E n g a g e

Volume 4, Issue 2 October 2003

Letter from the Editor...

E n g a g e, the journal of the Federalist Society for Law and Public Policy Studies, is a collaborative effort involving each of the Society's fifteen Practice Groups. The Federalist Society's Practice Groups spark a level of debate and discussion on important topics that is all too often lacking in today's legal community. Through their programs, conferences and publications, the Practice Groups contribute to the marketplace of ideas in a way that is collegial, measured, and open to all.

Volume 4, Issue 2, following the trend of our recent issues, is dedicated almost exclusively to original articles produced by Society members and friends, as well as speakers we have hosted. Racial profiling, the FCC's new media ownership rules and the war on terrorism are just a few of the hot topics that have inspired written work in this issue. Activity in the courts is also well documented, with *Nevada v. Hibbs*, *Green Tree*, *Hoffman Plastic* and the *Grutter* and *Gratz* cases representing only a sampling of those commented on in the pages that follow.

Also noteworthy are several reviews of thought-provoking books. Engage author Andru Wall's book *Legal and Ethical Lessons of NATO's Kosovo Campaign,* and *Skepticism and Freedom: A Modern Case for Classical Liberalism* by Richard Epstein are among those covered at the close of the journal.

Upcoming issues of Engage will feature other original articles, essays, book reviews, practice updates and transcripts of programs that are of interest to Federalist Society members. We hope you find this and future issues thought-provoking and informative.

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1015 18th Street, N.W., Suite 425, Washington, D.C. 20036
Phone: (202) 822- 8138 Website: www.fed-soc.org Email: fedsoc@radix.net

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Managing Editor
Jessica King

Administrative Law

The Benefits and Costs of Sound Economics: The "Clear Skies" Dilemma

by Jeffrey Ladik

In early 2003, officials from the U.S. Environmental Protection Agency (EPA) embarked on a "listening tour" through various cities in order to learn from senior citizens about the environmental health issues that most concerned them. During several of the meetings between EPA officials and senior citizen groups, the seniors, their advocates, and various environmental groups, expressed great dismay about an analytic method used by the agency to calculate the benefits of certain regulations. In the Bush Administration's proposed "Clear Skies" legislation, limits would be set on specific emissions from power plants which would reduce the amount of fine soot particles in the air, thereby decreasing respiratory-related illnesses. EPA monetized the health benefits of the "Clear Skies" proposal using, in part, analysis that valued the lives of those over 70 years at $2.3 million and the lives of younger people at $3.7 million. In addition to this methodology, EPA also estimated the benefits by using a value of $6.1 million for every statistical life saved regardless of age.[1] Because of the former methodology, seniors were angered by the notion that their lives do not have the same economic worth as younger people. The discontent of this powerful voting block was the impetus for the elimination of the "senior discount."[2] Indeed, the "clear skies" dilemma is an ever-present issue in regulatory policymaking: the willingness of non-economists to conflate social/moral value with economic value.

OMB's Role in the Regulatory Process

Established in 1980 by the Paperwork Reduction Act[3] (PRA), the Office of Information and Regulatory Affairs (OIRA) in OMB oversees agency activity in three areas: regulation, collection of information, and information resources management. OIRA is headed by a Presidential appointed, Senate confirmed, Administrator. Pursuant to Executive Order 12866, OIRA reviews major regulations, i.e. Federal regulations that would have an impact on the economy of $100 million or more, to insure that the benefits of the regulation "justify" the costs.[4]

OMB's published regulatory guidance for agencies explains in plain terms that "the evaluation of both the benefits and costs of alternative options through regulatory analysis helps agency policymakers arrive at sound regulatory decisions and also helps the public, Congress, and the courts understand those decisions."[5] Thus, "regulatory analysis is a tool agencies [should] use to anticipate and evaluate the likely consequences of their actions. It provides a formal way of organizing the evidence on the key effects—good and bad—of the various alternatives that should be considered in developing regulations…By choosing actions that maximize net benefits, agencies direct resources to their most efficient use."[6] To this end, the "distinctive feature of [benefit-cost analysis] BCA is that both benefits and costs are expressed in monetary units, which allows [agency analysts] to evaluate different regulatory options with a variety of attributes using a common measure."[7]

Following the political controversy surrounding EPA's use of an age-adjustment factor in estimating the benefits of the "Clear Skies" initiative, OIRA's Administrator issued a memorandum advising EPA to discontinue use of this factor in the economic value of a statistical life (VSL). The VSL would thus be the same for people of all ages. The memorandum further stated that "OMB is concerned that a simple VSLY [value of a statistical life year] approach could underestimate benefits significantly when applied to rules that primarily or significantly benefit senior citizens. Consequently, OMB recommend[ed] that agency analysts, when performing benefit-cost analysis, present results using both the VSL and VSLY methods."[8]

Valuing Statistical Life and Life Years

In order to conduct high-quality benefit-cost analysis, the value of a statistical life (VSL) and a statistical life year (VSLY) have to be quantified.[9] In terms of maximizing benefits for the smallest cost imposed, which method promotes the greatest net benefits? OIRA advises using both VSL (without an age-adjustment factor) and VSLY approaches. Alternatively, Professor Sunstein of the University of Chicago advocates using the VSLY method, and wisely states that rhetoric suggesting age discrimination are misconceived criticisms. He argues that "if regulatory policy is based on VSLY, every person will, in a sense, be both benefited and burdened, and in exactly the same way. Indeed, every person will be both a beneficiary and a victim of the relevant discrimination. People—the same people—will be benefited when they are younger and burdened when they are older. It is hard to see how that form of discrimination is illicit."[10] In addition, "if the beneficiaries of a regulation are mostly elderly people, then the regulation will seem far less attractive with the use of VSLY than with VSL. But if the beneficiaries are mostly children, then a regulation will seem far more attractive with VSLY than with VSL."[11] This insight might explain, in part, why OIRA has urged agencies to use both VSL and VSLY methods when performing benefit-cost analysis.[12]

To this end, OMB's guidance for agencies instructs that '"opportunity cost'" is the appropriate concept for valuing both benefits and costs. The principle of "willingness-to-pay" (WTP) captures the notion of opportunity cost by measuring what individuals are willing to forgo to enjoy a particular benefit. In general, economists tend to view WTP as the most appropriate measure of opportunity cost, but an individual's "willingness-to-accept" (WTA) compensation for not receiving the improvement can also provide a valid measure of opportunity cost…WTP is generally considered to be more readily

measurable and to provide a more conservative measure of benefits.[13] Thus, in "monetizing health benefits, a willingness-to-pay measure is the conceptually appropriate measure."[14]

The Importance of Sound Regulatory Impact Analyses

Economics is the efficient allocation of scarce resources that have alternate uses. Clearly, resources are finite and regulatory decisionmaking must take tradeoffs into account. Although established principles of economic analysis should drive policymaking, too often rhetoric trumps science. When transparency and accountability are not built into the framework, the addition of regulation after regulation burdens the national economy and results in higher prices for consumers.

To counteract this problem, Executive Orders 12291 and 12866 require agencies to prepare a Regulatory Impact Analysis (RIA) for all major Federal regulations.[15] Robert Hahn and Robert Litan, of the AEI-Brookings Joint Center for Regulatory Studies, have suggested that Congress should require that agencies make each regulatory impact analysis available on the Internet before a proposed or final regulation can be issued. Also, each RIA should include an executive summary with a standardized regulatory impact summary table that contains information on costs, benefits, technical information, and whether the regulation is likely to pass a benefit-cost test based on the estimate of quantifiable benefits and costs.[16]

Messrs. Hahn and Litan also note that Executive Orders are difficult to enforce because they are not judicially enforceable, and agencies cannot be sued for noncompliance. However, an explicit congressional requirement to balance benefits and costs would increase the transparency of the regulatory process by forcing agencies to provide high-quality analyses that the courts could review.[17] These reforms ought to be strongly considered by Congress so that important matters such as the VSL/VSLY debate can be based on the merits of the issue, rather than simple political machination.[18]

One possible way to deal substantively with the matter is through the Paperwork Reduction Act and the Data Quality Act. One purpose of the PRA is to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society.[19] The Data Quality Act requires that OMB's interagency data quality guidelines "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by Federal agencies…"[20] Equally important, the Data Quality Act requires that OMB's interagency data quality guidelines require all Federal agencies subject to the PRA to establish administrative processes allowing "affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with" OMB's interagency guidelines.[21] In fact, the data quality guidelines apply to all and any information that Federal agencies make public.[22]

Conclusion: The Political Realities

Establishing procedures, guidance, and mandates for sound benefit-cost analyses (or a regulatory budget) is not the hardest challenge to improving the regulatory system. Rather, the most difficult obstacle to overcome is devising an effective public relations campaign that conveys principles of benefit-cost analysis to the public. Making economic choices should not be seen as a zero-sum game. Nevertheless, regulatory policymaking will always have to contend with the fact that more people are unfamiliar with economics compared to those who are economically oriented. Thus, special interest groups that launch pro-regulation grass root campaigns are able to exert great influence on the public. Unfortunately, the message is predictably not based on sound science or economics, but it finds receptive audiences by evoking emotionally powerful expressions. The impact in policy terms means that costly regulations are imposed on the economy and finite resources are inefficiently allocated.

Footnotes

[1] *See* Robert H. Hahn and Scott Wallsten, Is Granny Worth $2.3 Million or $6.1 Million? available at http://www.aei-brookings.org/policy/page.php?id=138; *see also* http://www.epa.gov/clearskies.

[2] The AARP told OMB that it was "deeply troubled" by the use of "a 37 percent discount to the life value of adults aged 70," s*ee* Washington Post, "Under Fire, EPA Drops the 'Senior Death Discount,'" available at www.washingtonpost.com/ac2/wp-dyn/ A47678-2003May12; *see also* Statement of Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency, May 7, 2003, available at http://www.epa.gov/aging/listening/2003/balt_ctw.htm.

[3] 44 U.S.C. §§ 3501 *et seq*.

[4] Executive Order 12866, 3 C.F.R. 638 (1993).

[5] *See* Office of Management and Budget, Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations, 68 Fed. Reg. 5498 (February 3, 2003).

[6] *Id*. at 5514.

[7] *Id*. at 5516.

[8] *See* Memorandum of John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, to the President's Management Council 1-2 (May30, 2003), available at http://www.whitehouse.gov/omb/inforeg/pmc_benefit_cost_memo.pdf.

[9] *See* OMB Circular A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs" (10/29/92) (Revised 01/22/2002) available at http://www.whitehouse.gov/omb/circulars/a094/a094.pdf.

[10] *See* Cass R. Sunstein, Lives, Life-Years, and Willingness to Pay, Working Paper 03-5 at 30 (June 2003) available at http://aei.brookings.org/admin/pdffiles/phprW.pdf.

[11] *Id*. at 2.

[12] *See* Memorandum of John D. Graham, *supra* note, at 2.

[13] *See* OMB 2003, *supra* note, at 5518.

[14] *Id*. at 5520

[15] *See* Executive Order 12291, 3 C.F.R. 128 (1981); Executive Order 12866, 3 C.F.R. 638 (1993).

[16] *See* Testimony of Robert W. Hahn before the House Government Reform Committee, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, March 2003, 8 available at http://reform.house.gov/UploadedFiles/3-11-03_Testimony_Hahn.pdf.

[17] *See id*. at 10-11.

[18] S*ee eg* Press Statement of Senator Lieberman, Bush Administration Policy Shows No Respect for Seniors, May 20, 2003, available at http://lieberman.senate.gov/~lieberman/press/03/05/2003521436.html.

[19] *See* 44 U.S.C. § 3501(4).

[20] *See* 44 U.S.C. § 3516 note. The Data Quality Act, which is uncodified, amends the PRA.

[21] *See* id.

[22] *See* "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" ("data quality guidelines") http://www.whitehouse.gov/omb/fedreg/reproducible.html.

Warning to Trial Lawyers: Read the Law -- The *Federal* Law -- Before Proceeding

*By Douglas T. Nelson and Lawrence S. Ebner**

In the world of toxic tort suits, "failure to warn" can be a trial lawyer's fastest road to success. A plaintiff, with the aid of an attorney, files a state court suit alleging that use of some toxic chemical, let's say a pesticide, caused his chronic illness. The boilerplate complaint alleges that the pesticide's manufacturer is liable under state law because it failed to warn him about the risks of using the product. At trial, a well paid expert testifies that the warnings and precautions on the pesticide product's labeling were inadequate. The sympathetic jury, with the benefit of hindsight ("if only the plaintiff had been warned, he would not have used the product"), awards hundreds of thousands of dollars in compensatory and punitive damages.

There is plenty wrong with this picture, too much to discuss here. One *crucial* omission is the fact that the pesticide and its labeling, including the warnings that accompany the product, are extensively regulated by the United States Environmental Protection Agency ("EPA") pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the federal pesticide statute. Originally enacted in 1947, Congress rewrote the act in 1972 to "transform FIFRA from a labeling law into a comprehensive regulatory statute."[1] The legislation was enacted for the "protection of man and the environment."[2] The revised statute "establishe[d] a coordinated Federal-State administrative system to carry out the new program."[3] Indeed, one of the statute's key features is the carefully balanced allocation of regulatory authority between the federal government and the states.

FIFRA requires all pesticide products to be granted a registration by EPA, and to be distributed with EPA-approved product labeling.[4] But there is no blanket "field preemption" of state regulatory authority over pesticides.[5] Instead, FIFRA "specifies several roles for state and local authorities,"[6] and expressly confirms that the states can further regulate the "sale or use" of pesticides.[7] This means, for example, that a state agency, pursuant to a state pesticide regulatory statute, can ban the sale or use of a FIFRA-registered pesticide. Under §136v(b) of FIFRA, however, *EPA alone* has the authority to regulate the content and format of each pesticide product's labeling, which must be nationally uniform and accompany the product at all times.[8]

Congress wanted a single federal regulatory agency, possessing the necessary scientific resources, expertise, and data, as well as the national perspective and experience, to determine what warnings, precautionary measures, and directions for use, should accompany each pesticide product's own, nationally uniform, federally approved labeling. Thus, FIFRA's legislative history indicates that "[i]n dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program [Congress] adopted language which is intended to *completely preempt* State authority in regard to labeling and packaging."[9] Section 136v(b), entitled "Uniformity," accomplishes this objective by mandating that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]."[10] As the Supreme Court confirmed in *Wisconsin Public Intervenor v. Mortier*, although the states possess the residual authority to regulate pesticides, "labeling . . . fall[s] within an area that FIFRA's 'program' pre-empts."[11]

The FIFRA Preemption Defense Gains Widespread Judicial Approval

In 1984, the D.C. Circuit held in a now widely repudiated decision, *Ferebee v. Chevron Chemical Co.*, that despite the language of §136v(b), FIFRA does not expressly or impliedly preempt state law damages claims that attack the adequacy of the warnings on a pesticide's labeling.[12] Beginning in the early 1990s, however, federal and state courts around the nation began to recognize that allowing individual juries to second guess EPA by imposing state tort liability on pesticide manufacturers for inadequate labeling or failure to warn would interfere with Congress' goal of maintaining a system of nationally uniform product labeling regulated exclusively by EPA. For example, in a seminal FIFRA tort preemption case, *Papas v. Upjohn Co. ("Papas I")*, the Eleventh Circuit held that

> [a] jury determination that a label was inadequate would require that the manufacturer change the label or risk additional suits for damages. Such a change, if permitted by the EPA, would *destroy the uniformity that Congress and the EPA seeks to achieve in pesticide labeling* . . . This case-by-case, state-by-state outside pressure on the regulatory process would hinder the development of an orderly, systematic, and uniform nationwide labeling scheme.[13]

Similarly, in another early case, *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.* ("*Arkansas-Platte I*"), the Tenth Circuit held that "State court damage awards based on failure to warn . . . would hinder the accomplishment of the full purpose of §136v(b), which is to ensure uniform labeling standards."[14] Accordingly, these courts of appeals held that state law failure-to-warn claims are impliedly preempted by FIFRA because they conflict with the statute's goal of national labeling uniformity.

In June 1992, the Supreme Court held in *Cipollone*

v. Liggett Group, Inc., a landmark tort preemption case involving federal cigarette advertising and labeling legislation, that a federal statute which expressly preempts the states from imposing their own "requirement[s] . . . sweeps broadly and suggests no distinction between positive enactments and common law . . . '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.' "[15] Shortly after deciding *Cipollone*, the Supreme Court vacated and remanded *Papas I* and *Arkansas-Platte I* to the courts of appeals for further consideration in light of *Cipollone*. On remand, both courts held that § 136v(b), which prohibits the states from imposing additional or different "requirements" for labeling, *expressly* preempts state tort claims for inadequate labeling or failure-to-warn.[16]

Since that time, all nine federal circuits that have considered the subject of FIFRA tort preemption in light of *Cipollone* have held that §136v(b) expressly preempts failure-to-warn and other claims which implicate the adequacy of EPA-approved product labeling.[17] This is because such claims have the unavoidable effect of imposing state law requirements for labeling which are "in addition to or different from" those imposed under FIFRA. The Eleventh Circuit in *Papas II* explained that "*Cipollone* convinces us that the term 'requirements' in section 136v(b) 'sweeps broadly and suggests no distinction between positive enactments and the common law.' . . . Common law damages awards are one form of state regulation and, as such, are 'requirements' within the meaning of section 136v[b]."[18] Or as the Ninth Circuit put it in *Taylor AG Indus. v. Pure-Gro*, "[l]ike the preemption provision of the 1969 Cigarette Act [in *Cipollone*], §136v(b) uses the broad term 'requirements' to preempt state actions for damages. . . . '[n]ot even the most dedicated hair-splitter could distinguish these statements.' "[19] Along the same lines, the Fifth Circuit held in *Andrus v. AgrEvo USA Co.*, that "the 'undeniable practical effect' of . . . recovering a large damage award on . . . claims that the manufacturer failed to meet state labeling requirements and failed to warn . . . of potential adverse effects would be the imposition of additional labeling standards not mandated by FIFRA."[20]

Numerous state appellate courts have reached the same conclusion, often affording deference to the unanimous, post-*Cipollone* view of the federal courts of appeals on this question of federal statutory interpretation. For example, in *Etcheverry v. Tri-Ag Service, Inc.*, the California Supreme Court explained that "[t]he federal court decisions holding that FIFRA preempts state law failure-to-warn claims are numerous, consistent, pragmatic and powerfully reasoned."[21] Consistent with the overwhelming body of case law on FIFRA preemption, the court held that "[w]hen a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA."[22]

Thus, for more than a decade, the FIFRA preemption defense, which is limited to claims which directly or indirectly challenge the adequacy of the warnings or other information on EPA-approved product labeling, has been successfully invoked by pesticide manufacturers and distributors in personal injury, environmental contamination, and crop damage suits.

The Trial Bar Persuades The Clinton EPA To Intervene

As the FIFRA tort preemption doctrine was adopted by more and more federal and state courts throughout the 1990s, trial lawyers started to realize that they would be deprived of the ability to pursue failure-to-warn claims against pesticide manufacturers. To try to pin liability for their clients' problems on pesticide manufacturers, trial lawyers, instead of directly or indirectly attacking the EPA-approved labeling or warnings accompanying a pesticide product, now would have to satisfy the burden of proving at trial that a pesticide product, approved for use both by EPA and state regulatory agencies, contained a design defect or manufacturing flaw.

In 1996, certain members of the trial bar, supported by anti-pesticide groups, prevailed upon EPA's Office of General Counsel to issue, through the Office of Pesticide Programs, a "guidance" document purporting to "correct a misunderstanding" on the part of several federal courts of appeals which had held that § 136v(b) of FIFRA preempts labeling-related agricultural crop damage claims.[23] CropLife America (formerly known as the American Crop Protection Association), the national trade group for agricultural pesticide manufacturers and distributors, objected to the propriety and content of the guidance document. In response to CropLife America, which has played a leading role in establishing and maintaining the FIFRA preemption defense, EPA's General Counsel disclaimed any intent to take a position on FIFRA preemption.

Two years later, however, with the nationwide body of FIFRA preemption cases continuing to expand, the EPA, supported by the trial bar and anti-pesticide groups, tried again to stem the judicial tide. More specifically, in *Etcheverry v. Tri-Ag Service*, a case before the supreme court of California, the nation's most important agricultural state, on the issue of whether FIFRA preempts failure-to-warn claims involving agricultural crop damage, the federal government filed an *amicus curiae* brief for the first time in any FIFRA tort preemption case. The brief was filed despite industry's efforts to persuade the government to stay out of private tort litigation, or at least recognize that FIFRA preemption of labeling-related claims is expressly mandated by § 136v(b) and consistent with EPA's statutory responsibility to maintain national labeling uniformity.

The position taken in the March 1999 *Etcheverry amicus* brief ignored the vast body of FIFRA preemption case law that had developed in light of *Cipollone.* Instead, attempting to resurrect *Ferebee*'s holding (without ever cit-

ing that case), the government's *amicus* brief argued that § 136v(b) is limited to positive enactments (such as state statutes and state agency regulations), and does not encompass tort claims at all. In support of this categorical anti-preemption position, the government's brief adopted many of the arguments that the trial bar and anti-pesticide groups had unsuccessfully advocated in other FIFRA preemption cases. The California Supreme Court, in a 5-2 decision, squarely rejected all of the government's anti-preemption arguments.[24] In so doing, the court noted that "[e]ven though the question presented in this case has been addressed by nine of the federal circuit courts of appeals, the United States failed to file amicus curiae briefs in any of the cases and permitted those courts to proceed upon a fundamental assumption that it now characterizes as mistaken."[25]

Following the severe lashing that its arguments received in *Etcheverry*, the federal government never again filed a brief advocating an anti-FIFRA tort preemption position. Nevertheless, this *Etcheverry amicus* brief has continued to be routinely submitted, quoted, and/or cited by trial lawyers as representing EPA's position on FIFRA preemption of state tort claims. Most courts have not been persuaded. For example, the plaintiffs in *Eyl v. Ciba-Geigy Corp.* asked the Nebraska Supreme Court "to adopt the position of the EPA that was set forth in an amicus brief filed in *Etcheverry*."[26] The Nebraska Supreme Court pointedly declined to do so:

> [W]e give no deference to the EPA's position in the amicus brief filed in *Etcheverry*. The *Etcheverry* brief was written for that specific case. The EPA did not file an amicus brief with this court in this case. Nor have we found – outside of *Etcheverry* – a similar brief filed by the EPA in any of the numerous other cases which have discussed FIFRA preemption. In addition, the record is silent whether the view expressed in the *Etcheverry* brief was an EPA official policy statement for all cases and if the EPA still adheres to that view. Further, we note that in *Etcheverry,* the California Supreme Court did not adopt the EPA's arguments.[27]

As a result of developments during the Supreme Court's 2002 term, the *Etcheverry amicus* brief is now indisputably a dead letter, and cannot ethically be cited by trial attorneys or anti-pesticide groups as representing the government's position.

