syphoning the advertising dollars that sustain free television. Recently, the Federal Communications Commission (FCC or Commission) made this situation even worse when it failed to complete a statutorily required review of its broadcast ownership rules. Instead of completing the review, which is designed to remove unnecessary regulation, the FCC added a new restriction on local television ownership. As a result local stations in small and medium markets will be unable to create economies of scale that allow them to create compelling local content to vie for audience share against largely unregulated competitors.

I. Background

The FCC is required to review and decide every four years whether the broadcast ownership rules "are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest."[1] Among the rules subject to this review, the local TV ownership rule limits how many television licenses one entity may have in a market. Under the rule, one entity may not have ownership interests in two of the top four rated stations in a market or any two television stations if there would be less than eight independently owned full power television stations left in the market.[2]

The FCC separately defines the activities that amount to an attributable ownership interest. Before its most recent ruling, the FCC did not include "Joint Sales Agreements" (JSAs)[3] as an ownership interest. JSAs allow stations to save money by combining sales forces. Many licensees have entered into JSAs in recent years as a way to compete. And, the FCC has regularly reviewed and allowed licensees to create new JSAs, although it had a proceeding pending since 2004 that asked whether TV JSAs should be attributable. Since 2008 alone, the Commission has approved transactions involving over 71 JSAs in 53 markets. Broadcasters relied upon these approvals in investing financial and human resources into stations and communities via JSAs.

II. The 2014 Ownership Order

On March 31, 2014, the FCC, in a 3-2 party line vote, announced that it would not complete the 2010 Quadrennial Review of the broadcast ownership rules. It instead decided to roll the 2010 review into a new 2014 review that will not be completed until at least mid-2016.[4] NAB and other parties have challenged this decision as a breach of the agency's statutory duty.

Broadcasters are particularly concerned about the FCC's failure because, while it refused to update the underlying rules in light of market conditions, the Commission chose to restrict TV broadcasters even more by requiring the stations to count an ownership interest in another station if it sells more than 15% of that station's advertising time. And, the Commission went even further by applying the new rule retroactively and refusing to grandfather existing JSAs. The FCC said that existing JSAs must unwind within two years, even if the agency had approved them and broadcasters had relied upon the approval to invest significant amounts of capital.

The FCC assumed that TV JSAs create undue influence or control of the brokered station and enable the station selling the advertising to affect programming choices. Broadcasters actively disputed those assertions. The Commission said it would allow stations to apply for a waiver if they could show a lack of influence. But, a waiver requires a high showing to overcome

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"policy concerns."[5] Given the difficult standard, waivers are unlikely to be granted.

III. The FCC's Order is Arbitrary and Capricious

The FCC's decision to modify its treatment of TV JSAs without studying the full context of how a rule change would impact broadcasters is unlawful. Beyond the FCC's failure to comply with its statutory mandate to determine whether its ownership rules remain in the public interest, there are five reasons why its decision to attribute JSAs is arbitrary and capricious.

A. The Record Does Not Support The FCC's Contention that JSAs are Harmful or Lead to Influence Over a Brokered Station

The FCC's Order asserts that JSAs "provide incentives for joint operation that are similar to those created by common ownership."[6] Largely ignoring broadcasters' showings that JSAs do not create influence, the FCC simply states that a broker "can potentially" influence a brokered station's programming.[7] The Order, however, lacks any specific examples of this "influence" and relies solely upon speculation that a JSA "may" result in influence. Instead it places the burden on the broadcaster to prove a negative.

The FCC also supports its decision to attribute TV JSAs on a prior decision that radio station JSAs should be attributed. TV station and radio station JSAs, however, involve different services, differ greatly in substance, and should no more inform FCC policy than would a transaction involving wireless providers.

The FCC cannot point to any market failure to justify its new regulation. Indeed, under a cost-benefit review, any possible benefit from banning JSAs to protect against the potential for influence is outweighed by the negative impacts that broadcasters showed will result from the ban on local audiences. Efficiencies created by JSAs enabled stations to create news and other local programming that they could not afford to provide otherwise. The ban will increase operating costs and reduce possible services.

Paradoxically, the FCC rejected broadcasters' arguments that without JSAs certain television stations would not survive in competitive markets by stating, "arguments that television stations need JSAs to survive in a competitive television market are properly addressed in the context of setting the applicable ownership limits rather than in deciding whether television JSAs confer influence such that they should be attributed in the first place."[8] The problem with this argument is that the Commission refused to review the applicable ownership limits. This is plainly arbitrary and capricious.

Indeed, the real world has proven broadcasters correct. Stations that could not survive without a JSA have already started to go off the air.[9] The FCC cannot properly claim that stations can survive on their own and refuse to consider appropriate waivers or rational rules.

B. The Record Contains Similar Information Regarding JSAs and SSAs, Yet the FCC Treats Them Differently

Another example of the Order's arbitrary nature is the FCC's decision on JSAs as compared to Shared Services Agreements (SSAs).[10] The record regarding SSAs and JSAs is similar. Both records lack evidence to support FCC action. Indeed, if anything, the JSA record included additional evidence from broadcasters showing the value of JSAs and explaining their benefit to the public. Yet, while the FCC determined it lacked an appropriate record to act regarding SSAs, it effectively banned JSAs.

The Commission properly declined to ban SSAs.[11] It is difficult to reconcile the FCC's decision to act differently on JSAs and SSAs under an arbitrary and capricious standard.

C. The Record is Full of Evidence of the Public Benefits of JSAs

There is a significant amount of data on the benefits of JSAs. As noted above, the FCC has reviewed and approved broadcast transactions involving 71 JSAs since 2008.[12] If JSAs result in serious market harms, the FCC has at least 71 recent examples to use to prove its point. However, it did not, or could not.