The Bush Administration's Position

The U.S. Supreme Court has repeatedly denied review of cases involving FIFRA tort preemption. Most recently, on June 27, 2003, the Court denied the April 2003 certiorari petition filed in *Eyl v. Ciba-Geigy Corp.* by Public Citizen Litigation Group (a petition which relied upon the *Etcheverry amicus* as supposedly representing the government's position).[28] On the same day, the Court also denied the *certiorari* petition that was filed in September 2002 by the pesticide manufacturer defendant in *American Cyanamid Co. v. Geye.*[29] In *Geye* the Texas Supreme Court held in a result-driven opinion (contrary to the holdings of the Fifth Circuit, California Supreme Court, and numerous other courts), that labeling-related claims involving crop damage are excluded from FIFRA preemption.

Significantly, in November 2002, two months after the *Geye certiorari* petition was filed, the Supreme Court, for the first time in any FIFRA tort preemption case, invited the Solicitor General to submit a brief expressing the views of the United States. The Court's invitation (in reality, an order to file an *amicus* brief), afforded the government a clear opportunity to reconsider the *Etcheverry amicus* brief.

Industry attorneys, including from CropLife America and the Chamber of Commerce of the United States, met with the Solicitor General's office, and with attorneys from EPA and other interested federal agencies, to explain why as a matter of both legal analysis and public policy, the reasons for FIFRA preemption of failure-to-warn and other labeling-related damages claims are compelling. (One author of this article represented American Cyanamid, the petitioner in *Geye*, and the other author is the General Counsel of CropLife America, which filed an *amicus* brief in support of the petitioner.)

The Solicitor General's May 2003 *amicus* brief to the Supreme Court unequivocally declared that the categorical position against FIFRA preemption that had been advocated in the *Etcheverry amicus* brief to the California Supreme Court is "incorrect" and "no longer represents the view of the United States"[30] The Solicitor General's *Geye amicus* further explains:

> The United States has *reexamined* the position that it urged in *Etcheverry* in light of the ruling by the California Supreme Court in that case, as well as the subsequent rulings of other courts, and it has concluded that its position in *Etcheverry* that FIFRA categorically does not preempt common law tort suits or other damages actions is *incorrect*. In the United States' view, just as Section 136v(b) applies to requirements imposed in a law enacted by a state legislature or a regulation promulgated by a state agency, *it applies to requirements imposed in the form of a duty or standard of care in a tort action*. . . The United States . . . submits that the legal standard applied in a state-law damages action may "impose" a "requirement[]" for labeling or packaging within the meaning of 7 U.S. C. 136v(b).[31]

The foregoing position of the United States on FIFRA tort preemption, presented to the U.S. Supreme Court in the *Geye amicus* brief, is consistent with *Cipollone* and other Supreme Court tort preemption jurisprudence, as well as with the nearly unanimous views of the hundreds of fed-

eral and state trial and appellate courts that have considered the subject. This Administration's carefully considered reexamination of FIFRA tort preemption remedies the prior Administration's politicization of that subject.[32]

Conclusion

The Supremacy Clause,[33] which is the constitutional basis for federal preemption of state law, is one of the principal constitutional underpinnings of our federalism. Respect for states' rights does not require, and the Supremacy Clause does not allow, state law tort claims which, as in the case of pesticide-related failure-to-warn claims, conflict with federal law. Congress determined that to promote safe and effective use of pesticides, nationally uniform product labeling is necessary and desirable, and that only the federal EPA should have the authority to regulate it. This intent is clearly expressed in § 136v(b) of FIFRA. The courts, and now the Executive Branch, have recognized that state tort claims for failure-to-warn and inadequate labeling are encompassed by the broad, plain language of that preemption provision.

* Douglas T. Nelson is Senior Vice President and General Counsel of CropLife America, a trade association of the developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States. CropLife America (predecessor names, National Agricultural Chemicals Association (1933-1995) and American Crop Protection Association (1995-2000)) has played a leading role in establishing and maintaining the FIFRA tort preemption doctrine, including by filing *amicus* briefs in numerous federal and state appellate cases on that subject.

Lawrence S. Ebner is leader of the Appellate Group at McKenna Long & Aldridge LLP in Washington, D.C. He has advocated the FIFRA preemption defense on behalf of individual pesticide manufacturers and CropLife America in appeals before the U.S. Supreme Court, federal courts of appeals, and state appellate courts. These include the *Geye*, *Etcheverry*, *Taylor*, *Arkansas-Platte*, and *Papas* cases discussed in this article.

Footnotes

[1] *Ruckelshaus v. Monsanto Co*, 467 U.S. 986, 991 (1984) (citing H.R. Rep. No. 92-511, at 1 (1971)).
[2] S. Rep. No. 92-838, pt. II, at 1 (1972).
[3] S. Rep. No. 92-511, at 1 (1971).
[4] 7 U.S.C. §§ 136a(a), 136a(c)(5).
[5] *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 612 (1991) (holding that FIFRA does not preempt local governments from adopting ordinances that restrict pesticide use).
[6] *Id.* at 601.
[7] 7 U.S.C. § 136v(a).
[8] 7 U.S.C. § 136v(b).
[9] H.R. Rep. No. 92-511, at 16 (1971) (emphasis added); *see id.* at 1-2 ("State authority to change Federal labeling and packaging is completely preempted . . . .").
[10] 7 U.S.C. § 136v(b).
[11] *Mortier*, 501 U.S. at 615.
[12] *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529 (D.C. Cir. 1984)
[13] *Papas v. Upjohn Co.*, 926 F.2d 1019, 1025-26 (11th Cir. 1991) (emphasis added).
[14] 959 F.2d 158, 162 (10th Cir. 1992).
[15] 505 U.S. 504, 521 (1992) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Cipollone*, 505 U.S. at 522) (noting *Cipollone* held that a "federal statute barring additional 'requirement[s] . . . "imposed under state law" ' pre-empts common-law claims").
[16] *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.* ("*Arkansas-Platte II*"), 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Papas v. Upjohn Co.* ("*Papas II*"), 985 F.2d 516 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993).
[17] *See, e.g., Dow AgroSciences v. Bates,* 332 F.3d 323 (5th Cir. 2003); *Netland v. Hess & Clark Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied* 123 S.Ct. 415 (2002); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Papas v. Upjohn Co. ("Papas II")*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc. ("Arkansas-Platte II")*, 981 F.2d 1177 (10th Cir. 1993).
[18] 985 F.2d at 518 (quoting *Cipollone*, 505 U.S. at 521).
[19] 54 F.3d 555, 559-60 (9th Cir. 1995) (quoting *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993)).
[20] 178 F.3d 395, 398-99 (5th Cir. 1999) (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)).
[21] 993 P.2d 366, 368 (Cal. 2000).
[22] *Id.* at 377.
[23] Pesticide Regulation ("PR") Notice 96-4.
[24] *See* 993 P.2d at 371-74; *see also* Lawrence S. Ebner, *The California Supreme Court Weighs In On FIFRA Preemption*, 15 BNA Toxics Law Reporter 627 (June 22, 2000); Lawrence S. Ebner, *California Supreme Court Repudiates Federal Government Position on FIFRA Tort Preemption*, Product Liability Law & Strategy (April 2000).
[25] *Id.* at 374 .
[26] 650 N.W.2d 744, 753 (Neb. 2002), *cert. denied* 71 U.S.L.W. 3799 (June 27, 2003) (No. 02-1500).
[27] *Id. at* 753-754.
[28] *See* n.26.
[29] 79 S.W.3d 21 (Tex. 2002), *cert. denied* 71 U.S.L.W. 3799 (June 27, 2003) (No. 02-367).
[30] Brief for the United States As Amicus Curiae, *American Cyanamid Co. v. Geye* (No. 02-367), *available at http://www.justice.gov/osg/briefs/2002/2pet/6invit/2002-0367.pet.ami.inv.html*
[31] *Id.* at 17, 18-19 (emphasis added).
[32] The government's brief opposed certiorari in *Geye* on the ground that because the Texas Supreme Court's order was interlocutory (it affirmed the state court of appeals' reversal of the state trial court's grant of summary judgment in favor of the manufacturer), the U.S. Supreme Court lacked jurisdiction under 28 U.S.C. § 1257. For this reason, the government's brief took no position on the merits of whether the *Geye* plaintiffs' particular claims are labeling-related, and thus, preempted. *See* U.S. Br. at 19.
[33] U.S. Const., Art. VI, cl. 2.

Civil Rights

In Defense of Common Sense: The Case for Terrorist (Not Racial) Profiling

*By Mark W. Smith, Esq.**

On September 11, 2001, 19 male Muslim fundamentalists of Arab descent murdered 3,000 people on American soil. Despite this mass murder, the debate over the use of so-called "racial profiling" in thwarting terrorism continues. One need only scan the media to find complaints about the government devoting too much attention to young Middle Eastern males.[1]

This article is adapted from Federalist Society-sponsored debates in which I have participated since September 11 and summarizes the arguments supporting the use of terrorist — not racial — profiling.

1. We Are At War

The United States is at war with terrorists and the countries that sponsor them. The United States did not start this war. This war violently and preemptively visited our shores on September 11, 2001. The United States can win this war by thwarting those who seek to destroy America. Steps must be taken to prevent future terrorist attacks, for unchecked terrorism poses a serious threat not only to the United States, but to civilization itself.

As President George W. Bush said, the war now being fought is unlike any fought before.[2] As seen on 9/11, terrorists show no respect for innocent civilian life or conventional rules of engagement. Thus, as the Department of Justice recently acknowledged, law enforcement must "use every legitimate tool to prevent futurist terrorist attacks, protect our Nation's borders, and deter those who would cause devastating harm to our Nation, and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means."[3] One such legitimate tool helpful in thwarting future attacks is terrorist profiling.[4]

2. Terrorist Profiling — Not Racial Profiling

There should not be two sides to the debate over *so-called* racial profiling — especially in the context of protecting the country from terrorist or foreign threats. That law enforcement should be allowed to consider race, ethnicity, gender, eye color, height, weight, or any physical identifying characteristic that would allow them to prevent and solve terrorist acts is nothing more than common sense. There are too many hyperbolic claims about a practice that does not even exist. Indeed, the concept of "racial profiling" is at best ill-defined and at worst a politically-charged term coined by some seeking yet another excuse to claim victim status.[5] A more accurate description of the process whereby race may be considered to thwart terrorism is "terrorist" profiling. Law enforcement should be permitted and *encouraged* to engage in terrorist profiling, for doing so better deploys scarce societal resources.

To illustrate, in the search to locate Osama bin Laden and his Al Qaeda network, it makes no sense for law enforcement to devote time and resources by raiding Saint Patrick's Cathedral in New York, infiltrating black Baptist churches in the South, or sneaking around Hindu temples in California. We know for a fact that the individuals fitting the terrorist profile of bin Laden and his followers are not Catholic priests, not black Baptists, and not Hindus. They are, instead, male Muslim fundamentalists of Arab descent.[6]

Making this point does not translate into attacking all Arabs; instead, it simply acknowledges that it is logical to look at certain individuals within the Arab community in order to win the current war on terrorism.[7] If you want to thwart Al Qaeda and similar terrorist groups from killing us in the sky, then law enforcement should be permitted to consider whether an individual boarding an airplane is a male Muslim fundamentalist of Arab descent.[8] The Justice Department recognizes this reality. Its recently adopted Guidelines provide:

> Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution.[9]

When law enforcement fails to consider material facts in the name of political correctness, resources are utterly wasted and lives are placed at risk. For example, in December 2001 in Arizona, airport screeners wasted time investigating an eighty-six year old white man, General Joseph Foss. General Joseph Foss earned the Congressional Medal of Honor by shooting down twenty-six Japanese fighter planes over the Pacific in World War II. In December 2001, General Foss — former president of the American Football Conference and former Governor of South Dakota — was traveling from Arizona to visit the U.S. Military Academy at West Point. He brought his Congressional Medal of Honor to show the cadets. The Medal, which was encased, is in the shape of a star. The airport screeners in Arizona stopped and harassed General Foss for about an hour apparently because they were worried that this eighty-six year old white man might use the medal as a weapon, such as a Chinese throw-

ing star, to commandeer the plane.[10] Interrogating and harassing an eighty-six year old Congressional Medal of Honor recipient (who obviously did not fit any serious terrorist profile) was not a wise use of scarce resources and made no one safer. Though the result of the silly interrogation of General Foss may be defended as "no harm, no foul," but if such decisions are repeated hundreds of times each day at airports across the nation, then huge amounts of critical resources needed in the war on terrorism will be utterly wasted.

The consideration of race or ethnicity is hardly new in terrorist or criminal profiling.[11] For example, to thwart the Italian mafia, law enforcement looks at Italian males. To thwart the Japanese crime organizations such as the Yakuza, law enforcement looks at Japanese males. To thwart a Jamaican drug posse, law enforcement considers Jamaicans. And to stop the Irish Republican Army, law enforcement considers white males with brogue accents. In each of these examples, race and ethnicity are critically important, but despite their consideration, these examples do not reflect "racial profiling." Instead, the examples reflect criminal or terrorist profiling.

Using race, ethnicity, and other identifying traits to maintain the peace is hardly the sole province of politically conservative thinkers. In the 1960s, when terrorists of a different type – white supremacist terrorists – were rampaging through the South burning black churches and terrorizing the black community,[12] what did the Justice Department under Robert Kennedy, Attorney General at the time, do? He, together with the FBI, went out and investigated groups of white males.[13] They did not seek to thwart white terrorists by investigating blacks, Hindus, Arabs or Muslims. Of course, the FBI and Justice Department did not investigate all whites. Instead, they investigated white supremacist groups in the South. In determining whom to investigate, they obviously considered the race of the suspected domestic terrorists. As this example shows, political conservatives and honest liberals should in fact be able to agree that profiling is a useful tool in threatening crime and terrorism.[14]

Defending terrorist profiling should not be misconstrued as a suggestion that race alone justifies investigating somebody for a crime. Suggesting someone is guilty of something *solely* because of race is immoral, wrong, and should be outlawed.[15] For example, nothing justifies a highway patrolman searching specifically for minority drivers to stop and harass them when there is no reason for suspicion. However, an airport security guard is fully justified in asking a few additional questions of Arab males who are praying to Mecca before boarding a cross-country flight.

3. Muslim Fundamentalists of Arab Descent

Using race and ethnicity as factors in thwarting terrorism is appropriate. An airport screener who interrogates an Arab-looking man attempting to board a plane is not engaging in racism. Instead, the airport screener is engaging in rational and proactive terrorist profiling. Whether our society is comfortable with it or not, there is a higher probability that an Arab man will attempt a suicide hijacking while traveling by plane than a randomly-selected white, black or Hispanic passenger doing the same.[16] Although some like to think we live in a world where there is no correlation between race, ethnicity, and modern-day terrorism, that notion does not comport with reality.

In the real world, the United States is at war with the Arab terrorists who killed thousands of people on September 11, 2001. In the real world, these terrorists have followers and supporters right here in the United States.[17] The search for bin Laden, Saddam Hussein, and Daniel Pearl's murderers[18] show that we still lack necessary information about the terrorists who seek to destroy the United States in terms of where, or how, to find them. Thus, should we really ignore those few facts that we do know about these terrorist threats, *i.e.*, that they consist predominantly of Muslim fundamentalists of Arab descent who are males?[19]

To illustrate, consider the following:

In 1983, the United States Marine barracks in Beirut was blown up, killing 243 United States Marines.[20] By whom?

In 1985, the Achille Lauro cruise ship was hijacked and an elderly wheelchair-bound American was murdered.[21] By whom?

In 1988, Pan Am flight 103 was bombed killing 270 innocent people.[22] By whom?

In 1993, the World Trade Center was bombed.[23] By whom?

In 1995, the U.S. military barracks in Saudi Arabia were bombed killing 292 people.[24] By whom?

In 1997, American embassies in Kenya and Tanzania were bombed killing 243 people and injuring over 5000.[25] By whom?

In 2000, the naval ship USS Cole was bombed killing 17 American sailors.[26] By whom?

And on September 11, 2001, four airliners were hijacked, turned into missiles, aimed at the World Trade Center and the Pentagon,[27] and used to kill 3000 people. By whom?

These acts were committed by Arab males who were Muslim extremists, mostly between the ages of 17 and 40.[28] Should our nation's law enforcement officers be asked to ignore these undeniable facts and this undeniable history when attempting to thwart terrorist attacks and save innocent lives? The correct answer — and the answer supported by the majority of Americans — is that these facts should be considered.[29]

4. Conclusion

As a nation, we cannot afford to ignore hard facts. In reality, we live — and law enforcement serves — in a world where not all people love America. Law enforcement should not be forced to stick its head in the sands of political correctness. Banning reality and fact-based profiling will help no one except terrorists.

* Mark W. Smith currently works as a trial attorney in private practice in New York City. He serves as the Vice President of the New York Chapter of the Federalist Society, and serves as National Co-Chairman of the Lawyers Division's Subcommittee on the Second Amendment.

Footnotes

[1] *See, e.g.*, Eric Lichtblau and Adam Liptak, "Threats and Responses: On Terror, Spying and Guns, Ashcroft Expands Reach," *The New York Times*, March 15, 2003, p. A1 (quoting Ibrahim Hooper, Council on American-Islamic Relations, as stating "Since he's been in office, American Muslims have lost many of their civil rights . . . All Muslims are now suspects. We have to assume that every mosque in America is being bugged by the F.B.I., with the attitude that's prevalent today at the Justice Department.").

[2] President George Bush has stated "Americans should not expect one battle, but a lengthy campaign, unlike any other we have seen." *Bush Calls Nation to "War on Terror*, L.A. Times, September 21, 2001. *See also*, Prepared Testimony of Andrew F. Krepinevich, Executive Director, Center for Strategic and Budgetary Assessments, before the House Committee on Government Reform Subcommittee on National Security, Emerging Threats, and International Relations, "Combating Terrorism: A Proliferation of Strategies," Federal News Service, March 3, 2003, *available at* http://www.csbaonline.org/4Publications/Archive/T.20030303.Combating_Terroris/T.20030303.Combating_Terroris.htm (last visited Mar. 3, 2003) (stating "Following the [September 11] attacks, the United States finds itself engaged in the first war of the 21st century. This war against international terrorist aggression … presents a very different set of challenges, and requires a wholly different response from the more traditional conflicts that have dominated America's recent history."). Dinesh D'Souza, What's So Great About America 4-5 (2002) ("we find ourselves at war against the forces of terrorism … [T]his is a new kind of war against an enemy that refuses to identify himself.").

[3] *See* U.S. Department of Justice, Civil Rights Division, Guidance Regarding The Use of Race By Federal Law Enforcement Agencies, (June 2003) ("Justice Department Guidelines") at 9.

[4] In June 2003, the Justice Department issued guidelines articulating the correct view that federal law enforcement efforts may consider race and ethnicity in investigating past acts of terrorism as well as thwarting new ones. The Guidelines provide:

> In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing law protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and the laws of the United States.

Justice Department Guidelines at 9.

[5] Some commentators observe that the concept of "racial profiling" has been defined by only "cop-bashers" and that "the police have never endorsed the term." *See* Heather MacDonald, Are Cops Racist? 165 (2003). *See also* Clayton Searle, *Profiling in Law Enforcement*, *at* http://www.inia.org/whats-new-presidents.htm (last visited Mar. 3, 2003) ("This nation has recently been in an emotional discussion concerning the use of profiles by law enforcement officers. Unfortunately, this debate has been entitled 'racial profiling'. There is a saying in debating, 'If you can define the terms, you win the contest'. Utilizing the term, 'racial profiling', ensures that the debate will be negative in tone and divisive in nature.").

[6] "All 19 of the September 11 hijackers were young Arab men. The vast majority of Al Qaeda members and Taliban fighters are Afghan or Arab men. All 22 people on the FBI's most wanted terrorist list are Muslims and virtually all are Arab." Prof. Jonathan Turley, *"Profiling Isn't Always Wrong,"* L.A. Times News Service, January 22, 2002. *See also* Krepinevich, *supra* note 3 (stating "The United States now confronts radical Islamic terrorist organizations …")

[7] Obviously, the "profile" of terrorists should change as warranted. For example, if a group of the Pennsylvania Amish or blonde-haired, blue-eyed women from Minnesota commence a series of coordinated suicide bombings against American targets, then the "profile" of those trying to destroy the United States should change to recognize these new facts.

[8] Terrorist profiling can save lives. In 1999, U.S. government officials were "on the look out for Middle Eastern men when they stopped Ahmed Ressam, an Algerian." Ressam had in his car bomb-making materials that prosecutors later alleged were intended for an attack on an American airport. *See* John Stossel, *Rethinking Racial Profiling*, October 4, 2001, *available at* http://abcnews.go.com/sections/2020/2020/2020_ 011002_racialprofiling_ stossel.html (last visited Mar. 3, 2003).

[9] Justice Department Guidelines at 9.

[10] *See* Joyce Howard Price, *Medal of Honor Fails to Impress Airline Security*, Washington Times, Jan. 19, 2002. "'I kept explaining that it was the highest medal you can receive from the military in this country, but nobody listened,' General Foss said." *Id*. Of note, General Foss died in early 2003.

[11] *60 Minutes: That Dirty Little Word "Profiling"* (CBS television broadcast, Dec. 2, 2001) (Steve Kroft stated, "[U]sing race as a factor in criminal investigations is both commonplace and supported by the highest courts in the land.").

[12] Curtis Wilkie, *Miss. Whites Recall 1964 Church Fires, Decry Latest Wave*, THE BOSTON GLOBE, June 27, 1996, at 1.

[13] Athan G. Theobarris, *Political Counterintelligence, In* SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN I (Temple U. Press, 1978), available at www.icdc.com/-paulwolf/cointelpro/theoharris.htm (last visited Jun. 17, 2003). In response to the spread of the Ku Klux Klan, Attorney General Robert Kennedy sent a team to Mississippi to help identify individuals involved in terrorism. *Id.*

[14] Another instance where the consideration of race should be completely uncontroversial arises when police respond to the report of a specific crime. In such instances, of course, the police should use any and all available facts to catch the criminal including the physical description of the perpetrator. The Justice Department explains: "[c]ommon sense dictates that when a victim describes the assailant as being of a particular race, authorities may properly limit their search for suspects to persons of that race." *See* Justice Department Guidelines at 2.

[15] *See Herbert v. City of Saint Clair Shores*, 2003 U.S. App. LEXIS 4450 (6th Cir. March 11, 2003) (Krupansky, J., dissenting) (stating "The targeting of a criminal suspect solely by reference to the subject's race violates the constitution") (cites omitted); *60 Minutes: That Dirty Little Word "Profiling"* (CBS television broadcast, Dec. 2, 2001) (quoting Randy Means, attorney, who explained that singling out people for investigation solely on race is illegal, but noting that using race or ethnicity as one aspect of a criminal profile is legal and a valuable tool).

[16] Stuart Taylor, Jr., *The Case for Using Racial Profiling at Airports,* National Journal, September 22, 2001 ("Racial profiling of people boarding airliners … done politely and respectfully – may be an essential component (at least for now) of the effort to ensure that we see no more mass-murder-suicide hijackings."); Michael Kinsley, *Racial Profiling is Sometimes Appropriate — Now, For Example*, Pittsburgh Post-Gazette, October 2, 2001, at A11 ("An Arab-looking man heading toward a plane is statistically more likely to be a terrorist. That likelihood is infinitesimal, but the whole airport rigmarole is based on infinitesimal chances."). *See also 60 Minutes: That Dirty Little Word "Profiling"* (CBS television broadcast, Dec. 2, 2001) (Floyd Abrahms stated, "[I]t would be crazy not to consider what people look like when

we're looking for people who may be involved in hijacking.").

[17] Recent events, including the guilty plea of Faysal Galab (who was one of six men arrested in a Buffalo, New York suburb for allegedly having terror links to Al Qaeda), demonstrate that bin Laden's network still has connections within the United States. *See* John Riley, *Guilty Plea in Upstate Terror Case; Al-Qaeda Camp Attendee will Cooperate with Probe*, NEWSDAY (New York), Jan. 11, 2003, at A6. Galab, who was one of six young Yemeni-American men arrested for attending an Al Qaeda training camp in Afghanistan, admitted that he knew he was going to a "military training camp before leaving Buffalo in mid-2001 and knew that it was illegal, that he purchased a military uniform before going to camp, and that he performed 'guard duty' for Al-Qaeda while receiving terrorist training at the camp." *Id*.; *see also* D'Souza, *supra* note 3, at 5 ("Our enemy is a terrorist regime that inhabits many countries, including the United States.").

[18] Pearl was a Wall Street Journal reporter who was kidnapped and killed by Islamic militants in Pakistan in February 2002. *Tests Show Body Found in Karachi is Pearl's*, WALL ST. J., July 22, 2002, at A12.

[19] Kinsley, *supra* note 17, at A11 ("[T]oday we're at war with a terror network that just killed [3,000] innocents and has anonymous agents in our country planning more slaughter. Are we really supposed to ignore the one identifiable fact that we know about them? That may be asking too much.").

[20] Max Boot, *The End of Appeasement: Bush's Opportunity to Redeem America's Past Failures in the Middle East*, THE WEEKLY STANDARD, February 10, 2003. On April 18, 1983, a Shiite suicide bomber killed 63 people including 17 Americans and on October 23, 1983, another Shiite suicide bomber attacked the U.S. Marine barracks in Beirut, killing 241 soldiers. *Id*. *See also Hezbollah Summit Presence Sends Signal?*, UNITED PRESS INTERNATIONAL, Oct. 19, 2002 ("Hezbollah, which supports Islam even over Arab nationalism … claimed responsibility for the 1983 bombing of the Marine barracks that killed 241 Americans"); Walter Williams, *We Need To Profile*, *at* www.townhall.com/columnists/walterwilliams/ww20020612.html (last visited June 12, 2003).

[21] *See* "Achille Lauro Hijacking, October 7, 1985," *at* www.terrorismvictims.org/terrorists/achille-lauro.html (last visited Mar. 3, 2003).

[22] Radical Muslim terrorist groups blew up Pan Am Flight 103 over Lockerbie, Scotland. Ron Wheeler Albany, *Why No Protests When Americans are Killed?*, THE TIMES UNION (Albany, NY), March 31, 2003, at A6. In fact, "[o]ne Muslim terrorist was sentenced to life in a Scottish jail" and the "other was acquitted and returned to a hero's welcome in Tripoli." *Id. See also* Williams, *supra* note 21.

[23] *Timeline: Al Qaeda's Global Context* (Public Broadcasting System), available at www.pbs.org/wgbh/pages/ frontline/shows/krew/etc/ cron.html (last visited Mar. 3, 2003). *See also* Williams, *supra* note 21.

[24] Hezbollah attacked a Saudi National Guard facility in Riyadh in 1995, killing five Americans. Boot, *supra* note 21.

[25] Radical Islamic terrorist groups bombed the U.S. embassies in Africa in 1998. *See* Krepinevich, *supra* note 3; Boot, *supra* note 21 ("Islamist operatives bombed … two U.S. embassies in Africa in 1998.").

[26] "Islamist operatives bombed . . . the USS Cole in 2000." Boot, *supra* note 21.

[27] "All 19 of the September 11 hijackers were young Arab men." Turley, *supra* note 7.

[28] *See* Williams, *supra* note 21. "Daniel Pipes estimates that even before the costliest terrorist strike in history occurred on September 11, 2001, Islamist violence directed at Americans had killed 800 people – 'more than killed by any other enemy since the Vietnam War.'" Boot, *supra* note 21.

[29] *See* Ann Scales, *Polls Say Blacks Tend to Favor Checks*, BOSTON GLOBE, September 30, 2001, at A6; Pete DuPont, *Arab-Americans and Racial Profiling,* National Center for Policy Analysis, *at* http:// www.ncpa.org/edo/pd/ fp2001/fp110601.html (last visited Mar. 3, 2003). "71 percent of Blacks in a recent Gallup poll and 54 percent of Blacks in a Zogby poll said Arab-Americans should be singled out for extra security at airports." Dennis Niemiec & Shawn Windsor, *Arab Americans Expect Scrutiny, Feel Sting of Bias*, DETROIT FREE PRESS, October 1, 2001. 60 percent of Arab-Americans in Detroit area said "extra questioning or inspections" of Arab Americans is justified. *Id*.

Racial Profiling and the War on Terrorism

*By Nelson Lund**

Roger Clegg's encomium to the Justice Department's new position on racial profiling contains several perfectly valid points. But the Department's new policy is nowhere close to being "perfect." [See Mr. Clegg's June 19, 2003 article entitled *Perfect Profile* in National Review Online at http://www.nationalreview.com/clegg/clegg061903.asp]

Before 9/11, we had what looked like a clear national consensus against racial profiling in law enforcment. Although the issue had become controversial, the disputes were almost entirely concerned with whether the police were in fact commonly using forbidden racial stereotypes, especially when choosing which motorists to pull over for traffic violations that are so common that officers necessarily ignore them most of the time.

Then came the terrorist attacks. All of the hijackers who carried out the hijackings were Middle Eastern men, and commentators began arguing that racial profiling is an appropriate tool in the war on terrorism. Judge Robert Bork, for example, has neatly distinguished ordinary law enforcement from the new threat we face: "The stigma attached to profiling where it hardly exists has perversely carried over to an area where it should exist but does not: the war against terrorism."[1] The public seems to agree. Polls have showed strong majorities in favor of subjecting those of Arab descent to extra scrutiny at airports. Interestingly, blacks and Arab-Americans were even more likely than whites to favor such policies.[2]

The Bush Administration at first resisted the pressure to employ racial profiling.[3] The Department of Justice, however, has now reversed course and adopted Judge Bork's distinction between ordinary police work and anti-terrorism activities. In June, the Department's Civil Rights Division promulgated a new directive entitled "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies." This document adopts two standards, one for "traditional law enforcement activities," and a very different one for certain other police activities.

The first standard is faithful to President Bush's pre-9/11 statement that racial profiling is "wrong and we will end it in America." Federal agencies are forbidden to consider race[4] in any "traditional" law enforcement decision, except where officials have trustworthy information linking someone of a specific race to a specific crime, as for example where a credible eyewitness has described a fleeing felon as a member of a particular race, or where a criminal organization is known to comprise members who are overwhelmingly of a given race. Because these exceptions do not entail racial profiling or stereotyping, the Justice Department has effectively imposed a total ban on that practice in traditional law enforcement activities.

A completely different standard is now applicable to federal activities involving threats to "national security or other catastrophic events (including the performance of duties related to air transportation security) or in enforcing laws protecting the integrity of the Nation's borders." According to the new Justice Department guidance, racial profiling may be used in these contexts whenever it is permitted by the Constitution. This is very close to giving federal officials *carte blanche* to select targets for investigation or especially intensive attention on the basis of racial stereotypes.

The applicable constitutional test is called "strict scrutiny." As the Justice Department acknowledges, applying this test is "a fact-intensive process." That is just another way of saying that there is no clearly defined constitutional line between permissible and impermissible uses of racial profiling. And because the Justice Department makes no effort to draw a line between what it regards as permissible and impermissible, security officials are effectively encouraged to err in the direction of using racial stereotypes whenever they might seem useful.

The only examples of forbidden behavior offered by the Justice Department are two very extreme cases. First, the Department rules out using racial criteria "as a mere pretext for invidious discrimination." This is something that nobody would ever admit to doing. Second, the Department says that a screener may not pick someone out for heightened scrutiny at a checkpoint "solely" because of his race "[i]n the absence of any threat warning." This situation cannot even arise, given that the whole nation is under a constant and continuing "threat warning" that is likely to remain in place for the foreseeable future; thus, the principal implication here is that screeners may indeed focus on individuals "solely" because of their race so long as any threat warning remains in place.

In addition to being inherently "fact intensive," the constitutional test will almost certainly be applied by the courts in a way that is extremely deferential to the discretionary judgments of federal officials. The leading case, *Korematsu v. United States*, upheld the mass internment of Japanese-Americans during World War II, even though the internment program was based entirely on a generalized and unsubstantiated mistrust of Japanese-Americans. Although this decision has frequently been criticized, it has not been overruled. Similarly, the Supreme Court has held that law enforcement decisions based on racial stereotypes do not violate the Fourth Amendment.[5] And, in its most recent decision on racial discrimination, the Court gave extreme deference to the discretionary judgments of government officials who used a form of racial profiling in admissions decisions to a state law school.[6] Because the government interests at stake in

this affirmative action case were clearly much less urgent than those involved in preventing terrorist attacks, one must infer that the Court has implicitly dictated a virtual hands-off policy with respect to judicial supervision of racial profiling in this context.

The Justice Department's guidance document, which encourages federal agencies involved in anti-terrorism and related activities to employ racial profiling to the full extent permitted by the Constitution, has several serious imperfections, including the following:

First, law enforcement officials now have an incentive to bring ordinary law enforcement activities under the rubric of "national security or other catastrophic events" in order to escape the very strict rules imposed by the Department for traditional law enforcement. If an agent at the DEA decides that the escape of a particular drug trafficker would be "catastrophic," the Justice Department's guidance does not clearly prohibit him from using racial stereotypes in his investigation. The same goes for many other activities that Congress has thought so threatening that they deserve to be made federal crimes.

Whether or not this bleeding of the categories occurs on a significant scale, the unbridled use of racial profiling as a tool in the war on terrorism and other "catastrophic events" could significantly undermine the unfulfilled national commitment to making citizens of all races equal under the law. Few events could have been more catastrophic than losing World War II, yet almost everyone now recognizes that massive racial profiling, albeit lawful, was a completely inappropriate and unnecessary means of preventing that catastrophe.

Finally, the Justice Department has neglected one of the most obvious and well-known pathologies of government bureaucracies. The new policy imposes virtually no controls on the use of racial stereotypes in an indeterminately large class of activities. This will encourage government officials to employ racial stereotypes, and it may foster the lazy use of such stereotypes. The actual effect could well be to impede the war on terrorism.

We have a recent example of this danger: the investigation (in which the Department of Justice participated) of the terroristic sniper attacks in the Washington, D.C. area in late 2002. Apparently relying on well-publicized "criminal profiles," according to which random snipers are almost always white males, the police focused their attention on suspects fitting this stereotype. Duly shocked to find that the investigation had been based on a false premise, the Washington police chief memorably remarked: "We were looking for a white van with white people, and we ended up with a blue car with black people."[7] Not the least of the shortcomings in the Justice Department's new policy guidance is that it makes no effort at all to erect safeguards against repetitions of this sort of dysfunctional bureaucratic behavior.

The report's racial profiling policy is, in short, hardly perfect.

* Nelson Lund is Patrick Henry Professor of Constitutional Law and the Second Amendment and Foundation Professor of Law, George Mason University School of Law.

Footnotes

[1] Robert H. Bork, *Civil Liberties After 9/11*, Commentary, July-Aug. 2003, at 30.

[2] Milton Heumann & Lance Cassak, *Afterword: September 11th and Racial Profiling*, 54 Rutgers Law Review 283, 286-87 (2001); Jason L. Riley, *'Racial Profiling' and Terrorism*, Wall Street Journal, Oct. 24, 2001, at A22.

[3] *See*, *e.g.*, Michael Chertoff, Assistant Attorney General for the Criminal Division, Testimony Before the Senate Judiciary Committee Hearing on Preserving Freedoms While Defending Against Terrorism, Federal News Service, Nov. 28, 2001 [available at LEXIS, News Library, News Group File, A11].

[4] Here, and throughout, I use "race" as a shorthand for "race or ethnicity."

[5] *Whren v. United States*, 517 U.S. 806 (1996).

[6] *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

[7] Craig Whitlock & Josh White, *Police Checked Suspect's Plates At Least 10* Times, Washington Post, Oct. 26, 2002, at A1. For further detail, see Nelson Lund, *The Conservative Case against Racial Profiling in the War on Terrorism*, 66 Albany Law Review 329 (2003).

A Roadmap for the Continuing Legal Challenge to Race-Based Admissions

*By Curt A. Levey**

The higher education establishment breathed a sigh of relief in June when the Supreme Court's split decision in the Michigan cases allowed the continued use of race in admissions. But a careful reading of *Grutter v. Bollinger*[1] and *Gratz v. Bollinger*[2] suggests that the decisions ensure only a temporary and limited reprieve for race-based admissions policies. Already, a roadmap for a continuing legal challenge to these policies is clear. That roadmap can yield substantial improvements over the status quo in the short term, and, in the long term, may hasten the decline and eventual elimination of race-based admissions.

I. The Roadmap's Textual Underpinnings

The strategic roadmap envisions litigation which will serve to enforce, strengthen, and even expand the restrictions on race-based admissions contained in the *Gratz* and *Grutter* decisions. Those restrictions involve both the current scope of racial admissions preferences and the obligation of schools to transition from race-based to race-neutral methods of achieving diversity.

Concerning the current scope of preferences, the Michigan decisions held that race must be used in a "flexible, nonmechanical way"[3] and cannot generally be a "decisive factor."[4] Instead, colleges must engage "in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[5] In such a review, "the critical criteria are often individual qualities or experience *not dependent upon race but sometimes associated with it.*"[6] Thus, higher-education institutions may not treat race as if it "automatically ensured a specific and identifiable contribution to a university's diversity."[7] This language, if taken seriously, should result in admissions policies that place less emphasis on race and more on factors such as unusual experiences or viewpoints and socioeconomic, educational, or other types of disadvantage.

A more direct boost for race-neutral policies arises from the Supreme Court's requirement that colleges engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[8] Such alternatives are already in operation in states where racial preferences were banned by ballot initiatives, legislative action, and court rulings. The Court, noting the "wide variety of alternative approaches," said each institution must "draw on the most promising aspects of these race-neutral alternatives" and must conduct "periodic reviews to determine whether racial preferences are still necessary" in order to "terminate its race-conscious admissions program as soon as practicable."[9]

In addition, the Justices called for "sunset provisions in race-conscious admissions policies" and expressed, at very least, an expectation that such policies will end within 25 years.[10] One goal of future litigation should be to establish that time limit as an essential part of narrow tailoring. After all, a more permissive reading ignores the immediately preceding paragraphs in *Grutter*, which emphasize that the grant of compelling-interest status to student diversity is conditional on a time limit. In any case, a school still using race-based admissions 25 years from now will be doing so without the Supreme Court's clear sanction.

Though supporters of racial preferences were relieved by the Michigan decisions, even they recognize that the Court's sanction of race-based admissions is limited. Consider the joint statement issued in July by some of the most prominent legal scholars on the other side of the debate, including Laurence Tribe, Christopher Edley, and Drew Days. The statement, published by the Harvard University Civil Rights Project, acknowledges that the decisions have resulted in "additional narrow tailoring requirements addressing race-neutral alternatives, undue burdens, and time limits" that "must be incorporated into *all* analyses of race-conscious policy making."[11] More specifically, the scholars concede that "even a holistic, non-numerical system can be constitutionally vulnerable, if a racial 'plus' factor is assigned automatically to all racial minority applicants."[12] Instead, "[a]dmissions officials are required to evaluate each applicant on the basis of all of the information in the file, including a personal statement . . . and a personal essay describing the applicant's potential contribution to the diversity of the Law School."[13] Moreover, "a policy that offers such a heavy advantage to minority applicants that it virtually guarantees their admission" is "not sufficiently flexible to satisfy narrow tailoring."[14]

Perhaps most importantly, the Harvard statement concedes that "although an institution may have a permanent interest in gaining the benefits of a diverse student body, its use of race to advance that goal is subject to time limits."[15] The liberal scholars envision a transition towards race-neutral admissions policies, acknowledging the Court's "understanding that diversity will continue to be a compelling interest, but that less race-conscious measures will be required to produce it."[16] Therefore, "the effectiveness of race-neutral policies at other schools should be monitored" as part of "an institution's documentation of its good faith efforts to develop effective [race-neutral] solutions."[17]

These scholars clearly are aware that the Supreme Court's sanction of race-based admissions is limited in both scope and time. One goal of the litigation roadmap is to make sure that this circumscribed sanction does not expand into

something more in practice. This is particularly important in light of higher education's proven willingness to stretch any standard it is given. This propensity makes it inevitable that the courts will be called upon to keep universities honest and to gradually put meat on the bones of the new standards.

The success of future litigation will depend on how much deference courts show to universities when comparing their behavior to the new standards. After *Grutter*, strict scrutiny remains – in word at least – an "exacting standard" which demands that the preferential treatment be "precisely tailored."[18] If the lower courts take this language seriously, there will be little room for deferring to defendant universities with regard to either the scope of their racial preferences or their good faith efforts to adopt race-neutral alternatives. Though the Supreme Court found that Michigan's law school was paying only "[s]ome attention to numbers"[19] and would "like nothing better than to find a race-neutral admissions formula,"[20] schools cannot be confident that other courts will be so generous.

II. Issues Along the Roadmap

"The University of Michigan decisions have settled one set of legal questions, but we can expect many more to arise in our courts," said the joint statement published by the Harvard Civil Rights Project.[21] Indeed, the potential issues for future legal challenges to race-based admissions are too many to fully enumerate in this article. However, I will lay out some of the most significant ones here. Justice Scalia's discussion of "future lawsuits"[22] in *Grutter* also addresses "areas where institutions must be careful not to overstep the bounds of the *Grutter* and *Gratz* cases."[23] Given *Grutter's* holding that student body diversity satisfies the compelling interest part of the strict scrutiny test, most of the issues and arguments concern the narrow tailoring part of the test. Nonetheless, there are still several important open questions concerning a school's reliance on the diversity rationale.

One such avenue applies to K-12 education. *Grutter* relied on assertions that "universities occupy a special niche in our constitutional tradition" and "represent the training ground for a large number of the Nation's leaders," such that "nowhere is the importance of [inclusive institutions] more acute than in the context of higher education."[24] Therefore, K-12 schools that use race in admissions are vulnerable to the argument that *Grutter's* holding on diversity is limited to higher education. The joint statement from Harvard concedes that "K-12 decision makers may not enjoy the same academic freedoms as their higher education counterparts, and among the educational benefits of diversity in higher education is the 'robust exchange of ideas,' which is less applicable to education in the lower grade levels."[25] The use of race in K-12 admissions will likely come before the courts soon as educators, emboldened by *Grutter*, test the limits imposed by recent decisions involving magnet schools. [26] The large number of students potentially disadvantaged by the use of race in grades K-12 – far more than attend the highly competitive colleges where race plays a large role in admissions – also suggests that *Grutter's* relevance at the K-12 level soon will be tested.

Even in higher education, the diversity rationale does not automatically provide legal cover for using race in admissions, because strict scrutiny requires that the proffered compelling interest for a racial classification be the actual motive. Thus, a school would lose its cover if it could be demonstrated that the benefits of broad-based intellectual diversity are not the real motive behind its race-based admissions policy. In fact, Justice Scalia suggests exactly this vulnerability in his *Grutter* dissent when he says that future "suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*."[27] Scalia notes that schools that extol the benefits of multiculturalism "but walk the walk of tribalism and racial segregation on their campuses" are likely to be "[t]empting targets."[28]

It is important to remember that "outright racial balancing [remains] patently unconstitutional."[29] Whether a particular school is engaged in racial balancing or, instead, is paying only "[s]ome attention to numbers"[30] in pursuit of broad-based intellectual diversity is a factual determination that each court will have to make based on the evidence. But if the former is found to be true, then the school is engaging in "discrimination for its own sake," and the diversity rationale cannot protect it.[31]

Although it probably is fruitless to argue that the genuine pursuit of broad-based diversity in higher education is not a compelling interest under the U.S. Constitution, the diversity rationale may not fare as well under the equal protection guarantees of various state constitutions. In states with favorable law or sympathetic Supreme Courts, we'll likely see state constitutional claims against race-based admissions systems, challenging both the diversity rationale itself and the requirements of narrow tailoring. The University of Michigan's victory in *Grutter* will do it no good if the Michigan Supreme Court finds that diversity-based preferences violate the state constitution's prohibition of racial and ethnic discrimination.[32] A victory in Michigan or another state could effect momentum and the public perception of race-based admissions as substantially as California's passage of Proposition 209 did in 1996.

While there doubtless will be continuing litigation over the diversity rationale, the most fertile ground for future litigation likely involves a variety of narrow tailoring issues, concerning both the scope of preferences and the use of race-neutral alternatives. It is worth noting that most of the court decisions striking down racial admissions preferences have been based on narrow tailoring. Five times the U.S. Courts of Appeal have addressed whether a school's race-based admissions policies are narrowly tailored to achieve an interest in diversity, and four times the answer has been

no.[33] And those victories occurred before *Gratz* highlighted potential areas of vulnerability.