In fact, broadcasters filled the record with examples of broadcast stations that were struggling or failing, broadcasters that could not afford to produce local content prior to a JSA, and minority broadcasters that were able to survive only with a JSA.[13] JSAs were the sole reason that these stations were able to produce new local content, going so far as creating new newsrooms and broadcasting hours of new local news. The FCC overlooked this evidence.[14]

The real harm in these broadcast markets is FCC-created. The JSA Order eliminates broadcaster regulatory certainty. When combined with the recently released Public Notice providing "guidance" concerning processing of television applications,[15] the FCC has now created a significant impediment against broadcaster assignment transactions and harmed access to capital. Wall Street is skeptical to invest when it cannot reasonably predict how or when the FCC will act.[16]

D. The FCC Has Created a Catch-22 That Ensures JSAs Will Be Unwound Before the FCC Completes a Statutorily-Required Review of the Broadcast Ownership Rules

Even if we accepted the argument that the FCC did not have sufficient information in the record to complete its statutorily required review of the broadcast ownership rules, another problem is that the FCC has eliminated any opportunity to remedy its JSA decision. According to the Chairman of the FCC, Tom Wheeler, the FCC's goal to complete its "2010 ownership review" is June 2016. Nonetheless, the FCC is requiring entities that currently rely upon JSAs to unwind them within two years.[17] This deadline is before mid-2016. The effect is a "Catch-22" where the agency will assume the validity of the underlying rule so that existing JSAs have no opportunity to continue. The damage will be done, and final. Broadcasters' ability to provide local news, sports, entertainment, and emergency information will suffer. Consumers are going to lose the benefits that JSAs have allowed broadcasters to provide.

E. The FCC Misapplied Antitrust Policy

Finally, the FCC relies on an outdated antitrust policy to justify its decision. Although bolstered by a Department of Justice letter, the FCC's conclusion that any joint sales of

television advertising time is anti-competitive is out of date. The assumption is based on a market that no longer exists. It may once have been true that broadcasters dominated advertising sales. Now, however, broadcasters compete with cable and telephone companies, satellite, and the Internet for both local and nationwide advertising, and viewers. The average consumer spends a significant amount of time watching video via a pay-TV subscription, the Internet, on a mobile phone, tablet, or computer. The FCC and the Department of Justice cannot continue to assume that television broadcasters only compete against other television broadcasters. Other services are continuing to take larger and larger shares of the advertising dollars that support local broadcasting. The FCC must take a realistic view of the 21st century marketplace if it is going to govern in the public interest.

IV. A Better Path

The appropriate path for the FCC is to determine, based on data and hard evidence, whether its broadcast ownership rules are necessary in the public interest as the result of competition. Broadcasters are confident that many of them are not. The market has undergone significant changes since the FCC last completed a review and modified the ownership rules. Only a thorough and comprehensive review of the rules as a whole will ensure that the FCC will fulfill its statutory obligation.

Most importantly, the FCC must remember that JSAs are used to support local programming that would not otherwise exist. Consumers throughout the country rely upon these services. Banning JSAs has the ultimate effect of harming consumers, because without the efficiencies provided by joint arrangements many stations cannot afford to provide the services they do now. It is hard to believe that the FCC's decision is in the public interest.

Endnotes

1 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("Appropriations Act") (amending Sections 202(c) and 202(h) of the 1996 Act). In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. See Appropriations Act § 629, 118 Stat. at 100.

2 47 C.F.R. § 73.3555(b).

3 A JSA is an agreement authorizing a broker from one television station to sell some or all of the advertising of another non-commonly owned station.

4 *See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 14-28, (2014) (2014 JSA Order), Statement of Chairman Tom Wheeler ("I have instructed the Media Bureau to complete this review by June 30, 2016").

5 *See* 2014 JSA Order, ¶ 364.

6 *See e.g.*, 2014 JSA Order, ¶ 351.

7 *See* 2014 JSA Order, ¶ 354.

8 *See* 2014 JSA Order, ¶ 356.

9 *See* Statement of Commissioners Ajit Pai and Michael O'Rielly on the Negative Impact of the Decision to Restrict Television Stations' Use of Joint Sales Agreements, rel. May 29, 2014, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327353A1.pdf. The Commissioners warned that the JSA change would result in less diversity and fewer TV stations. Two months after the Order was adopted Sinclair Broadcasting Corp. turned in three licenses that previously had a buyer, because the potential buyer could not afford to operate the stations without a JSA.

10 An SSA is an agreement between two broadcast stations to share services or resources between two uniquely owned stations, though the stations generally do not share advertising sales.

11 *See* 2014 JSA Order, ¶ 320.

12 *See* Letter from Jane Mago, Executive Vice President and General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, MB Docket No. 09-182 (Mar. 21, 2014) (NAB Ex Parte).

13 *See*, *e.g.*, Letter from Jennifer Johnson, Covington & Burling LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 09-182 (Feb. 28, 2014). *See also* Letter from James Winston, National Association of Black Owned Broadcasters, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 09-182 (Feb. 27, 2014) (stating that FCC should examine JSAs and SSAs for their potential to promote diversity of ownership).

14 *See* Letter from Jennifer Johnson, Covington & Burling, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, MB Docket No. 09-182 (Feb. 19, 2014).

15 *See* Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests, 29 FCC Rcd. 2647 (Mar. 12, 2014).

16 *See* NAB Ex Parte.

17 *See* 2014 JSA Order, ¶ 367.