Turning now to the details of narrow tailoring, it is important to note that the mere elimination of a point-based admissions system is not sufficient to meet the requirement that race be used in a "flexible, nonmechanical way."[34] Even the joint statement published by the Harvard Civil Rights Project concedes that *Gratz* "makes clear that policies which automatically and inflexibly assign benefits on the basis of race . . . are constitutionally suspect."[35] Thus, any admissions system that gives minority applicants a preference without a "highly individualized, holistic"[36] showing of how that applicant will contribute to broad-based intellectual diversity is vulnerable to challenge. Larger schools will be particularly vulnerable, because of the difficulty of conducting highly individualized reviews of many thousands of applicants. In fact, until *Gratz* and *Grutter* came down, the University of Michigan contended that "the volume of applications ... make it impractical for the [undergraduate college] to use the [individualized] admissions system" upheld in *Grutter*.[37] But the Supreme Court was clear that administrative ease is no defense: "[t]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."[38]

Larger schools in particular may be tempted to limit the "highly individualized" review to a subset of their applicants. But universities that take this approach will be at risk if the filtering process uses race at all. In that case, the filtering process must also comply with all the requirements of narrow tailoring. In *Gratz*, the College admissions system was struck down, in part, because the "individualized review is only provided *after* admissions counselors automatically distribute the University's version of a [racial] 'plus.'"[39]

Schools will also be at risk if their race-based admissions policies consistently admit substantially more than a "critical mass" of underrepresented minorities – that is, more than about ten percent of the student body, which Michigan officials testified is the threshold minority enrollment necessary to achieve the educational benefits of diversity. The *Grutter* Court found only that "a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."[40] It did not find that additional minority enrollment – beyond a critical mass – is even more beneficial, and it certainly did not sanction an admissions policy based on that assumption. While honest people will disagree over how much leeway a university has on this issue, it would be fair to say that a school that uses racial admissions preferences to consistently achieve minority enrollment well in excess of ten percent will be operating without constitutional cover.

Race-based admissions policies will also be vulnerable if they do not explicitly give nonminority applicants "the opportunity to highlight their own potential diversity contributions."[41] Schools could meet this requirement, for example, by explicitly requesting of each applicant and "seriously consider[ing]" an "essay describing the ways in which the applicant will contribute to the life and diversity of the [school]."[42]

In addition, schools will be at risk if they treat nonracial diversity factors as *substantially* less important than race and ethnicity. In part, Michigan's undergraduate admissions system was found to be unconstitutional because "the points available for other diversity contributions . . . are capped at much lower levels."[43] Without a point system, it will be more difficult for courts to evaluate the importance of nonracial diversity factors. But, for instance, a plaintiff can assemble statistical data that compares the odds of admission for minority applicants to the odds for similarly situated candidates who are diverse in other ways. Also, consider that schools, because they are no longer permitted to "automatically and inflexibly assign [preferences] on the basis of race,"[44] may be tempted to make special efforts to encourage minority applicants to describe the ways in which they can contribute to diversity. In fact, the University of Washington Law School did exactly this through letters it sent to only minority applicants.[45] Such a practice is an example of non-quantitative evidence that a school is treating nonracial diversity factors less seriously than minority status. Ultimately, regardless of the form the evidence takes, it is the defendant university – not the plaintiff – that has the burden of proving compliance with the requirements of narrow tailoring.

Admissions policies also may fail the narrow tailoring test if they use race as a "decisive factor."[46] The devil is in the details of what "decisive" means, but there are at least two ways that schools will be vulnerable. One is if a school gives "such a heavy advantage to minority applicants that it virtually guarantees their admission."[47] Michigan lost *Gratz*, in part, because it did exactly that. The other defines decisiveness in a more relative sense, looking at whether "the factor of race [is] decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism."[48] A large disparity between the average grades and test scores of minority and nonminority admittees, while not unlawful in and of itself, will be evidence that race is being used in a decisive manner, in both the relative and absolute sense. It is the nation's most selective schools, where the magnitude of the racial bonus tends to be greatest, that will potentially be the most vulnerable to the charge that race is decisive. However, the degree of vulnerability will depend on whether the lower courts look at what the Supreme Court said or, instead, what it did – namely, uphold a law school admissions policy that relied on race just as heavily as the undergraduate system.

That concludes my discussion of arguments involving the static, scope-related restrictions on the use of race in admissions. But arguably the most important restrictions in

the Michigan decisions concern the phasing out of race-based admissions, and the phasing in of race-neutral alternatives. While it's tempting to think of these as a single transition, that view is not entirely accurate. After all, the Court's command that "race-conscious admissions policies must be limited in time"[49] – as well as Michigan's concession that "race-conscious programs must have reasonable durational limits"[50] – were not predicated on the success of race-neutral alternatives, much less academe's perception of that success. Although there *may* be other ways to meet the requirement for a durational limit, the Court, at very least, strongly suggests that race-conscious admissions policies contain "sunset provisions." [51] Although it will be up to the lower courts to add detail about what sunset provisions should look like, a race-based admissions system will be vulnerable if its sunset provision – or alternative durational limit – is more like a vague aspiration than a concrete plan with not-too-distant milestones. While schools will surely be given some flexibility in adhering to their termination plans, it seems reasonable to expect that unanticipated extensions of the race-based system be, at the very least, explicitly and openly approved by the university's governing body.

Even if a university adopts durational limits, it must, nonetheless, engage *now* in "serious, good faith consideration of workable race-neutral alternatives" and "draw on the most promising aspects of these race-neutral alternatives as they develop" in order to "terminate its race-conscious admissions program as soon as practicable."[52] Even the Harvard statement acknowledged that "the Court's language expresses its understanding that . . . less race-conscious measures will be required to produce [diversity]."[53] Given the Supreme Court's recognition that "a wide variety of alternative approaches" are already in operation in states with race-neutral admissions policies,[54] the Court envisions the transition to race-neutral methods as a process that should start sooner rather than later. Put another way, time limits are intended to function as caps, not licenses to delay the consideration and adoption of race-neutral alternatives. Universities that can be shown to be dragging their feet will be attractive targets for litigation.

While "a university [need not] choose between maintaining a reputation for excellence or fulfilling a commitment to [diversity],"[55] schools will be particularly hard-pressed to explain a failure to adopt those race-neutral methods of promoting diversity that require no sacrifice in academic excellence. For example, the University of Georgia saw a modest increase in minority enrollment after eliminating race from its admissions criteria in 2002 and substituting more aggressive outreach to potential applicants.[56] Schools that fail to use such methods to, at least, reduce their reliance on race are especially vulnerable to the argument that they are "unduly burden[ing] individuals who are not members of the favored racial and ethnic groups." [57]

Ironically, on the issue of race-neutral alternatives, the Court's reliance on a "critical mass" theory should work to the advantage of those seeking to end race-based admissions. While it will always be possible to point to schools with race-neutral admissions where minority enrollment is somewhat lower – or somewhat higher – than under the previous race-based regime, all that matters legally is whether a critical mass of minorities is attained. And on this point, the evidence is clearly in a plaintiff's favor. In the five states with race-neutral admissions policies, virtually every college and professional school – including those at flagship universities such as the University of California-Berkeley and the University of Texas-Austin – has a critical mass of underrepresented minorities.[58]

The success of race-neutral alternatives in those states means that it will be difficult for them to legally justify a return to race-based admissions policies. After all, states may not use such policies unless they demonstrate that "racial preferences are still necessary to achieve student body diversity."[59] But a state cannot convincingly claim that a "serious, good faith consideration of workable race-neutral alternatives"[60] has revealed that racial preferences are still necessary, when that state's own race-neutral methods were just as successful as race-based policies in achieving a critical mass of minorities. As an example, consider the University of Texas at Austin, where president Larry Faulkner recently signaled his intent to restore race as a factor in admissions. Yet, by Faulkner's own report, black and Hispanic enrollment recovered fully and minority academic performance increased at Austin's flagship college after *Hopwood v. Texas* banned the use of race in admissions.[61]

III. A Strategic Vision

In sum, the legal landscape for race-based admissions is filled with potholes, thus inviting continued court challenges along a number of fronts. Though the specifics of future litigation depend on the unfolding development of universities' revised admissions policies, a major focus is likely to be the Court's requirement that universities "draw on the most promising aspects of these race-neutral alternatives."[62] That requirement is likely to draw litigants, because the issues surrounding it are very much in play. A couple of good court decisions addressing the good-faith consideration and adoption of race-neutral admissions methods could well have a major impact on the law, while also helping to educate the public about the success of these methods. Most vulnerable in the near-term are states that abandon their successful race-neutral admissions policies.

Race-based admissions will be challenged on the political front as well. Given the huge gulf between public and elite opinion on this issue[63], the biggest political threat to racial admissions preferences comes from ballot initiatives like California's Proposition 209 and Washington State's I-200, which allow voters to go over the heads of politicians and powerful lobbies. In fact, just two weeks after *Gratz* and *Grutter* were decided, Ward Connerly – a prominent figure

behind Proposition 209's passage – announced a campaign to put a racial preference ban on the Michigan ballot.

While it is unlikely that legislators will enact such preference bans – notwithstanding Florida's example – critics of affirmative action may have some success lobbying federal and state representatives and the U.S. Department of Education for legislative or regulatory rules that put teeth into the Michigan decisions' restrictions on race in admissions. One example, based on the Court's call for sunset provisions, would be a rule mandating each university to publish a plan and timetable for phasing out race-based admissions, with the additional requirement that the planned termination point be no later than June 23, 2028 – 25 years after the Michigan decisions.

Federal and state lawmakers also could require transparency for race-based admissions policies, including statistics on admitted students' grades and test scores, broken down by race. In addition to the side effect of making racial preferences less politically palatable, transparency would make it easier for litigators and the courts to keep universities honest. Powerful interest groups will undoubtedly oppose any reform, but notions of transparency and an end to racial preferences by 2028 should prove popular with the general public.

These are just some of the reasons to expect progress on the issue of race-based admissions. The strategic vision of those opposed to using race in admissions should be informed by the lesson of the Supreme Court's 1978 *Bakke* decision, which, like the Michigan decisions, left a number of important open questions. Though the *Bakke* Court struck down the race-based admissions system before it, the persistence of the higher education establishment and its allies filled the voids in such a way that *Bakke* came to be seen a big victory for affirmative action. The lesson learned is that a Supreme Court decision – especially one with ambiguous language and conflicting messages – is the beginning of the story, not the final chapter. The rest of the story will be written by those that have the clearest vision and the most energy.

* Curt A. Levey is Director Of Legal And Public Affairs at the Center for Individual Rights, which represented the plaintiffs in both *Gratz* and *Grutter*.

Footnotes

[1] 123 S. Ct. 2325 (2003).
[2] 123 S. Ct. 2411 (2003).
[3] *Grutter*, 123 S. Ct. at 2342.
[4] *Gratz*, 123 S. Ct. at 2430.
[5] *Grutter*, 123 S. Ct. at 2343.
[6] *Gratz*, 123 S. Ct. at 2429 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (appendix to opinion of Powell, J.)) (emphasis added in *Gratz*).
[7] *Id.* at 2428.
[8] *Grutter*, 123 S. Ct. at 2345.
[9] *Id.* at 2346.
[10] *Id.* at 2346-47.
[11] Erwin Chemerinsky et al., *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases; A Joint Statement of Constitutional Law Scholars*, Harvard University Civil Rights Project, at 17-18 (July 2003) (emphasis added), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf.
[12] *Id.* at 19.
[13] *Id.* at 11.
[14] *Id.* at 9.
[15] *Id.* at 11.
[16] *Id.*
[17] *Id.* at 10-11.
[18] *Grutter*, 123 S. Ct. at 2336.
[19] *Id.* at 2343 (quoting *Bakke*, 438 U.S. at 323 (Powell, J.)).
[20] *Id.* at 2346 (quoting Brief for Respondent Bollinger et al. at 34).
[21] Chemerinsky et al., *supra* note 11, at 26.
[22] *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part, dissenting in part).
[23] Chemerinsky et al., *supra* note 11, at 16.
[24] *Grutter*, 123 S. Ct. at 2339-41.
[25] Chemerinsky et al., *supra* note 11, at 23.
[26] *See, e.g.*, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).
[27] *Grutter*, 123 S. Ct. at 2349 (Scalia, J., concurring in part, dissenting in part).
[28] *Id.* at 2349-50 (Scalia, J., concurring in part, dissenting in part).
[29] *Id.* at 2339.
[30] *Id.* at 2343 (quoting *Bakke*, 438 U.S. at 323 (Powell, J.)).
[31] *Gratz*, 123 S. Ct. at 2428 (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)).
[32] *See* MICH. CONST. art. 1, § 2 ("No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.").
[33] Race-based admissions policies were struck down on narrow tailoring grounds in *Johnson v Bd. of Regents of the Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001), *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999*)*, *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998). However in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), the Sixth Circuit held that the University of Michigan Law School's race-based admissions system was narrowly tailored. Only the Fifth Circuit struck down a race-based admissions system on compelling interest grounds. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
[34] *Grutter*, 123 S. Ct. at 2342.
[35] Chemerinsky et al., *supra* note 11, at 2.
[36] *Grutter*, 123 S. Ct. at 2343.
[37] *Gratz*, 123 S. Ct. at 2430.
[38] *Id.*.
[39] *Id.* (emphasis in original).
[40] *Grutter*, 123 S. Ct. at 2341.
[41] *Id.* at 2344.
[42] *Id.*
[43] *Gratz*, 123 S. Ct. at 2432. Interestingly, the University of Michigan's undergraduate admissions system was struck down despite awarding the same twenty points for *some* other diversity factors as it did for race. Those factors included being from a socio-economically disadvantaged background, attending a predominantly minority high school, being an athlete, or being identified by the University's Provost as having a special characteristic. This could indicate that schools will have a hard time demonstrating compliance with this requirement, but it is also a measure of the confusing nature of the Court's Michigan decisions.
[44] Chemerinsky et al., *supra* note 11, at 2.
[45] *Smith v. Univ. of Washington Law School*, No. 97-cv-00335, slip op. at 11 (W.D. Wash. June 5, 2002).
[46] *Gratz*, 123 S. Ct. at 2430.
[47] Chemerinsky et al., *supra* note 11, at 9.

[48] *Gratz*, 123 S. Ct. at 2428 (quoting *Bakke*, 438 U.S. at 317 (Powell, J.)).
[49] *Grutter*, 123 S. Ct. at 2346.
[50] Brief for Respondents Bollinger et al. 32.
[51] *Grutter*, 123 S. Ct. at 2346.
[52] *Id.* at 2345-46.
[53] Chemerinsky et al., *supra* note 11, at 11.
[54] *Grutter*, 123 S. Ct. at 2346. The Court explicitly mentions only California, Florida, and Washington, the three states where race-based admissions are prohibited by *state* law. However, in response to federal court decisions, race-neutral admissions policies were also implemented in Texas and at the University of Georgia.
[55] *Id.* at 2344.
[56] Clarissa Collier, *Georgia Preview Day Aimed at Minorities*, RED AND BLACK (University of Georgia), December 03, 2002 (reporting that black enrollment increased from 4.8 to 5.4 percent, and overall minority enrollment increased from 13 to 14 percent).
[57] *Grutter*, 123 S. Ct. at 2345 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).
[58] "Critical mass" is defined here as ten percent or more of the student body, based on testimony by University of Michigan officials.
[59] *Grutter*, 123 S. Ct. at 2346.
[60] *Id.*
[61] Larry Faulkner, *'Top 10 Percent Law' Functioning Well*, DALLAS MORNING NEWS, October 24, 2000, at 15A.
[62] *Grutter*, 123 S. Ct. at 2346.
[63] Though the nation's elite institutions – from the Fortune 500 to the military to the Ivy League – sided with the University of Michigan, polls conducted this year by the Gallup Organization, NBC, *Newsweek,* the *Los Angeles Times,* and the *Chronicle of Higher Education* – to name just a few –showed that the overwhelming majority of Americans oppose the use of race in admissions. A 2001 poll by the *Washington Post* and others found that 94 percent of whites and 86 percent of black people disagree that "race or ethnicity should be a factor when deciding who is ... admitted to college." Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASHINGTON POST, July 11, 2001, at A1 (finding that "an overwhelming majority of all whites and blacks continue to reject giving outright preferences to blacks and other minorities in employment or admissions to college"); Michael E. Rosman, *Thoughts on Bakke and Its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45, 47 (2002) (providing percentages and wording of question).

The Diversity Lie

*By Brian T. Fitzpatrick**

Last term, the Supreme Court mulled over the legality of the University of Michigan's consideration of race in deciding which applicants it admits to its undergraduate college and to its law school. As is now well known, the University ranked undergraduate applicants on a 150-point scale, and it awarded 20 points to applicants who are black, Hispanic, or Native American by mere virtue of their skin color; white and Asian applicants get no such points. By contrast, a perfect SAT score merited only 12 points on the 150-point scale. The law school similarly granted preference to black, Hispanic, and Native American applicants over white and Asian applicants, but did so in a less conspicuous fashion.

Generally, of course, racial discrimination of this sort runs afoul of the Fourteenth Amendment to the United States Constitution, which guarantees all citizens "equal protection of the laws." The Supreme Court has, however, decided that not *all* racial discrimination is illegal. Rather, if a state has a really good reason to discriminate, and if it is careful enough in how it goes about discriminating, then the state is free to do so. The Supreme Court evaluates the constitutionality of racial discrimination under what it calls the "strict scrutiny" test. In order to pass this test, the state must advance a "compelling interest" that it seeks to serve by racial discrimination, and the discrimination must be "narrowly tailored" to serve that interest. The Supreme Court has found this test satisfied on only two occasions. The first was during World War II, when it held that the internment of Japanese-Americans, although racial discrimination, was nonetheless justified by the compelling interest of national security.[1] The second was during the 1980s, when it held that forcing the Alabama Sheriff's Department to use a 50% black quota in hiring was justified by the compelling interest of remedying the long and sorry history of discrimination against blacks by that department.[2]

The University of Michigan claims that it too has a really good reason to discriminate on the basis of race. The reason it advances is not national security, and it is not to remedy the University's own prior racial discrimination. Instead, the University advances a third reason: it discriminates, it explains, in order to provide its students with the educational benefits of a diverse student body. In particular, the University claims that it must discriminate on the basis of race in order to enroll "meaningful numbers" or a "critical mass" of black, Hispanic, and Native American students. According to the University, meaningful representation of these groups yields educational benefits insofar as it increases the number of merchants in the campus market place of ideas: if these groups were not included in meaningful numbers on campus, the University says, valuable and unique perspectives would be lost from classrooms, dormitories, and quadrangles. As the law school has argued to the Supreme Court, "classroom discussion is more livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[3] A critical mass of these students serves to "introduce students to unfamiliar experiences and perspectives."[4]

There can be no doubt that a university with a more robust market place of ideas offers its students a better education. Whether tinkering with the racial composition of a student body translates into a more robust market place of ideas is less certain. Moreover, even if it does, whether whatever educational benefits derive from doing so should constitute a "compelling interest" alongside national security and remedying specific past discrimination is less certain still. These are among the central questions over which the litigants fought in the United States Supreme Court.

While all interesting questions, these debates are largely beside the point because, regardless of the answers to these questions, the University's admissions policy is still unconstitutional. This is the case for the simple reason that the University of Michigan (along with, for that matter, the rest of the academic establishment) is lying to the Supreme Court when it says that the reason it uses racial preferences is to reap the more robust market place of ideas fostered by racial diversity. And, according to numerous Supreme Court precedents, supported by every sitting justice, the University's utter lack of sincerity in this regard is fatal to its constitutional claims.

The Supreme Court has repeatedly held that, when a litigant comes before it and offers a justification for race or gender discrimination, the justification must be sincere. That is, the justification must be the *actual reason* the state decided to discriminate, not some post-hoc, litigation-driven rationalization. Post-hoc rationalizations are rejected out of hand. For example, in *United States v. Virginia*,[5] the Court declared unconstitutional the Virginia Military Institute's admissions policy because it discriminated on the basis of gender by limiting enrollment only to men. In defense of its single-sex policy, VMI advanced educational-benefits arguments not unlike Michigan's; it asserted that "[s]ingle sex education affords pedagogical benefits" and that "diversity among public educational institutions [serves] the public good."[6] Justice Ginsburg's opinion for the Court rejected these justifications for lack of sincerity: "Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth."[7] Although only five members of the Court joined Justice Ginsburg's opinion in the VMI case,[8] every member of the current Court has either penned or joined an opinion

expressing the same view.[9]

For several reasons, it is clear that the University's appeal to the educational benefits of diversity as a justification for its discriminatory admissions policy was even more insincere than was VMI's. Accordingly, the Supreme Court should reject the diversity rationale out of hand.

First, it is clear that the University's rationale was insincere because the University's preference scheme is wholly underinclusive. There exist any number of other groups of students that have interesting and unique perspectives to share with their classmates, yet to whom the University grants no preferences and of whom it has indicated no desire whatsoever to develop a "critical mass." Just last year, the Supreme Court struck down a state law in *Republican Party v. White* for a similar lack of sincerity.[10] The state law in question was a Minnesota canon of judicial conduct that required candidates for judicial office to refrain from "announc[ing] [their] views on disputed legal or political issues."[11] As a burden to core electoral speech, the "announce clause" was subject to strict scrutiny[12]—the same test applicable to the University of Michigan's racial preference policies. Minnesota attempted to justify its restriction with the need to preserve the impartiality of the judiciary.[13] The Court, however, rejected that rationale because it "d[id] not believe" that the announce clause was "adopted . . . for that purpose."[14] The Court noted that, while the announce clause restricted speech only during election campaigns, "statements in election campaigns are . . . an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake . . . ."[15] "As a means of pursuing the objective of [impartiality] that [Minnesota] now articulate[s], the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous."[16] Although only Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas joined Justice Scalia's opinion in *White*, Justice Stevens authored a *unanimous* opinion in 1994, *City of Ladue v. Gilleo*,[17] that struck down another state law under strict scrutiny for precisely the same reason: the law was underinclusive to serve its purported goal and this "diminished the credibility of the government's rationale . . . ."[18]

As were the justifications advanced in *White* and *City of Ladue,* the compelling interest the University has offered to the Supreme Court is so "woefully underinclusive as to render belief in that purpose a challenge to the credulous." The University says it needs to use racial preferences in order to generate a critical mass of black, Hispanic, and Native American students so that the educational benefits of interacting with persons from these unique backgrounds will not be forgone: *e.g.*, "livelier, more spirited, . . . more enlightening" classroom discussion that "introduces students to unfamiliar experiences and perspectives."[19] The law school specifically has deemed a critical mass to be at least 11% of the student body, and accordingly, under its current enrollment policy, it has every single year enrolled black, Hispanic, and Native American students in numbers exceeding that percentage.[20]

There are, however, any number of groups of students who do not represent at least 11% of the law school class and of whom the University has not sought to achieve a critical mass. To take just two groups as examples, there can be no doubt (and the University certainly has not contended otherwise) that enrolling a critical mass of Mormons and Arab-Americans would also provide educational benefits to the student body. To whatever extent a critical mass of black, Hispanic, and Native American students can contribute to "livelier, more spirited, more enlightening" classroom discussion by "introducing students to unfamiliar experiences and perspectives," surely a critical mass of Mormon and Arab-American students can do so as well. The experience of being a Mormon or an Arab-American is just as unique and unfamiliar to other students as the experience of being black, Hispanic, or Native American. Yet the University is wholly unconcerned about enrolling a critical mass of these students. Indeed, it appears that none of the elite universities who similarly employ racial preferences and who filed briefs in support of the University of Michigan seeks to enroll a critical mass of Mormon and Arab-American students.

Second, it is clear that the University's invocation of the educational benefits of diversity is insincere because, at the same time the University has purported to need the use of racial preferences to create "livelier, more spirited, more enlightening" classroom discussion, it has taken other measures to censor and dull classroom discussion. Indeed, these measures not only sought to censor classroom discussion as a whole, but they have been directed to censor in particular discussions on the very topics one would think would be generated by a more diverse student body. In 1988, after several racial incidents on campus, and in response to demands by members of the same minority groups to which it grants preferences in admissions, the University of Michigan adopted a speech code that prohibited, among other things, "any verbal behavior" that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation," by creating an "intimidating, hostile, or demeaning environment" or by having the "reasonably foreseeable effect of interfering with an individual's academic efforts."[21] According to the University's interpretative guide to the code, prohibited speech included suggesting in a classroom that "[w]omen just aren't as good in this field as men" and "display[ing] a confederate flag on the door of your room in the residence hall."[22] Unsurprisingly, a federal district court promptly struck down the speech code as an unconstitutional infringement of the First Amendment rights of students,[23] finding that "the record of the University's enforcement of the Policy over the past year suggested that students in the classroom and research setting who offended others by discussing ideas deemed controversial could be and were subject to discipline."[24] Needless to say, as the

Supreme Court put it in *White* when confronted with similar inconsistencies, this is all "quite incompatible with the notion that the need for [livelier classroom discussion] lies behind the [racial preferences] at issue here."[25]

As with underinclusiveness, the University of Michigan is not alone in its inconsistencies. Many elite universities that profess to practice racial preferences in order to create "livelier" classroom discussions have similarly sought simultaneously to censor those discussions. These efforts have included speech codes directed at quashing any comments that might offend students of certain racial groups. Many of these practices are catalogued in *The Shadow University* by University of Pennsylvania Professor Alan Kors and Massachusetts attorney Harvey Silverglate.[26] They explain that the theory behind many of these speech codes was, contrary to the current protestations of the educational establishment, that the "constitutional commitments to freedom of expression . . . *conflict* with the nation's commitment to providing equal access to educational opportunities" because, according to the fears of many in the educational establishment, minority students are not fully capable of learning in an environment in which they are not comfortable and not insulated from comments that might cause them offense.[27] Other elite universities, including some of those (such as Stanford University) that filed *amicus* briefs in the Supreme Court supporting the University of Michigan's racial preference policy, have had their speech codes struck down by courts as well.[28]

Indeed, the measures taken by elite universities to undermine the purported educational benefits of racial diversity extend far beyond attempts to censor classroom discussions. The University of Michigan argues that the purported educational benefits of diversity accrue from "opportunities for students of different races and ethnicities to interact in *and out* of the classroom."[29] Yet, many elite universities go out of their way to facilitate and encourage racial segregation outside the classroom. The segregation begins as soon as students step foot on campus for the first time. As Professor Kors and Mr. Silverglate report: "Most colleges and universities with significant populations of racial minorities hold separate orientations for them . . . . Minorities in the class of 1999 at Princeton University were invited to a special 'minority orientation.' At the bottom of that invitation, they were told they also were welcome to attend the university's general orientation."[30] Princeton also filed an *amicus* brief in the Supreme Court in support of Michigan's position that racial preferences are needed to achieve the educational benefits of diversity.

The segregation does not end with orientation. Many universities maintain special "multicultural" dormitories that allow minority students to segregate themselves from the white population. Professor Kors and Mr. Silverglate report that these "racially separatist dormitories . . . provide the chance to avoid unsympathetic white American students, or, for that matter, anyone of a different culture."[31] Cornell University, for example, submitted a brief in support of Michigan's need to use racial preferences in order to reap the educational benefits that accrue from "informal interactions with peers" of different races.[32] Yet, Cornell maintains special dormitories for black, Hispanic, and Native American students.[33] Cornell has been investigated by both the United States Department of Education and the New York Civil Rights Coalition for its facilitation of racial segregation in residence halls.[34]

Indeed, such segregation continues all the way through graduation. The University of Michigan maintains a separate graduation ceremony for black seniors, and it is not alone in this regard.[35] Many of the universities which filed briefs in support of Michigan maintain separate graduation ceremonies for black, Hispanic, and Asian seniors, including the University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Stanford University.[36] This is all, again, "quite incompatible with the notion" that the need for students of different races and ethnicities to interact in and out of the classroom lies behind the racial preferences at issue here.[37]

Finally, the case against the sincerity of the University of Michigan and its peer institutions when it comes to the educational benefits of racial diversity is really more open and shut than even all of the above would suggest. In their more candid moments, members of the academic establishment freely admit their purposes are entirely different. In March of this year, Randall Kennedy, a professor of law at Harvard and a supporter of affirmative action, had this to say:

> Let's be honest: Many who defend affirmative action for the sake of 'diversity' are actually motivated by a concern that is considerably more compelling. They are not so much animated by a commitment to what is, after all, only a contingent, pedagogical hypothesis. Rather, they are animated by a commitment to social justice. They would rightly defend affirmative action even if social science demonstrated uncontrovertibly that diversity (or its absence) has no effect (or even a negative effect) on the learning environment.[38]

Professor Kennedy is not alone. Yale Law School Professor Peter H. Schuck: "many of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds"; "even today when defenders of affirmative action use diversity rhetoric in order to avoid legal pitfalls, the heart of the case for affirmative action is unquestionably its capacity to remedy the current effects of past discrimination."[39] Columbia Law School Professor Samuel Issacharoff: "The commitment to diversity is not real. None of these universities has an affirmative-action program

for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint."[40] Yale Law School Professor Jed Rubenfeld: "Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued. (Why no preferences for fundamentalist Christians or for neo-Nazis?)."[41] Columbia Law School Professor Kent Greenawalt: "I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students..."[42] Harvard Law School Professor Alan Dershowitz: "The *raison d'être* for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals. In recent years, it has been invoked—especially by professional schools—as a clever post facto justification for increasing the number of minority group students in the student body."[43]

Indeed, the educational elite was using racial preferences long before the educational benefits of racial diversity had even been pondered. The elite embraced the diversity rationale because the real reason they maintain racial preferences—"social justice" (in Professor Kennedy's words)—has been repeatedly rejected by the Supreme Court as a legal justification for racial preferences. Justice Powell rejected this rationale in his opinion in *Regents of University of California v. Bakke*,[44] and a majority of the Court rejected it in *Wygant v. Jackson Board of Education*,[45] where it held unconstitutional a school board's use of racial preferences in deciding which faculty members to terminate. The Court held that alleviation of "the effects of societal discrimination" was not a compelling interest because "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[46]

Thus, having lost years ago with the truth, the University has decided to try a lie: the diversity lie.

* Mr. Fitzpatrick is an associate at Sidley, Austin, Brown & Wood LLP in Washington, D.C., and a former law clerk to Supreme Court Justice Antonin Scalia. His views do not represent those of his law firm.

Footnotes

[1] *Korematsu v. United States*, 323 U.S. 214 (1944).
[2] *United States v. Paradise*, 480 U.S. 149 (1987).
[3] Brief for Respondents at 3, *Grutter v. Bollinger* (No. 02-241) ("Grutter Br.").
[4] *Id*. at 2.
[5] 518 U.S. 515 (1996)
[6] *Id*. at 535.
[7] *Id*.
[8] Justices Stevens, O'Connor, Kennedy, Souter, and Breyer.
[9] *See e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (O'Connor, J joined by, *inter alia*, Stevens, J.) ("Thus, we conclude that, although the state recited a [legitimate purpose], it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."); *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (Rehnquist, C.J., joined by O'Connor, J., Scalia, J., Kennedy, J., and Thomas, J.) (holding that a racially discriminatory law cannot "withstand strict scrutiny based upon what 'may have motivated' the legislature"; instead, "the State must show that the alleged objective was the legislature's 'actual purpose'"); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (Rehnquist, J., joined by, *inter alia*, O'Connor, J.) (refusing to hear the state's "legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude" because "such a purpose simply was not a motivating factor of the 1901 convention," at which the law under consideration was enacted).
[10] 122 S.Ct. 2528 (2002).
[11] *Id*. at 2531.
[12] *Id*. at 2534.
[13] *Id*. at 2535.
[14] *Id*. at 2536.
[15] *Id*. at 2537.
[16] *Id*.
[17] 512 U.S. 43.
[18] *Id*. at 52-53.
[19] Grutter Br. at 2-3.
[20] Grutter Br. at 7-8.
[21] *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989).
[22] *Id*. at 857-58.
[23] *Id*. at 853.
[24] *Id*. at 861.
[25] *White*, 122 S.Ct. at 2537.
[26] Free Press, 1998.
[27] *Id*. at 80 (emphasis added).
[28] *See, e.g., Corry v. Stanford*, No. 740309 (Cal Sup. Ct., Feb. 27, 1995) (order on preliminary injunction).
[29] Brief for Respondents at 27, *Gratz v. Bollinger* (No. 02-516) (emphasis added).
[30] Shadow University, at 194.
[31] *Id*. at 198 (internal quotation marks omitted).
[32] Brief of Columbia, et. al., at 2, *Grutter v. Bollinger* (No. 02-241) & *Gratz v. Bollinger* (No. 02-516) (internal quotation marks omitted).
[33] Shadow University, at 200. The University balked at creating a special dorm for gay students. *Id*.
[34] *Id*.
[35] Michael A. Fletcher, *Diversity or Division On Campus?*, Wash. Post (May 19, 2003) at A1.
[36] *Id*.
[37] *White*, 122 S.Ct. at 2537.
[38] *Affirmative Reaction*, The American Prospect, Mar. 1, 2003.
[39] *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 28, 34 (2002).
[40] Daniel Golden, *Some Backers of Racial Preferences Take Diversity Rationale Further*, Wall Street Journal (June 14, 2003) at B1.
[41] *Affirmative Action*, 107 Yale L.J. 427, 471 (1997).
[42] *The Unresolved Problems of Reverse Discrimination*, 67 Cal. L. Rev. 87, 122 (1979).
[43] *Affirmative Action And The Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 Cardozo L. Rev. 379, 407 (1979).
[44] 438 U.S. 265 (1978).
[45] 476 U.S. 267 (1986).
[46] *Id*. at 274, 276 (plurality opinion); *accord id*., at 288 (O'Connor, J., concurring in part and concurring in judgment); *id*., at 295 (White, J., concurring in judgment).

Corporations

Harmonization, Preemption or Federalism?

By Michael Fransella

Blue Sky laws aren't much fun for a securities lawyer. Often an afterthought, and nearly always an annoyance, they demand extra research and extra blurbs in offering documents, and accomplish little beside extracting a few dollars from the pockets of issuers to state coffers (and of course, to lawyers), and furnishing a further set of tripwires for companies and attorneys picking their way through the SEC minefield. When the SEC proposed defining a "qualified purchaser" under the Securities Act to be equivalent to an "accredited investor" under Regulation D,[1] a move that would result in the preemption of state standards for many private offerings, I suspect most securities lawyers applauded hopefully, except perhaps the ones who specialize in Blue Sky laws. Even those of us otherwise ideologically committed to federalism, devolution, and local control couldn't help but think that preemption would be a good thing, for our clients and for the securities market as a whole. An example, perhaps, of self interest trumping ideology.

More recently, legislation was again introduced in the Financial Services Committee of the House of Representatives that would limit the power of state regulators and attorneys general to impose rules and standards of conduct on the securities industry beyond what is required by federal laws and regulations. That the legislation is supported by the SEC and opposed by the states could not be less surprising. The apparent paradox, to the bill's detractors in the House, the states, and the punditry, is that its proponents are conservative Republicans who in other circumstances have been known to champion such things as "states' rights" and "federalism." In the words of New York Attorney General Eliot Spitzer, "the Federalism of the Republican Party seems to apply when the issue is the rights of the poor, and they want to leave that to the states…but when it comes to using power to help their corporate patrons, they bring it back to Washington."[2] In the face of such criticism, the bill has been postponed and perhaps killed.

Do Spitzer and the other critics have a point? Are Republican lawmakers hypocritically putting aside their principles to further their own interests or those of their friends and supporters? Were those of us who supported federalism in theory, but reacted hopefully to the SEC's proposed preemption of state private offering standards, allowing our own annoyance at having to navigate state laws to blind us to the laws' beneficial effect to society? Since we can't look into hearts to discern motives, a better question is, is it *inherently* inconsistent and hypocritical to support federalism and states' rights in general, but still support the federal preemption of state securities regulation? Can one simultaneously oppose tax harmonization efforts or the establishment of federal corporate law, while supporting the Uniform Commercial Code or federal preemption of state antitrust enforcement? In other words, when federalism, and when harmonization or preemption?

The Point of Federalism

Although traditionally referring simply to a system of split authority between a central government and local governments, particularly the system established by the U.S. Constitution, "federalism," in modern political parlance, is often used to refer to the position that the current split of authority vests too many powers in the federal government and too few in the states, or, even more specifically, to the political philosophy advanced by Michael Greve[3] and others that pathologies of government will be reduced, and beneficial governance made more likely, when governing power is held by a number of competing jurisdictions. Advocates of federalism so defined would hasten to point out that they are not promoting "states' rights" per se, but a system thought to promote liberty and efficiency. In our current context, such an analysis will often lead to the conclusion that some of the powers currently exercised by the federal government should instead be exercised by the states. However, the point is not to protect the sovereignty of states after the manner of John C. Calhoun, but rather to protect the liberty of private actors. Competition among jurisdictions, it is argued, will produce a kind of market force that will compel governments to shape their laws so as to appeal to private actors. When states compete, you win.

On the other hand, there is clearly an economic cost to federalism, particularly, or at least particularly visibly, in the areas of corporate, commercial, and financial law. Even evaluating and choosing a single legal regime from among fifty requires time and resources that could be saved if there were only one, national regime available. And if more than one regime must be complied with, a potentially very large transaction cost is added to economic activity. Businesses that operate nationwide or worldwide are often happy to reduce the cost of compliance through federal preemption of state regulation, perhaps without thought to the likely differences in substantive content. Less frequently, a similar consolidation of regulatory regimes is achieved by harmonization of state laws, rather than by federal preemption, with the UCC being a conspicuous example. It would be hard to find a banker or a frequent secured debtor who would be eager to return to having fifty different regimes regulating secured

transactions or letters of credit. And yet, we might suppose that federalist theory would liken the UCC to a cartel among the states, all agreeing to offer the same product so as to avoid competing. And when suppliers (in this case, of law) form a cartel, consumers seldom come out ahead. Similarly, no merging company wants to comply with fifty antitrust regimes, and no issuer wants to comply with fifty securities commissions.

The question, then, is what principles can be articulated to determine when the benefits of federalism will be likely to outweigh the costs of federalism (or, to put it the other way around, when the costs of preemption or harmonization will outweigh the benefits of uniformity). The benefit of federalism, remember, is competition. If states do not or are not likely to compete meaningfully, there is little reason to bear the economic cost of duplicative regulatory regimes. This question then becomes, when are states likely to compete meaningfully? Under the same circumstances under which businesses compete: when consumers have a meaningful choice, and when forming or maintaining a cartel is impractical. To determine whether a particular area of corporate or commercial law is better handled by the federal government or by the states, therefore, should involve analyzing whether state regulation would result in meaningful choice for economic actors among regulatory regimes.

Federalism in Securities Law?

Take securities regulation.[4] A securities offering is typically initiated by a single seller, which offers and sells securities to buyers who are numerous and often dispersed. Each state imposes its regulations territorially. If a buyer is located within a state, that state's regulations must be complied with, at least to the extent they are not preempted by the SEC. The buyer or offeree does not have a realistic choice among regimes: few individuals will seriously consider moving their residences to another state to take advantage of a greater range of securities offerings that might be available there as a result of a better regulatory regime. Nor does the seller have a choice: it must comply with the regulations of each state where an offeree resides, or forego that part of the transaction.[5] The only check on state regulators is whatever pressure their constituents exert on them to craft regulations that will increase the number and quality of securities offerings available in their state. Given the infrequency of participation in securities offerings by most affected buyers, and the relatively small and speculative nature of the damage done to any one of them by inefficient regulation, this pressure ranges from negligible to nil. State politicians are likely to get far more mileage from posing as defenders against out-of-state snake oil touts than they could hope to get by opening markets. In this state of affairs, there is little or no incentive for states to compete in a way that would make securities markets more efficient. Moreover, even if there were such an incentive, since offerings would still have to comply with the poor regimes as well as the good ones, the strictest regimes might end up setting the de facto standard. Since there is no significant competition among states, and no reasonable prospect of such competition, it is hardly surprising that those who might normally adhere to federalist principles would favor preemption by the SEC of state securities regulation. One standard is obviously preferable to fifty, other things being equal, and the securities industry will be at least part of the constituency of the SEC, which means that there is reason to think that SEC regulations could be substantively superior to those adopted by most individual states.

To capture the benefits of federalism for securities regulation, issuers would have to have the ability and the incentive to choose among competing regimes. This would require a shift from the territorial application of securities regulations, based on where the "offer" is made or where the offeree is located, to a system in which an issuer could choose the regime that would regulate its offering, or as a second-best solution, to a system in which the law of the issuer's jurisdiction, rather than the jurisdiction of the offeree, applied to the transaction (assuming that issuers could and would organize in or move to a jurisdiction to take advantage of its regulatory regime).[6] Several scholars have in fact proposed giving issuers the power to choose a regulatory regime to govern their offerings. For example, Stephen Choi and Andrew Guzman proposed a mechanism under which participating nations would recognize an issuer's choice of another participating nation's securities laws, or, indeed, of contractual or private regimes,[7] and Roberta Romano has proposed a similar system of competing regulation by states, the SEC, and foreign nations, any one of which could be chosen by issuers.[8]

What Spitzer and other critics miss or choose to ignore is that federalism is not about restraining private actors, but rather about restraining governments. To the extent that we want to be paternalistic, and believe that the market will not provide the protections that offerees need, then the question is whether allotting such regulation to the states rather than to the federal government will provide some benefit that can justify the economic cost, both in wasted governmental resources and in compliance costs, of having fifty such different regimes. Of course, an argument can be made that, even discounting competition among states, government that is closer to its constituents will be more responsive and better aware of their particular desires and tolerances, and will therefore produce better results than the federal government, or that experimentation by states, letting fifty flowers bloom as it were, will produce at least some very good regimes that can then be adopted more widely. But given the experience of how state regulators operate, and the reasons, discussed above, to be skeptical of the potential for any effective electoral check on regulatory excess at the state level, it's hard to fault congressional Republicans for concluding that preemption by the SEC of Spitzer and his colleagues would be a good thing.

When Federalism?

The classic example of an area in which competitive federalism can work is taxation. To the extent that individuals and businesses are able to move themselves or their economic activity from one jurisdiction to another in response to differing levels of taxation, states (and nations) are forced to compete for tax revenue by lowering taxes, just as businesses compete for revenue by lowering prices. Crucially, each individual, transaction or stream of income is most often taxed by only one jurisdiction at a time, and taxes can be such a substantial factor that the benefits of switching jurisdictions based on taxation will often outweigh the costs of switching. These same competition-promoting factors also serve to inhibit the ability of regimes to form a cartel, although, like businesses, many of them would like nothing better than to do so.[9] In fact, shifting taxing authority and spending responsibility from the states to the federal government is equivalent to the formation of a cartel: a single "supplier" of services and tax policy replaces competing suppliers, and like a cartel or monopoly is insulated from the discipline of the market.

The benefits of federalism for improving taxation policy can be enhanced by reforms that base taxation on factors that can be easily changed or manipulated by the subjects of taxation. For example, as Greve has pointed out,[10] allowing states to tax internet sales based on the location of the seller would be far superior to a system in which such sales were instead taxed based on the location of the buyer, since sellers will typically have far greater incentive and ability to change jurisdictions than will buyers. It's true that, for businesses that operate nationally or globally, a proliferation of taxing regimes will increase compliance costs. But any likelihood of real competition among states with respect to tax policy would result in any such costs being dwarfed by the benefits of the lower tax burden that devolution of taxing and spending authority would provide.

Similarly, corporate law, and contract law in general, provide an example of federalism that has been, on balance, successful. Because an entity can choose its jurisdiction of organization and have that choice respected by most other jurisdictions, there is real competition among states and foreign governments to produce corporate law and corporate forms that will be attractive to incorporators or to existing entities looking to reincorporate. The way Delaware markets its corporate law, and the way the Delaware Division of Corporations interacts with its "customers," for example, is far closer to what we typically expect from a private firm than to what we expect from a bureaucracy. As a result, corporate law is shaped to appeal to those who are subject to it.[11] Similarly, because most jurisdictions will recognize a choice of law by sophisticated parties to govern a contractual relationship, cross-border transactions can take advantage of a known commodity like New York or English law and limit their inquiry into other local laws to the question of whether their choice of law will be observed, passing over substantive contract law entirely. Because a jurisdiction does not necessarily benefit directly from having parties choose to be governed by its contract law, the incentive for states to improve contract law is not as great as the incentive to improve tax or corporate law. Even so, since there is no appreciable benefit to having only a single contract law, the benefit of experimentation alone, even without competition, should be enough to justify leaving contract law to the states.

When Harmonization or Preemption?

Like securities regulation in its current form, other areas of business law in which federal preemption or harmonization of state laws appears desirable from the standpoint of governance and economic efficiency[12] tend to be characterized by a lack of realistic choice among regimes on the part of regulated entities. For example, if each state is going to have a mandatory standard for validity and perfection of security interests that it applies to debtors and/or collateral within its borders, better that each state have the same standard, as in the case of Article 9 of the UCC, than that there be fifty different standards, as in the case of priorities in real estate. Moreover, because such laws govern intercreditor disputes in addition to creditor/debtor issues, there is no practical way for the involved parties to choose a law. In such a case, the best solution is likely to be a single standard, arrived at either through harmonization of state laws, as with the UCC, or through federal preemption.[13]

Regulation of industries that operate in a national market, such as telecommunications regulation, much of antitrust, or energy, provide another instance in which regulation by local jurisdictions would tend to be cumulative, rather than competitive, because such regulation is based on operation within the jurisdiction of the regulator, rather than on the choice or home jurisdiction of the regulated entity. Indeed, the securities industry can be considered as part of this category. This cumulative regulation is why proponents of deregulation and smaller government often support transfers of authority to regulatory agencies such as the FCC or FTC at the expense of state regulators.

Conclusion

The reason that Spitzer's criticism is poorly founded, then, is that federalism is a means, and not an end. The end is regulation that is more efficient and less burdensome to economic actors, and less detrimental to liberty. If devolution were good at all times and places, then presumably we would not have a federal government at all. Unless you are a bureaucrat or politician in one or the other, there is little reason to support the states against the federal government, or the federal government against the states, in all circumstances: both are tools to be used to keep the other in check and perform the tasks for which they are best suited. Because it happens that the states are best positioned to tax and spend on social programs, while the federal government is best positioned to provide any mandatory regulation of securities offerings, the contrast cited by Spitzer as an example of hy-

pocrisy is in fact consistent with the principle of free enterprise and small government. This point is poorly understood by the public at large, and appears to be poorly understood even by many of the very politicians who practice it but seem incapable of explaining the apparent contradiction, and are therefore forced to retreat from a beneficial reform. If they are to avoid being painted as latter-day Calhouns at best and corrupt hypocrites at worst, it would be well for leaders who preach federalism to understand it.

Footnotes

[1] Proposed Rule: Defining the Term "Qualified Purchaser" Under the Securities Act of 1933, Release No. 33-8041,17 C.F.R. pt. 230 (Dec. 19, 2001).

[2] *As quoted in* E.J. Dionne Jr., *Defending States' Rights—Except on Wall Street*, Wash. Post, July 22, 2003, at A17.

[3] *E.g.*, Michael S. Greve, Real Federalism: Why it Matters, How it Can Happen (1999).

[4] …Please! *Cf.* Henny Youngman, Take My Wife, Please!: Henny Youngman's Giant Book of Jokes (1998).

[5] The latter response can be seen on an international level in the frequent offerings that are made available to investors virtually everywhere except the United States by firms that don't want to expend the resources necessary to comply with U.S. securities regulation. The SEC's reputation at home as a lax regulator is not shared abroad.

[6] Ironically, effective federalism will often require harmonization of choice-of-law rules across competing jurisdictions.

[7] Stephen J. Choi and Andrew Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903 (1998).

[8] Roberta Romano, The Advantages of Competitive Federalism for Securities Regulation (2002).

[9] *See, e.g.*, Organisation for Economic Co-operation and Development, Harmful Tax Competition: An Emerging Global Issue (1998).

[10] Michael Greve, *Yes, Tax the Net*, Weekly Standard, May 15, 2000.

[11] That is, to those who have control over the entities organized under such law. How to deal with the agency costs inherent in dispersed ownership of such entities, and the resultant possibility that corporate law is serving the interests of managers rather than shareholders, is an important but distinguishable issue; the point here is that it is the preferences of the regulated, and not of the regulators, that are being served.

[12] Whether federal preemption complies with Constitutional limitations on the federal government's powers, although undoubtedly an important question, is beyond this article's scope.

[13] This analysis would arguably not apply to purely contractual portions of the UCC, such as Article 2 (Sales). Contracting parties are capable of choosing the law to apply to a sales transaction, and federalism would presumably provide at least the benefit of experimentation and natural selection, if not competition. However, to the extent that contract law is default law that applies only when an alternative governing law has not been chosen, a uniform default law will reduce costs, which may offset the benefit of experimentation.

Mandatory Expensing of Stock Options: A Bad Idea Whose Time Has Not Come

*By Daniel Fisher**

I. Introduction

The corporate scandals of the last few years have dramatically altered the landscape of corporate governance. These scandals resulted in a rush by regulators and legislators alike to alter the existing regulatory framework, which was thought to have led to billions of dollars in investor losses. The scandals and the market losses they caused have been addressed by reform measures such as the Sarbanes-Oxley Act, enhanced New York Stock Exchange, NASD, and American Stock Exchange corporate governance standards, New York Attorney General Eliot Spitzer's use of an obscure 1921 statute, the Martin Act, to launch a crusade against Wall Street, and SEC Chairman William Donaldson's recently announced proxy rule changes.[1] These actions have been in response to demand, of varying degrees of intensity, from the public and the investment community. However, like many previous sets of reforms, the test of whether the recent corporate governance measures will actually result in less corporate wrongdoing, or will merely force those wishing to engage in corporate wrongdoing to be more creative, will come over time.

Recent corporate governance reforms, whether by legislation or litigation, have arguably been burdensome, but not excessively harmful to public companies that must comply with them. However, the Financial Accounting Standards Board (FASB) and the Securities and Exchange Commission (SEC) are nearing a decision that would be truly deleterious to public companies, especially small and medium-sized ones, and the benefits of which would not come close to outweighing the burdens: to force companies to account for employee stock options as an expense on their income statements.

Even a brief examination of the role that employee stock options play in the economy, and the manner in which they are currently accounted for in corporate financial statements, shows their importance. This article examines the potential FASB action, embodied in proposed modifications to Financial Accounting Standard 123 (FAS 123), as well as alternatives that would increase the transparency and usability of financial statements without the harmful effects of mandatory expensing. To force the expensing of employee stock options would be a significant overreach that would not have the effect intended, but would instead result in blowback that would be harmful to the economy, especially some of its most vulnerable parts.

II. The Role of Employee Stock Options

Like stock ownership itself, employee stock options have grown in popularity over the past decade, and are now granted not only to senior executives but to hourly workers and middle managers as well. Advocates of employee stock options claim that they serve a valuable purpose by aligning the interests of a company's employees with those of its shareholders and promoting a sense of ownership, which leads to better corporate performance, and by allowing smaller companies to offer competitive compensation packages that attract talented employees.

Employee stock options are particularly important among start-up companies in technology and related fields. Large, established companies, with more predictable cash flows, have little difficulty utilizing cash compensation to attract employees. However, emerging or other growth businesses often need to save their cash resources for crucial stages of their own internal development. As a result, such companies must include stock options as a substantial component in order to offer competitive total compensation packages. Thus, the ability to grant options relatively painlessly is important to the competitiveness of these crucial parts of the economy.

Companies that decided to issue fewer employee stock options would likely place a high priority on ensuring that their executive compensation packages remain attractive, and would allocate those options remaining to their high-ranking executives. Thus, lower-paid workers and those with fewer stock options, and for whom stock options are a key part of what could be an otherwise modest compensation package, could well be most affected. This result runs contrary to the intent and spirit of the recent corporate governance reforms, which has been to limit the possibility of malfeasance by a handful of high-ranking executives, and to put strict limits and controls in place to prevent such individual abuses. Instead, any decline in the popularity of options would penalize workers farther down the corporate ladder, workers who have been the victims, rather than the villains, of the corporate scandals of the past several years.

The data on the broad range of stock option grantees speaks for itself. According to the National Center for Employee Ownership (NCEO), as of 2002 there were over 4,000 broad-based stock option plans covering between 8 and 10 million participants.[2] As an indicia of the broad nature of the stock option plans, in making its calculations the NCEO only counted as "broad-based" those plans that granted stock options to more than half of a company's full-time employees.[3]

III. The Current Paradigm

Prior to FAS 123, Accounting Principles Board Opinion 25 (APB 25) governed the accounting of stock options. APB 25 stated that the compensation expense of options charged against earnings at the time of grant was the difference between the company's current stock price and the option strike price at the time of grant. Since the option strike

price is virtually never below the company's current trading price, this essentially results in no charge against the income statement. However, companies must nonetheless provide some pro-forma information about the effect of employee stock options on their financial statements.

Currently, the number and value of employee stock options are typically disclosed in footnotes to the income statement and balance sheet presentation of a company's annual report on Form 10-K. Companies have varying ways of displaying these data. However, the core metric that allows investors to understand the impact of employee stock options on the company's financials statements is called "diluted earnings per share" (Diluted EPS). Diluted EPS is built off the company's normal earnings per share, which is generally calculated by dividing net income by the number of outstanding shares. Diluted EPS takes into account the potential impact on earnings of employee stock options by increasing the number of the company's outstanding shares—the denominator in the EPS equation—by the number of employee stock options that are "in the money".[4] This metric is appropriate because it takes into account the maximum realistic exercise of options, and is easily readable and distinguishable from normal EPS.

IV. The FASB "One Size Fits All" Solution

FAS 123 encourages companies to account for the expense of stock options as a charge against earnings on their income statements, and to use the date of the grant of the option as the basis to calculate the expense. In the alternative, FAS 123 permits companies to continue to adhere to APB 25, but requires those that do so to provide further disclosure about pro-forma net income and earnings per share as if the company recorded the employee stock options as an expense at their grant date. If the FASB drops the optional APB 25 provision, as it is considering, and the SEC recognizes the modified FAS 123 as GAAP (and therefore mandatory in financial statements provided on Form 10-K), reporting companies will have no choice but to expense their stock options in the manner provided for by FAS 123.

There are a number of serious flaws with the mechanics of mandatory expensing, even if the policy considerations in favor of stock options are ignored. Perhaps the most difficult aspect of expensing options in adherence with FAS 123 is the problem of valuing the option at the grant date. Currently, options are generally valued according to the Black-Scholes model, which is a multi-factor model that takes into account current stock price, option exercise price and duration, expected stock volatility and dividends, and a theoretical risk-free interest rate, and was initially developed to value tradable short-term options. However, Black-Scholes is generally thought to overstate the value of employee stock options, since it does not take into account that fact that, unlike the tradable short-term options for which the model was developed, employee stock options are not tradable, have vesting period of varying lengths and are subject to blackout periods.[5] Although several alternative models to Black-Scholes have been developed, these are as yet untested, and may well contain similar or additional flaws to those of the Black-Scholes model.

Another potential problem that could stem from mandatory expensing is the double-counting of the impact of options on a company's bottom line and equity holders. As described above, Diluted EPS, which consists of net income divided by shares (including "in the money" options) is a crucial metric in analyzing financial statements and best represents the impact of extant stock options on current shareholders. If options were required to be expensed, the EPS equation numerator (net income) would be reduced, since the expense of options would be offset against net income. However, Diluted EPS already takes options into account by increasing the denominator (to reflect the "in the money" options). Thus, the expensing of options would have a double impact on the Diluted EPS numbers of a company. This combination would cut diluted EPS sharply at many companies, including some that are the cornerstones of the U.S. economy, and could serve to confuse investors far more than it would help. For example, if Microsoft had been required to expense options in 2002, its Diluted EPS would have gone from $1.41 per share to $0.98 per share, a 30% drop.[6]

V. Alternatives to Mandatory Expensing

Many companies, mindful of the controversy surrounding the accounting treatment of employee stock options and seeking to improve transparency and accountability in light of the current corporate governance environment, have recently begun to expand their presentations of the impact of employee stock options in their financial statements in order to give an even fuller picture of their financial effect. For example, in its notes to its financial statements, Microsoft presents pro-forma income statements that reflect compliance with the FAS 123 expensing requirements. Other companies utilize similar presentations in their Form 10-Ks.

As the sector perhaps most seriously affected by the possibility of mandatory expensing, the technology industry has been at the forefront of opposition to the FASB's proposed modifications to FAS 123. TechNet and the American Electronic Association (AeA), which represent the interests of high-tech executives and companies, respectively, have proposed guidelines for greater stock option impact disclosure that would not have the deleterious effects of mandatory expensing. The TechNet/AeA proposal recommends that on a quarterly basis, in their 10-Q filings, companies report detailed information about employee stock option exposure in a manner accessible by investors. The TechNet/AeA proposal calls for increased disclosure of:[7]

- employee and executive option grants;
- year-to-date option activity, as well as option activity in the prior fiscal year;
- "in the money" and "out of the money" option informa-

tion as of the reporting date (i.e., options that have an exercise price below a company's current share price, as well as options with an exercise price above the company's current share price); and
- the portion of options that go to executives versus the portion provided to the rest of the company's employees.

The TechNet/AeA proposal would also separately provide more information about options granted to and held by a company's senior executives, including:

- new options granted during the quarter;
- options exercised during the quarter and the value of those options;
- the total number of options held by executives; and
- the dollar value of options that are "in the money".

The TechNet/AeA proposal is intended to give shareholders a "one-stop shopping" approach to employee stock option information and to avoid the conflicting presentations sometimes found in annual reports, while providing a proactive solution to calls for increased transparency and avoiding mandatory expensing.

Currently, companies may also make the choice to treat options as an expense or to stop issuing them altogether, either because they seek to maximize their transparency to the financial markets or because stock options no longer fit their compensation structure. This allows companies the flexibility to comply with FAS 123, but does not impose on all public companies compensation structures that, in reality, are highly dependent on individual circumstances. For example, Microsoft recently announced that it would no longer issue stock options, but would instead issue restricted stock with a five-year vesting period to employees. The financial press treated this announcement as an admission by Microsoft that it was no longer a growth stock, and that employee stock options with high strike prices were not the incentive that they had been previously, rather than any normative statement about the need for pure accounting standards. Other companies, such as Fannie Mae, have announced that they will continue to issue stock options, but will voluntarily adhere to FAS 123 and record the cost of options as an expense against earnings at the time of the grant. Market capitalism would presume that these companies have weighed the danger to employee morale and competitive compensation versus transparency and other corporate governance factors, and determined that expensing is worth the cost. If they have not made such a determination, their rush to judgment should be reflected in their financial performance.

Unsurprisingly, the issue of expensing options has become political. Members of Congress who represent areas with high concentrations of start-ups and high-tech companies have been outspoken in their opposition to expensing, and have attempted to force the FASB to reverse itself. Two such members, Republican Congressman David Dreier (chairman of the House Rules Committee and a member of the Republican leadership) and Democratic Congresswoman Anna Eshoo, both of California, have introduced HR 1372, the Broad Based Stock Option Plan Transparency Act.[8] HR 1372 would compel the SEC to increase disclosure requirements for employee stock option information in ways generally designed to increase the average investor's ability to understand the data. However, the Dreier-Eshoo bill would also impose a three-year moratorium on the ability of the SEC to require companies to expense options. HR 1372 has received a hearing in the Capital Markets Subcommittee of the House Financial Services Committee. However, a similar bill in the Senate, sponsored by Senator Barbara Boxer (D-CA) and Senator John Ensign (R-NV) has been temporarily blocked by Senate Finance Committee chairman Richard Shelby (R-AL), who opposes what he claims is political intervention in FASB affairs.[9] Other politicians, such as Senator John McCain (R-AZ) and Senator Carl Levin (D-MI), who have generally been proponents of broad corporate governance reforms, have taken the lead in attempting to force companies to expense options.[10]

VI. Conclusion

Compensation policies appropriate for Microsoft or Fannie Mae are not necessarily appropriate for smaller high-tech or growth businesses, and the potential damage of mandatory expensing of options seems far higher than the marginal transparency benefits supplied by FAS 123. Moreover, there are substantial functional problems with the calculations required to implement FAS 123. If FAS 123 was to become mandatory, public companies would be forced to take hundreds of millions and in some cases billions of dollars of charges against their income statements based on a theoretical formula not designed for its current use, and producing valuations of dubious reliability.

Mandatory adoption of FAS 123 would also have a damaging effect on the ability of American companies to hire and retain skilled workers at all levels. It would reduce companies' earnings based on an uncertain metric—the very opposite of the goal of increased transparency. Furthermore, coming on the heels of Sarbanes-Oxley, the stock exchange and NASD corporate governance reforms, and the endless investigations of corporate scandals, mandatory expensing of stock options has the feel of a late-stage progressive reform whose full effects may not be fully understood, and whose true impact might not be known, until it is too late. In 1911, California Governor Hiram Johnson pushed through a well-intended measure, Constitutional Amendment No. 22. Constitutional Amendment No. 22 was passed by the California legislature and ratified by the public at the tail end of a number of other progressive political reforms and sought to ensure that state government was accountable to the people it serves—certainly a laudable goal. Constitutional Amendment No. 22 is perhaps better known as the California recall

measure, and we are seeing today the uncertainty it is bringing—an effect almost certainly not intended by its drafters. Will mandatory expensing of options have a similar effect? Will FAS 123, instead of resulting in one special election in one state as California Constitutional Amendment No. 22 has, result in significant damage to the American economy? Only by postponing mandatory expensing, studying the issue more fully, and developing a more accurate valuation model can we even begin to answer these questions.

* Daniel Fisher is an Associate in the New York office of Skadden, Arps, Slate, Meagher & Flom LLP. The views expressed in this article are solely those of Mr. Fisher, and do not necessarily represent the views of Skadden, Arps, Slate, Meagher & Flom LLP.

Footnotes

[1] The Martin Act, which has traditionally been seldom used, is among the most powerful state securities law in the nation. Jerry Markon and Charles Gasparino, *For Corporate-Crime Fighters, 1921 Martin Act Isn't Too Old*, Wall Street Journal, October 2, 2002.

[2] National Center for Employee Ownership, A Statistical Profile of Employee Ownership (April 2002).

[3] *Id*.

[4] In the money options are options for which the exercise price is below the current market price of the underlying stock.

[5] Letter from Biotechnology Industry Organization to FASB (January 31, 2003), *available at* <http://www.bio.org/tax/letters/20030131.asp>; *see also* Letter from TechNet to FASB (February 1, 2003), *available at*http://www.technet.org/issues/option_comment_letter_02_03.html>.

[6] Microsoft Corporation 2002 Form 10-K.

[7] The TechNet/AEA proposal, which is restated here, is available at <http://www.technet.org/issues/stock_options_disclosure.html>.

[8] *See* <http://dreier.house.gov/pdf/stockoptions_summary.pdf>.

[9] Craig Schneider, *Congress, FASB in Stock Option Flap*, CFO.com, June 2, 2003, *available at* <http://www.cfo.com/article/1,5309,9644,00.html>.

[10] *Dreier, Eshoo Go on "Offensive" in Debate Over Options Accounting, Introduce Measure*, BNA Pension and Benefits Reporter, March 25, 2003. Senators McCain and Levin have introduced several bills seeking to both pressure FASB to issue mandatory expensing standards, and to pressure companies into voluntarily expensing options.

Criminal Law & Procedure

Federal Plea Agreements: The Engine That Drives the Prosecution of Increasingly Complex Crimes

*by Carter K. D. Guice, Jr.**

There has been much controversy and criticism, from academia, the bench and the criminal defense bar, over the use of plea agreements to resolve criminal controversies. Indeed, a panel of the federal Tenth Circuit Court of Appeals in *United States v. Singleton*[1] held that plea agreements and subsequent motions filed by federal prosecutors on behalf of cooperating witnesses seeking a more lenient sentence rose to a level of public bribery criminally proscribed by Title 18 Section 201(c)(2) of the United States Code.[2] While the holding in *Singleton* was overturned in less than six months by the Tenth Circuit sitting *en banc,* the entire plea bargain/agreement issue remains a hot topic in the criminal law milieu. This article will attempt to present a practical view on the crucial role plea agreements[3] and Section 5K1.1 motions play in the investigation and prosecution of complex federal cases.

The plea bargain, defined here as a written agreement between the federal government and an uncharged federal criminal target which offers an opportunity for a the target to earn a chance at a lesser sentence based on substantial assistance to the government, is perhaps the single most effective tool available to the government to infiltrate criminal and terrorist organizations. Some courts have insisted that the federal government has at its disposal a vast arsenal of investigative and coercive weapons, including:

> ...the power to call persons before a grand jury; to send out FBI agents with the authority of that office to interview potential witnesses; the power to grant immunity which erases a person's Fifth Amendment privilege and compels the person to testify; the power to decide who to charge with what criminal offense; the power to indict, to dismiss and reduce charges.[4]

Despite the foregoing roster of government powers, all of those tools, many of which evaporate by the mere assertion of the Fifth Amendment by a target of an investigation, pale in comparison to the surgical utilization of an individual working on behalf of federal authorities inside of a criminal enterprise. As current events continue to play out, this writer believes that plea bargaining will take on an even more significant role in terrorism and major corporate corruption scandal cases as well as the traditional white collar, RICO and drug organization prosecutions.

This article will be divided into three sections. The first will briefly summarize two of the key criticisms of the plea bargaining process in both the academic and judicial spheres. The second will explore the policy reasons and practical daily use of the process, including the constitutional protections which are in place to not only protect the cooperator, but also the persons against whom they will ultimately testify. In the third and final section, an attempt to place plea agreements within the logical framework of responsible citizenship will be presented.

I. The Criticism of Plea Bargains

Those who dislike plea bargains constitute a very diverse and vocal congregation. The body of literature dealing with the perceived faults of plea bargaining is overwhelming. Out of the cacophony of complaints, for purposes of this article the two most historically resonant and consistent grievances will be reviewed.

The first criticism, led by the widely respected law professor Albert W. Alschuler, approaches the issue from a humanist perspective and takes the position that plea bargains, "depreciate the value of human liberty and the purposes of the criminal sanction by treating these things as commodities to be traded..."[5] This group asserts the concept was first considered by the Roman slave Publilius Syrus who wrote in the first century B.C., *"beneficium accipere libertatem est vendere,"* which roughly translates: to accept a favor is to sell one's liberty.[6] This group finds it offensive when a defendant is penalized for exercising the basic constitutional right of having his case tried before a jury of his peers. Put another way, if an innocent person receives a more severe sentence after a trial after turning down a more lenient plea offer, critics submit that plea bargains systemically undermine the integrity of the criminal justice system. Judge Fine of the Wisconsin State Court of Appeals eloquently summarizes this group's perceived evil of the existing plea bargaining system in arguing that, "[the defendant] was 'punished' the moment he demanded what the constitution said was his – the right to plead not guilty and have a jury decide his guilt or innocence."[7]

The other major complaint, which is much more cynical, was crystalized in *Singleton ,* which sets out that prosecutors in essence "buy" co-conspirator testimony by offering reduced sentences. As the three judge panel of the Tenth Circuit held, "The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money."[8] One court has held,

"It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."[9]

While the critics of plea bargaining, on the surface, present compelling arguments against the practice, a more in depth analysis discloses that written plea agreements significantly benefit not only the individual accused of the crime, but also society at large.

II. Practical Benefits of Plea Agreements to the Defendant and the Government

A. Plea Agreements Save Resources

The first and most obvious benefit to both the government and the defendant is that the defendant who admits his guilt avoids the time and expense of trial and potentially spends less time in government custody. The defendant can return to his life, family and friends that much sooner. Some commentators have suggested that the entire process of the defendant accepting responsibility for his actions and making intellegent decisions initiated by the plea agreement process may begin the criminal defendant's first step towards rehabilitation, which benefits society at large.

Moreover, from an economic standpoint, criminal defendants generally expend much less in legal fees, investigative and litigation expenses on a plea agreement than on a full blown jury trial. As there are inevitably economic challenges facing most defendants after conviction and incarceration, the money better serves him in his own pocket rather than that of his defense attorney's.

The government benefits directly because at the very least, it obtains a conviction, puts a criminal in the penitentiary for a period of time and does not have to expend the additional personnel, material and economic resources to convict the defendant at trial. While it is true that most criminal cases tried in a United States District Court result in a conviction for the government, most laymen and academics do not understand the prodigious amount of resources which must be expended by the prosecution, ultimately financed by the taxpayers, to raise the probability of unanimously convincing twelve persons beyond a reasonable doubt that a fellow citizen should be convicted of a crime and face incarceration.

A federal prosecutor preparing for a complex white collar jury trial, must put aside other casework to allow him to focus in detail on what is required to win the trial. Evidence, which has been gathered sometimes for months or years, is physically transported to the prosecutor's office and formally organized. Proof of fact sheets and trial binders are readied. Witnesses are frequently flown in from out of town, fed, housed and prepped. Other lawyers in the office are lassoed in order to add fresh intellectual wattage to arguments, examinations and cross-examinations. Other resources such as clerical personnel are diverted from routine duties to assist with trial preparation.

In more significant cases to the public, juror questionnaires are designed, distributed and analyzed. Prosecutors sometimes must travel to the Department of Justice in Washington, D.C. to confer with Department officials on policy issues. In short, the level of excellence required both by the individual prosecutors and the Department require intense activity for extended periods. A written plea agreement achieves substantially the same result with the added benefit of the defendant's cooperation.

Moreover, there is a certainty of outcome for both the defendant and the government. The defendant benefits because he is not exposed to a parade of witnesses rendering a long catalogue of his criminal acts to the judge who will ultimately sentence him. The government benefits because it can place its resources on other cases or expand the current case to higher levels using the information or activity provided by the defendant's plea agreement.

In cases involving public figures, the plea guarantees that the plethora of problems which arise in that type of highly publicized tension filled atmosphere will not be present. The public figure benefits by not enduring week after week of negative trial publicity; generally a plea results in a briefer press involvement.

B. Plea Agreements Help Victims Economically and Emotionally

Victims of the crime clearly benefit from plea agreements. As the complexity of crimes has continued to increase, there has been a concomitant evolution of economic items included in plea agreements. Especially in traditional white collar economic fraud cases, the agreement by the defendant and the government on the exact amount of economic loss greatly benefits the individuals from whom the money was purloined. The candid, sworn and written detailed disclosure of financial assets by the defendant avoids a sometimes extended and laborious cat and mouse game. Moreover, the agreement to not seek bankruptcy to discharge court ordered restitution protects those potential funds. Further, the agreement of the defendant not to contest civil or criminal forfeiture actions streamlines the process of attempting to compensate the victim. Too often, the defendant's assets are depleted after a long and ultimately unsuccessful jury trial. These tangible economic benefits for the victims are generally not available in contested jury trials.

One other victim-related benefit plea bargains render is that victims do not have to relive the crimes perpetrated against them by retelling the story on the witness stand. The victim is also relieved of the chore of extensive and frequently intense trial preparation by the prosecution team, which requires the detailed retelling of the events slowly and deliberately. Cross-examination is yet one more opportunity to relive the events. Perhaps those who have personally witnessed the spiteful, vicious, personal and irrelevant cross examinations of elderly or vunerable victims by

defense attorneys preening for their clients or seeking to undermine the witnesses' credibility in front of the jury have the greatest appreciation of the advantage of plea agreements on an humanitarian level. While generally not applicable to federal cases, the same benefit would obviously apply to young victims of child sexual offenses in state cases.

Plea bargains offer the additional benefit of certain and relatively quick closure for victims. Even a casual glance at network or cable new shows will invariably reveal a story of crime victims suffering through yet one more continuance or procedural delay of a trial. This drawing out of the process undermines confidence in the entire criminal justice system. Plea agreements moot all of those issues. A crime victim knows with certainty either at the guilty plea or sentencing who is responsible, why they committed the offense, how long they will be incarcerated and in economic crimes how much restitution will be ordered. In violent crimes, a family can close one part of an unpleasant chapter of their lives with relative swiftness and certainty.

C. Plea Agreements Benefit Defendants

The process of negotiating the terms of plea agreements allows defense attorneys to become involved in the process earlier. In the federal system, there are a growing number of criminal defense attorneys who have become specialists in navigating the nuances of the sentencing guidelines. In sophisticated federal white collar crime organizations, corporate, environmental and RICO prosecutions, the defense attorney is generally present from the moment a target letter is sent or a defendant is arrested on a complaint. Most experienced prosecutors would agree that a good defense attorney's input early in the case benefits the entire process for several reasons.

A skilled defense attorney can disabuse the defendant of many of the popular misunderstandings of the criminal justice system. One would be surprised at how many unrepresented targets believe they will be arrested at the United States Attorney's office during an initial target meeting, or that they will not be eligible for a bond because of a juvenile arrest or missed child support payments. Even a marginally competent defense counsel can put into perspective for his client what he can reasonably expect from the entire process. There are two major hurdles every defendant must overcome before he can make a meaningful plea. The first is that in most cases, their lives will be changed in some way. Whether it is career related, socio-economic or other, there will be changes in a defendant's lifestyle. The second is that the defendant is going to spend time incarcerated in some form or fashion. It could range from home detention to a maximum security facility, but it is inevitable for the most part. The intervention of good lawyers early on in the plea bargain process gives their clients a distinct advantage.

D. Plea Agreements Foster Accelerated Infiltration of Criminal Organizations.

One of the most significant benefits of plea agreements to the government is the early significant intervention into criminal enterprises. Most prosecutors would evaluate this tool to be much more effective than the arsenal of government powers enunciated, *supra.*

Most defendants' cooperation depends ***exclusively*** on the government's ability to offer them the opportunity to reduce their time spent incarcerated. Without this ability, the effectiveness of federal law enforcement would be greatly reduced. In *United States v. White,*[10] the court commented on cooperation based on plea agreements, " ... without such testimony, the government would be unable to enforce drug laws, prosecute organized crime figures under RICO, or otherwise effectively proceed in the thousands of cases each year in which it relies on witnesses who testify in return for leniency." Indeed, the courts have long recognized the tool of plea bargaining as a legitimate law enforcement resource. "The concept of affording cooperating accomplices leniency dates back to the common law of England and has been recognized and approved by the United States Congress, the United States Courts and the United States Sentencing Commission."[11]

Twenty-first century prosecutors and investigators can ill afford to meet more complex challenges using only good will or patriotic feelings of the criminal element ensnared in the criminal justice system.

The following are several concrete examples of tangible and proven benefits of the federal plea bargaining system.

1. Road mapping: No matter how much time and effort has been expended by federal agents attempting to document or surviell criminal groups to determine their activities, an insider can detail the specifics of an organization in a one afternoon debriefing which will serve as a roadmap to law enforcement. Even seemingly minor daily details and logistics of the organization can be invaluable. The basic chain of command— who reports to whom, methods of communication, the method discipline of wayward members— can all be helpful in establishing ways to infiltrate a criminal group. Details concerning how the organization actually operates on a day to day basis are especially beneficial for a variety of reasons. The types of phones, computers, fax and email facilities and internet service providers used as well transportation and financial institutions utilized by the group can be of great value. From a safety perspective, the types of weapons possessed or utilized by violent criminals can help agents prepare for undercover work or eventual arrest of the armed individuals.

Another investigative benefit is the identification of non-players within the organization and the elimination of dead end leads. From the outside looking in, it is frequently difficult to accertain who is a legitimate participant and who is a lower-level participant not worthy of further expenditure of investigative resources. Moreover, an insider

can provide useful information on group members' personal habits and illegal proclivities which can provide future pressure points to help close the enterprise or gain additional informants.

***2. Consensual Electronic Activity*:** One of the most powerful types of evidence is one's own voice admitting involvement in criminal activity or the commission of a crime while being recorded by federal law enforcement. Plea bargains once again prove to be reliable vehicles in obtaining this type of irrefutable evidence. By participating in consensually monitored telephone calls or by wearing concealed portable electronic or digital recording devices, a cooperator can potentially reduce his incarceration time by helping law enforcement. Of course, the cooperator must operate under closely controlled circumstances. If used properly early on in the investigation, this tool can gather a wealth of damaging evidence.

***3. Establishing Probable Cause*:** Prosecutors and federal agents can make good use of information provided from a cooperating individual regarding the participants and activities of illegal operations. The information can help provide the legal basis required to help establish probable cause for a wide ranging compliment of investigative tools, including arrest complaints and warrants, search warrants, pen registers and Title III wire intercepts.

E. Procedural Protections

Some of the more dated criticisms of plea bargains stemmed from the practice of oral plea bargains, which by their very nature tended to be imprecise and led to misinterpretation on the part of prosecutors and defendants alike. Most federal plea agreements are in writing. The typical written agreement recites the charges, maximum statutory penalties for incarceration, fines and supervised release terms. In addition, the agreement provides for the defendant's disclosure of financial information, as well as the defendant's agreement not to seek discharge in bankruptcy and his waiver of both Title 28, Section 2255 *habeus corpus* and direct appeal rights.

The most important two paragraphs in the document are those which address two of the main criticisms of plea bargains. The first paragraph sets out that any untruthful statement by the defendant renders the entire agreement void. The second paragraph informs all who read the document that the four corners of the letter constitutes the entire agreement. There are no side deals or secret agreements which exist. These two features should give comfort to even the most strident critics of the plea bargaining system. Most plea bargains are included in the court record for all to see. The element of transparency is certainly present in modern plea agreements.

Two more protective devices in the plea bargaining process inserted by judicial decree are the *Giglio* [12] and *Brady* [13] decisions. Simply stated, these cases require that the existence of a plea agreement must be disclosed to the defendants against whom the cooperator could testify. This tender is required because the government has a duty to disclose any favorable deals to witnesses under *Giglio* and any potentially exculpatory material under *Brady*. Federal prosecutors are compulsive about following the letter and spirit of these two holdings not only because it is their legal and moral duty to do so, but also because not doing so is an easy way to sabotage an otherwise outstanding case. There is no more painful a legal wound than one that is self-inflicted.

At the end of a jury trial, the court will generally read to the jury a long listing of rules to be followed during their deliberation concerning evidence. These rules, known as jury charges, deal with all aspects of how evidence should properly be considered by the jury. Some of this evidence is physical: papers, guns and blood. Other evidence is testimonial. There are at least two jury charges dealing with the testimony of co-conspirators and those who have reached plea agreements with the government. The charges are best summarized in Section 1.15 of the *5th Circuit Pattern Jury Instructions* [14]:" You should keep in mind that such testimony is always to be received with caution and weighed with great care. You **should never convict a defendant upon the unsupported testimony of an alleged accomplice** *[emphasis added]* unless you believe that testimony beyond a reasonable doubt." These instructions, read to every federal criminal jury, at a minimum, represent a judicial admonition that cooperators have gained a material benefit from their testimony. These jury charges are yet one more protection afforded defendants implicated by cooperating persons who have plead guilty pursuant to plea bargains.

This section has pointed out some the distinct advantages plea bargains render for government, victims and defendants. Moreover, there are a surfeit of protections built into the system to protect those against whom the cooperators testify. In the final section, this article will attempt to place in context where plea agreements fit within our constitutional framework.

III. Why Plea Bargains Make Sense in our System of Government

Thankfully, we live in a country which, from the days of our founding fathers, has given its citizens many protections from the excesses of government. These protections have been embodied in the Constitution. Some protections which were placed in the document because of bad behavior of the occupying British soldiers, such as the prohibition against quartering of soldiers in homes, have become dated. Other prohibitions are as modern and living as the evening news. Those rights which protected those whom the government sought to incarcerate were given exalted positions. The rights to be free from unreasonable search, self incrimination and the right to demand a jury trial are the cornerstones of our constitutional criminal system.

However, our system also contemplates a citizenry able to make informed decisions concerning these rights, and the power to waive them. Those who seek to eliminate a citizen's right to better his position by legally waiving these rights creates a less powerful citizen and a more powerful government, which is a notion that the framers of the constitution clearly rejected.

We, as citizens and adults choose to waive rights and privileges in order to take advantage of other more desirable rights and privileges. The examples are numerous and varied. For example, in order to enjoy the constitutional right of a bond pending trial, most defendants surrender their passport and agree to restrict travel pending the outcome of their case. In theory, a constitutional purist could argue that this common practice is outrageous and should be resisted. The practical result of the failure to waive this right would be bank tellers who purloin $5,000 from Mainstreet National Bank would spend more time in jail awaiting trial than they would serving their sentence.

On a daily basis, we give up certain privacy rights at airports so that we may travel from one coast to the other in four hours rather than four days. Some of us choose to live an hour from the cities in which we work in order to enjoy larger homes, better schools and safer neighborhoods. On a larger scale, most of us choose one partner to the legal and moral exclusion of all others to enjoy the joys of marriage and family.

The vast majority of people who become involved in the criminal system do so because of voluntary behavioral decisions. There are a minuscule number of criminal defendants who get into the system because of duress, insanity or other non-voluntary reasons. Most are there because they were caught after they decided to break the law. That is not to say there are not many compelling societal ills which drive the behavior which gets most ensnared, but that is a discussion for another forum.

Plea agreements give defendants an ability to make knowing and voluntary decisions to better their legal position. Information and cooperation become the currency by which they better their position. They must waive certain rights, but in doing so they gain or regain other rights sooner. The decisions seem logical and fit well within the framework of the rights and responsibilities of Americans. A. Neier, a former director of the ACLU was quoted as saying:

> "Stuff & Nonsense" was Alice in Wonderland's response to the idea that the sentence should come first and the verdict and trial later. Plea bargaining carries the logic of the Queen of Hearts one step further. It is sentence first and never mind about the trial and verdict. They are eliminated from the system.[15]

A defendant knows better than anyone else in the system whether he is guilty. He already knows what the verdict *should* be in the event he were to proceed to trial. His defense attorney, when informed by the defendant of his guilt, can further advise the defendant concerning the technical variables of trials, possibilities of evidence suppression under of the rules of evidence, as well as jury and sentencing issues. Unlike the *Alice in Wonderland* scenario alluded to by Mr. Neier, a federal defendant and his attorney are nearly certain of the probable outcome of the trial.

By entering a plea agreement, the defendant voluntarily waives his right to a jury trial, self incrimination, confrontation of witnesses, *inter alia*, and betters his position in the process based upon thoughtful and reasoned analysis. As a citizen, he chooses to make the best of a bad situation. This choice is a perfect merger of the dual ideals of personal freedoms and personal responsibility envisioned in our constitution. His choice also helps the victim, the system and hopefully society at large.

Conclusion

Some critics of the system have advocated for the hosing down of the "fish market"[16] that they say plea bargaining has become. However, reformers of the system, both judicial and executive, have proven by their holdings and actions their belief that sunshine is the best disinfectant. The modern federal plea bargaining system is virtually transparent to all who wish to view it and allows not only illumination, but also the heat of truthful assistance of cooperators to be felt by increasingly complex and dangerous criminal enterprises in the twenty-first century.

* B.A. in English and History, Tulane University, 1982; J.D., Mississippi College, 1985; Assistant United States Attorney, Eastern District of Louisiana. The views expressed in this article are entirely those of the author and do not constitute any policy statement by the United States Department of Justice.

Footnotes

[1] *United States v. Singleton*, 144 F.3d 1343 (10th Cir.1998); vacated by *United States v. Singleton,* 165 F.3d 1297 (10th Cir. 1999).

[2] The *United States Sentencing Guidelines* (USSG) provide at Section 5K1.1 that prosecutors may file a motion with the court seeking a downward departure for a defendant who has provided substantial assistance to the government.

[3] As a rule, state, municipal, misdemeanor and traffic plea bargain issues will not be addressed in this article as the issues presented are different.

[4] *United States v. Fruguela*, 1998 WL 560352*2 (E.D. La.)

[5] *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System,* Albert W. Alschuler, 50 U.Chi.L.Rev. 931, at 932(1983).

[6] Sentential B.5.

[7] *Echoes of a Muted Trumpet,* Ralph Adam Fine, 2003.

[8] *United States v. Singleton* 144 F.3d 1343 at 1347 (10th Cir. 1998).

[9] *U.S. v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir 1987).

[10] 27 F.Supp.2d 646, 649 (E.D.N.C. 1998).

[11] *United States v. Barbaro* 1998 WL 556152 (S.D. N.Y.) at *3.

[12] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).

[13] *Brady v. Maryland*, 373 U.S. 83, 835 S.Ct. 1194 (1963).

[14] 2001 Edition, West Publishing Company, St. Paul, Minn., at page 26.

[15] *Plea Bargaining and Guilty Pleas,* Bond, James E, Second Edition, Clark Boardman and Company, Ltd. New York, 1983, Section 2-10 quoting A.Neier, *Criminal Punishment, A Radical Solution* (1976), at page159.

[16] *Supra.,* Endnote 7.

Echoes of a Muted Trumpet

*By Ralph Adam Fine**

Forty years ago, the United State Supreme Court ruled that the Constitution gives every person charged with a felony the right to a lawyer, irrespective of whether the defendant can afford the fee. The case, of course, was *Gideon v. Wainwright*, 372 U.S. 335 (1963), made famous for non-lawyers by Anthony Lewis's best-selling "Gideon's Trumpet." *Gideon* recognized that the legal system's mazes and arcana were simply too daunting to be navigated or understood by persons not trained in the law. Sadly, the fairness that everyone thought the decision heralded has largely been lost in the fog of expediency.

Contrary to television-driven myth, most prosecutors and defense lawyers do not want to try cases. Many judges, too, would rather be doing other things — "moving" cases off their dockets, and, for some, an afternoon of golf or tennis. Even those who take their jobs seriously feel overwhelmed by the crushing load and paucity of resources. Thus, the resort to plea bargaining. Some ninety percent of all felony cases never reach trial; the defendants are convicted on their plea.

Although much of the time plea bargaining gives defendants great deals, letting them escape just punishment for many or most of their crimes, there is another side to plea bargaining that is less well-known — extortion. Most non-lawyers would be surprised if they knew that prosecutors can lawfully extort guilty pleas from defendants by threatening to pile on additional charges unless the defendants gave up their constitutional right to a trial. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), a five-to-four majority of the Supreme Court said that prosecutors could do exactly that.

When Paul Lewis Hayes was charged by the state of Kentucky with uttering a forged check for $88.30, he had two convictions on his record. In 1961, when he was seventeen, he pled guilty to "detaining a female," which was a lesser-included offense of rape. He served five years in the state reformatory. In 1970, he was convicted of robbery and was, in effect, placed on probation. The prosecutor in Hayes's bad-check case had a deal for Hayes: either plead guilty and accept a five-year sentence or face life in prison as a three-time loser. This is how the prosecutor described it at a later hearing:

> Isn't it a fact that I told you at that time [the initial bargaining session] if you did not intend to plead guilty to five years for this charge and ... save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

Despite the threat, Hayes exercised his constitutional right to a trial. The prosecutor charged him as a repeater. Hayes was convicted and sentenced to the mandatory life term. The Supreme Court, although recognizing that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort," nevertheless upheld Hayes's conviction, ruling that the prosecutor's actions were constitutionally permissible as part of the "give-and-take" of the plea-bargaining process. Significantly, the only reason given by the five-to-four majority in *Hayes* for permitting prosecutors to extort guilty pleas from defendants is that expediency demands it:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable" ¯ and permissible ¯ "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

(Internal citation omitted; brackets by *Hayes*.)

Four years after *Hayes*, the Supreme Court acknowledged in *United States v. Goodwin*, 457 U.S. 368 (1982), that the decision had been "mandated" by the "Court's acceptance" of plea bargaining "as a legitimate process." It explained that, in its view, the "fact that the prosecutor threatened" Hayes "did not establish that the additional charges were brought solely to 'penalize'" him. That is sophistry. If Hayes had not demanded a trial, as was his right, he would not have been charged as a "repeater." Under Kentucky law at the time, he would have then been exposed to a maximum penalty of ten years in prison and a realistic punishment of substantially less. Hayes was "punished" the moment he demanded what the constitution said was his — the right to plead not guilty and have a jury decide his guilt or innocence.

The "choice" Hayes faced was illusory and was similar to that offered by the innkeeper Tobias Hobson, who gave his guests the selection of any horse in his stable, as long as it was the one closest to the door. In reality, Hayes, like Hobson's lodgers, had no choice at all: both of the prosecutor's offers were unreasonable, especially if Hayes was innocent. Indeed, since for a guilty person the "choice"

was between a certain five years or a certain life-sentence, only an innocent person would have dared reject the prosecutor's deal.

Hayes's dilemma was foreshadowed in a 1967 report issued by the President's Commission on Law Enforcement, *The Challenge of Crime in a Free Society*:

> There are real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty. Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial.

In 1973, the National Advisory Commission of Criminal Justice Standards and Goals also warned:

> Underlying many plea negotiations is the understanding — or threat — that if the defendant goes to trial and is convicted he will be dealt with more harshly than would be the case had he pleaded guilty. An innocent defendant might be persuaded that the harsher sentence he must face if he is unable to prove his innocence at trial means that it is to his best interest to plead guilty despite his innocence.

Of course, *no* defendant is required to prove his or her innocence; the *prosecutor* has that burden and must prove guilt beyond a reasonable doubt. The National Advisory Commission's perception that plea bargaining results in a *de facto* shift of the burden, however, highlights that the plea-bargaining system not only sets upon society dangerous criminals who should be locked up where they can do no harm, but that plea bargaining is also at war with our most precious tradition: the presumption of innocence.

Sadly, all across this country, in both federal and state courts, the *Hayes* decision has been used by prosecutors as a tool with which to extort guilty pleas from defendants. An experienced trial judge in Wisconsin recently reflected on the record in open court that prosecutors in Milwaukee County used to give deals to dissuade defendants from going to trial but that now they were upping the ante by "amending up." Some of the defendants facing amended-up charges because they insist on their right to a trial may be innocent. No matter. In *Alford v. North Carolina*, 400 U.S. 25 (1970), the Supreme Court said that it was OK for defendants who believe themselves to be innocent to plead guilty — all as part of the plea-bargaining process!

Henry C. Alford was charged with the capital crime of first-degree murder. The case was plea bargained. Although he said that he did not kill anyone, Alford pled guilty to second-degree murder, a charge for which the death penalty was not authorized. He later explained why:

> I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said that if I didn't they would gas me for it, and that is all.

The trial judge accepted Alford's guilty plea and sentenced him to a thirty-year prison term.

After stewing about it for a number of years, Alford tried to get out. He complained that his guilty plea had been forced by the death-penalty threat, and that he never did admit his guilt. A number of lower-court judges believed that it was unseemly for a civilized society to send self-proclaimed innocent persons to prison without a trial. The Supreme Court, however, disagreed.

Hayes and *Alford* make up a potent one-two punch that permits lazy prosecutors to avoid having to prove their cases in court. The decisions help grease the system's wheels with the oil of expediency. We should remember, however, what the Supreme Court recognized in *Stanley v. Illinois*, 405 U.S. 645 (1972), albeit in another context:

> But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Although prosecutors and public defenders get paid whether they try the cases or not, most privately retained defense lawyers can only make money if they plead their clients guilty. Thus, there is a huge financial incentive for criminal-defense lawyers to run their clients through the system's case-processing, docket-clearing shredder. Researchers from the National Institute of Justice studying the effects of Alaska's plea-bargaining ban instituted in 1975 by the state's courageous chief law-enforcement officer, Avrum Gross, were told by one defense lawyer: "Criminal law is not a profit making proposition for the private practitioner unless you have plea bargaining." As University of Chicago law professor, Albert W. Alschuler, who has intensively studied plea bargaining wrote in one of his many law-review articles on the practice:

> There are two basic ways to achieve financial success in the practice of criminal law. One is to develop, over an extended period of time, a reputation as an outstanding trial lawyer. In that way, one can attract as clients, the occasional wealthy people

> who become enmeshed in the criminal law. If, however, one lacks the ability or the energy to succeed in this way or if one is in a greater hurry, there is a second path to personal wealth — handling a large volume of cases for less than spectacular fees. The way to handle a large number of cases is, of course, not to try them but to plead them.

During my nine years as a trial judge, I had several defendants who wanted to plead guilty even though when I then asked them to tell me what they did, responded with stories of innocence. When I asked them *why* they were trying to plead guilty, they all told me that they had been threatened with harsher penalties if they insisted on going to trial. In rejecting their pleas, I told them that we had enough guilty persons to convict, and that we did not need to dip into the pool of the innocent.

In each of the instances, we went to trial and the defendants were acquitted. After one of the not-guilty verdicts, the defense lawyer, whom I had dragooned into defending his client by rejecting the proffered plea, bitterly accused me of "wasting" his time. By that, of course, he meant that he lost money on the case because he had to take it to trial.

The lawyer's comment after his client's acquittal is writ large by our criminal justice system, which has elevated expediency above all the nice words that "guarantee" that no person can be punished for crime in this country unless the government proves guilt to a jury of fellow citizens beyond a reasonable doubt. In a real sense, by permitting plea bargaining to flourish, we have traded "justice" for tax dollars that plea bargaining allegedly saves. But this is an argument constructed from meringue. We spend tax money on all sorts of things with marginal benefit to society and our people. Moreover, Professor Alschuler estimated that giving a three-day jury trial to *every* felony defendant in the country would cost less than the annual expenditures that were funneled through President Richard Nixon's Law Enforcement Assistance Administration. But, of course, politicians get praise for giving money to local police departments, and for dispensing other pork in their districts. The kudos would be muted indeed for money spent to see that justice was done in *every* case. There would also be loud howls from prosecutors, defense lawyers, and judges fearing that they may have to do their jobs — the trying of cases.

Fears that there would be a glut of trials if plea bargaining were abolished, however, are unfounded. Experience shows that guilty pleas would come in at essentially the same rate as they do now. Most defendants who are guilty plead guilty, whether they are given a "deal" or not. I never accepted plea bargains and defendants pled guilty before me even though they knew they would not get a break for doing so. The experience in Alaska was similar. The National Institute of Justice, which, as noted, studied the Alaskan experience concluded:

> Supporters and detractors of plea bargaining have both shared the assumption that, regardless of the merits of the practice, it is probably necessary to the efficient administration of justice. The findings of this study suggest that, at least in Alaska, both sides were wrong.

Indeed, the disposition times for felonies in Anchorage fell from 192 days before the state-wide ban to under ninety days after. In Fairbanks, the drop was from 164 days to 120, and in Juneau, from 105 to eighty five.

The right to take a case to trial when a defendant disputes guilt is guaranteed in every state and in the federal system. To punish those who exercise that right is unworthy, to say the least. As former federal prosecutor and federal judge Herbert J. Stern has written, plea bargaining is a "fish market" that should be "hosed down."

* Ralph Adam Fine has been a judge on the Wisconsin Court of Appeals since 1988. He was a trial judge in Milwaukee for nine years before that, and presided over more than 350 jury trials. He is the author of six books, including *Escape of the Guilty*, from which this article is adapted. In addition to his court work, Judge Fine teaches trial advocacy throughout the country, and has written *The How-To-Win Trial Manual* and *The How-To-Win Appeal Manual*, both published by Juris. His trial-advocacy web site is: www.win-your-trial.com. He has appeared on CBS's *60 Minutes*, ABC's *Nightline*, PBS's *McNeil/Lehrer NewsHour*, and CNN's *Larry King Live*, among other national television shows. For several years, he was the host of *A Fine Point* on Milwaukee's CBS television affiliate, with such guests as Nobel laureates Elie Weisel and Milton Friedman.

Smoke and Mirrors on Race and the Death Penalty

*By Kent Scheidegger**

Introduction

Claims that the death penalty is enforced in a manner that discriminates on the basis of race have long been prominent in the capital punishment debate. In its 1972 decision in *Furman* v. *Georgia*,[1] the Supreme Court relied on the Eighth Amendment's Cruel and Unusual Punishment Clause to throw out the capital punishment laws then in existence, but the Equal Protection Clause lay just beneath the surface of the opinions.[2] Congress and 38 state legislatures rewrote their laws to put more structure into the sentencing decision so as to reduce the possibility of racial bias.[3]

In January 2003, a study of capital punishment in Maryland was widely reported as confirming the claim that race remains a large factor. "Large Racial Disparity Found By Study of Md. Death Penalty," said the headline in the Washington Post.[4] A hard look at the numbers tells a different story. First, however, a review of the background is in order.

The *McCleskey* Case

The most widely known study of race and capital punishment is the one involved in a Supreme Court case, *McCleskey* v. *Kemp*.[5] The NAACP Legal Defense and Education Fund, Inc. (LDF) asked a group of researchers headed by Dr. David Baldus to undertake a study for the specific purpose of using the results to challenge Georgia's capital punishment system.[6] The LDF also arranged funding for the study. One result of this study was undisputed. "What is most striking about these results is the total absence of any race-of-defendant effect."[7] The reforms after *Furman* v. *Georgia* had successfully eliminated discrimination against black defendants as a substantial factor in capital sentencing. This was consistent with a variety of studies done in other states.[8]

With their primary argument disproved by their own study, McCleskey's defenders proceeded to a federal *habeas corpus* hearing on a different theory. The Baldus group claimed to have found a "race-of-victim" effect. That is, after controlling for other factors, murders of black victims are somewhat less likely to result in a death sentence than murders of white victims.[9] Based on a mechanical "culpability index," Dr. Baldus identified a class of clearly aggravated cases where the death penalty was consistently imposed, a class of clearly mitigated cases where it was almost never imposed, and a mid-range where it was sometimes imposed,[10] exactly the way a discretionary system should work. It was only within the mid-range that the race of the victim was claimed to be a factor. After an extensive hearing with experts on both sides, the federal District Court found numerous problems with Dr. Baldus's data and methods. Most important, though, was a finding that the model claiming to show a race-of-victim effect had failed to account for the legitimate factor of the strength of the prosecution's case for guilt. When a different model that accounted for that factor was used, the race-of-victim effect disappeared.[11]

Despite this finding, and contrary to normal appellate practice, the Court of Appeals and the Supreme Court assumed on appeal that Dr. Baldus had actually proven his case.[12] Ever since, the Supreme Court's opinion in *McCleskey* has been cited for "facts" which it merely assumed, and which the trial court had found were false.[13] The Court held that even if the statistics were valid, "McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty."[14]

This holding points out what is so very odd about this race-of-victim bias claim. The benchmark of our society for what kind of case "deserves" the death penalty is established in those cases where race is not a factor, i.e., in those cases where the murderer, the victim, and the decision-makers are all the same race. Traditionally, at least in the Southeast, that would be the case where they are all white. A race-of-defendant bias would mean that there are black defendants on death row who would have been sentenced to life if their cases had been measured by the benchmark. That is a valid ground for attacking the death penalty, as was done successfully in *Furman*. However, a race-of-victim effect means that every murderer on death row would still be there if the bias were eliminated and every case judged by the race-neutral benchmark, but a few more murderers would be there as well. The unjust verdicts which result from a system biased against black victims are the cases that should result in a death sentence according to the race-neutral criteria, but which result in life sentences instead. McCleskey's sentence was correct when measured against the race-neutral benchmark, and he was justly executed for gunning down a police officer in the performance of his duty. The unjust sentences, if Dr. Baldus is correct, are in the similar cases where equally culpable murderers get off with life.

Post-*McCleskey* Studies

The *McCleskey* decision shut down Baldus-type studies as tools of federal litigation. Similar studies since then have been done in a few states where state courts chose not to follow *McCleskey* on independent state grounds, where legislative or executive branches commissioned them, or where there were done independently of government.

The California Attorney General commissioned the RAND Corporation to study that state's system in preparation for *McCleskey*-type litigation which was subsequently

dismissed. Using a different methodology, Klein and Rolph found no evidence of racial discrimination based on either the race of the victim or the race of the defendant.[15]

In New Jersey, the Supreme Court appointed a succession of special masters, the first one being Dr. Baldus, to study the death penalty in that state. The 2001 report of Judge David Baime reports that the statistical evidence supports neither the thesis of race-of-defendant bias nor that of race-of-victim bias in determining the likelihood that a defendant will be sentenced to death.[16] Statewide data do show that proportionately more white-victim cases advance to the penalty phase. However, this is not actually caused by race of the victim, but rather by different prosecutorial practices in counties with different populations. Prosecutors in the more urban counties, with proportionately more black residents and hence more black-victim cases, take fewer potentially capital cases to a penalty trial. Conversely, prosecutors in the less urban counties, which generally have higher percentage white populations, seek relatively more death sentences. "New Jersey is a small and densely populated state. It is, nevertheless, a heterogenous one. It is thus not remarkable that the counties do not march in lock-step in the manner in which death-eligible cases are prosecuted."[17]

The Nebraska Legislature commissioned a study, which was headed by Dr. Baldus and George Woodworth, the lead researchers of the *McCleskey* study. This study found no significant evidence of sentencing disparity based on race of the defendant, race of the victim, or socioeconomic status.[18] The study did find differences among counties, particularly between urban and rural. The Baldus group uses the term "geographic disparity"[19] to describe the same phenomenon that Judge Baime calls not marching in lockstep. However, the Baldus group found that the trial judges, who did the sentencing in Nebraska at this time, effectively corrected for the difference.[20]

In January 2000, the United States Justice Department released raw data on the ethnic breakdown of persons for whom the death penalty was sought at various stages of federal prosecutions and on those finally sentenced to death.[21] Federal prosecution of violent crime has been targeted specifically at drug-trafficking organized crime for many years. From 1988 to 1994, the only federal death penalty in force was the Drug Kingpin Act.[22] No one should be surprised that the organizations smuggling drugs from Latin America are largely Hispanic or that the drug-fueled, violent gangs of the inner city are largely black. So there should have been no surprise that the federal death row has a very large percentage of black and Hispanic murderers, as this report showed it does. The shock and dismay that accompanied the release of this report[23] was entirely unwarranted. The data gathering process continued and, sure enough, the proportion of minorities for whom the death penalty is sought or obtained reflects the pool of potentially capital cases which are appropriate for federal prosecution.[24]

A study by a legislative commission in Virginia produced results similar to the New Jersey and Nebraska studies. "The findings clearly indicate that race plays no role in the decisions made by local prosecutors to seek the death penalty in capital-eligible cases."[25] However, urban prosecutors do seek it less often than rural ones.[26] In interviews with the urban prosecutors, the reason most often given for seeking the death penalty less often was the reluctance of urban juries to impose it.[27]

The Maryland Study

With the background of these other studies in mind, analysis of the Paternoster study in Maryland[28] is straightforward. Prior to the year 2000, there had been four studies of the death penalty in Maryland, but none of them had information on the aggravating and mitigating circumstances of the individual cases. Thus, they lacked the essential information to make a judgment about the administration of the death penalty in Maryland.[29] In 2000, Governor Glendenning funded a study to gather that information.

The study began with a database of approximately 6,000 cases where the defendant was convicted of first- or second-degree murder between 1978 and 1999.[30] That is about 40% less than the approximately 10,000 cases of murder and voluntary manslaughter in that period,[31] so presumably the remainder were voluntary manslaughter, unsolved cases, or cases where a perpetrator was identified but evidence was insufficient to convict.

One of the essential requirements of a valid post-*Furman* death penalty statute is that it first narrow the category of defendants for whom the death penalty can even be considered.[32] Maryland law does this by requiring that the murder meet all of the following criteria: (1) the murder was first degree; (2) the defendant was a principal in the first degree (i.e., the actual killer, rather than just an accomplice); (3) the defendant was at least 18; (4) the defendant was not retarded; and (5) at least one of a list of ten aggravating circumstances is true.[33] The most common aggravating circumstance is murder in the course of a rape, robbery, or certain other felonies. The Paternoster group determined that 1,311 out of 5,978 murder convictions were "death eligible."[34] Before any decision-maker exercises any discretion, Maryland law whittles the class of murderers eligible for the death penalty to a mere 22% of the total. Maryland's criteria therefore easily meet the constitutional requirement of a meaningful narrowing of the eligible class.

Prosecutor discretion in seeking the death penalty and continuing the case to a penalty hearing further reduced the number of hearings to 14% of the original 1,311. Juries actually imposed death sentences in about 42% of the cases where they were asked, or about 6% of the originally eligible cases. The key question is what part, if any, racial discrimination plays in these two discretionary steps: the decision of

the prosecutor to ask the jury for the death penalty, and the decision of the jury, when asked, to actually impose it. A further subdivision is whether the race of the defendant or the race of the victim makes a difference.

The study also asks about so-called "geographic disparity," at one point even equating such "disparity" with "arbitrariness."[35] The study appears to simply assume throughout that variation by county is a problem on the same order as racial discrimination. In other words, contrary to Judge Baime's report in New Jersey,[36] the Paternoster report appears to assume that Maryland's counties *should* "march in lock-step." This assumption colors the entire report.

The report then tabulates numbers of cases by race and by county without adjusting for case characteristics.[37] However, the meat of the study lies in the adjusted race data, and the combined effects of race and county. First, there is the result, that by all rights, *should* have been the headline story. After adjusting for relevant case characteristics, so as to compare apples to apples, there is no difference between the death sentence rates of black and white offenders, beyond the inevitable level of statistical "noise" inherent in such studies. "In sum, *we have found no evidence that the race of the defendant matters in the processing of capital cases in the state.*"[38]

Although this result is consistent with the other studies discussed above, it is completely contrary to the popular conception of the death penalty in America. For any American institution to eliminate the primary racial effect of concern to the point that it is lost in the statistical grass is an accomplishment to be celebrated with fireworks and champagne. Instead, this finding was barely noticed.

On the race-of-victim effect, the picture is murky. There are various ways to analyze the data. Some ways show a significant race of victim effect while others do not.[39] Different regression models can be constructed by choosing which variables to include. Paternoster reports that "considered *alone* the race of the victim matters, those who kill white victims are at a substantially increased risk of being sentenced to death . . . ."[40] But considering race alone is wrong. A different model considering race and jurisdiction together yields a very different result:

"When the prosecuting jurisdiction is added to the model, the effect for the victim's race diminishes substantially, and is no longer statistically significant. This would suggest that jurisdiction and race of victim are confounded. There are state's attorneys in Maryland who more frequently pursue the death penalty than others. It also happens that there are more white victim homicides committed in those jurisdictions where there is a more frequent pursuit of the death penalty."[41]

What this means, in English, is that some counties in Maryland elect tougher-on-crime prosecutors and have tougher juries than other counties. In the tougher counties, a murder in the middle range is more likely to result in a death sentence than a similar murder in a softer county. Support for tough-on-crime measures generally and capital punishment in particular is substantially correlated with race. One poll earlier this year found whites in favor of capital punishment (68-27) and blacks opposed (40-56).[42] For this reason, the tougher counties are likely to have a higher proportion of white residents and hence white crime victims.

What the Paternoster group calls "geographic disparity" is, in reality, local government in action. This is exactly the way our system is *supposed* to work. We elect our trial-level prosecutors by county so that local people have local control over how the discretion of that office is exercised. If the voters of suburban Baltimore County choose to elect a prosecutor who seeks the death penalty frequently, while the voters of downtown Baltimore City elect one who seeks it rarely, that is their choice.

Prosecutors also make judgments about the kinds of cases in which the juries of their area will impose the death penalty. This form of local control, the jury of the vicinage, is one of our cherished rights going back to the common law. Parliament's violation of this right was one of the reasons for the American Revolution.[43] The right is guaranteed, albeit in modified form appropriate for the federal courts, in the Sixth Amendment.

Why, one might ask, is there so much hyperventilating about "geographic disparity"? Apparently, it is because all the other discrimination arguments against capital punishment have failed. The post-*Furman* reforms have been a resounding success in smashing the form of discrimination of greatest concern: the race of the defendant. In study after study, race-of-victim bias is either nonexistent or disappears when legitimate variables are accounted for. What is left is to create a brand new requirement of statewide uniformity, flatly contrary to the American tradition of local control, and then declare our judicial system a failure for violating this *ex post facto* requirement. It is an elaborate sleight of hand.

The Real Problem

Debunking the racial discrimination claim does not mean that everything is just fine in Maryland, or any other state. The Paternoster study does indicate a very real problem. The people of Baltimore City and Prince George's County are receiving an inferior quality of justice. A murderer who kills a resident of one of those counties is more likely to get off with a life sentence under circumstances where the death penalty is warranted.

Failure to use the death penalty where it is warranted can have fatal consequences for innocent people.

Although the deterrence debate has not yet been conclusively resolved, a mounting body of scholarship confirms what common sense has always told us: a death penalty that is actually enforced saves innocent lives.[44]

We can make a rough calculation with the Paternoster study's unadjusted geographic data[45] to get an idea of the magnitude of the problem. Baltimore City had a fraction of 0.435 of the state's 1311 death-eligible homicides, or 570. At the statewide average rate of death sentences, that would yield 33, instead of the 10 that Baltimore City actually produced. The Emory study estimates that each execution saves 18 innocent lives through deterrence.[46] If the additional 23 death sentences had been imposed and carried out,[47] over 400 murders could have been deterred.

That is a staggering toll of death caused by insufficient use and execution of the death penalty. Even if this rough calculation is off by a factor of four, that would still be over 100 people murdered who could have been saved.

To properly protect the people in Baltimore City and other jurisdictions like it, we must restore public confidence in and support of capital punishment, so that prosecutors can seek it in appropriate cases, and juries will impose it. The first step toward that end is to debunk the myth that capital punishment is imposed discriminatorily. The numbers are there in the opponents' own studies, once we cut through the spin and look at the facts.

* Kent Scheidegger is the Legal Director of the Criminal Justice Legal Foundation. He is the Chairman-Elect of the Federalist Society's Criminal Law and Procedure Practice Group.

Footnotes

[1] 408 U. S. 238.
[2] See *Graham* v. *Collins*, 506 U. S. 461, 479-484 (1993) (Thomas, J., concurring).
[3] See *Gregg* v. *Georgia*, 428 U. S. 153, 179-180 (1976); U. S. Dept. of Justice, U. S. Bureau of Justice Statistics, Capital Punishment 2001, Tables 1 & 2 (2002).
[4] Susan Levine & Lori Montgomery, Large Racial Disparity Found By Study of Md. Death Penalty, Washington Post, Jan. 8, 2003, p. A1.
[5] 481 U. S. 279 (1987).
[6] See D. Baldus, G. Woodworth & C. Pulaski, Equal Justice and the Death Penalty 44 (1990).
[7] *Id*., at 150.
[8] See *id*., at 254.
[9] The alarmist claim that the Baldus study shows that killers of white victims are "four times as likely" to receive a death sentence as killers of black victims is literally a textbook example of how to lie with statistics. See Barnett, How Numbers Can Trick You, 97 Technology R. 38, 42-43 (1994).
[10] See Baldus, *supra* note 6, at 91, Figure 5.
[11] *McCleskey* v. *Zant*, 580 F. Supp. 338, 368 (ND Ga. 1984).
[12] *McCleskey* v. *Kemp*, 481 U. S. 279, 291, n. 7 (1987).
[13] See, e.g., *Callins* v. *Collins*, 510 U. S. 1141, 1153-1154 (1994) (Blackmun, J., dissenting).
[14] 481 U. S., at 307.
[15] Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33, 44 (1991).
[16] D. Baime, Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term 61 (2001), http://www.judiciary.state.nj.us/baime/baimereport.pdf.
[17] *Id*., at 62.
[18] D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis, Executive Summary 14-22 (2001).
[19] *Id*., at 18.
[20] *Id*., at 21.
[21] U. S. Dept. of Justice, The Federal Death Penalty System: A Statistical Survey (1988-2000) (2000).
[22] *Id*., at 1.
[23] See, e.g., Bonner & Lacey, Pervasive Disparities Found in the Federal Death Penalty, N. Y. Times, Sept. 12, 2000, at A6.
[24] U. S. Dept. of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review 4 (2001).
[25] Joint Legislative Audit and Review Commission, Review of Virginia's System of Capital Punishment, iii (2002), http://jlarc.state.va.us/reports/rpt274.pdf
[26] *Ibid*.
[27] *Id*., at 31.
[28] R. Paternoster, et al., An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (2003) (cited below as "Paternoster"). The study is on the University of Maryland Web site as http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf (Executive Summary) and http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf (Final Report). Page cites below are to the Executive Summary unless otherwise noted.
[29] *Id*., at 4.
[30] *Id*., at 7.
[31] U. S.Bureau of Justice Statistics, Data Online, query run July 28, 2003; http://bjsdata.ojp.usdoj.gov/dataonline/Search/Homicide/State/StatebyState.cfm. The FBI collects data on a category it calls "murder and nonnegligent manslaughter."
[32] See *Tuilaepa* v. *California*, 512 U. S. 967, 972 (1994).
[33] Paternoster, *supra* note 28, at 5-7.
[34] *Id*., at 9.
[35] *Id*., at 1.
[36] See *supra* note 17 and accompanying text.
[37] Paternoster, *supra* note 28, at 13-23.
[38] *Id*., at 26 (emphasis in original).
[39] See *id*., at 27-28 (logistical regression shows significant race-of-victim effect, according to generally accepted statistical criterion, while stepwise regression does not).
[40] *Id*., at 32 (emphasis added).
[41] *Ibid*.
[42] Sussman, No Blanket Commutation, Poll: Most Oppose Clearing Death Row (Jan. 24, 2003), http://abcnews.go.com/sections/us/DailyNews/commutation_poll030124.html.
[43] Declaration of Independence (1776) ("For transporting us beyond Seas to be tried for pretended Offences").
[44] See Dezhbakhsh, Rubin, and Shephard, Does Capital Punishment Have a Deterrent Effect?, 33 American Law and Economics Report 344 (2003); Mocan, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, Journal of Law and Economics (forthcoming Oct. 2003), http://econ.cudenver.edu/mocan/papers/GettingOffDeathRow.pdf; Cloninger & Marchesini, "Execution and Deterrence: A Quasi-Controlled Group Experiment," 33 Applied Economics 569, 576 (2001); California District Attorneys' Association, Prosecutors' Perspective on California's Death Penalty 44-46 (2003), http://www.cdaa.org/WhitePapers/DPPaper.pdf
[45] See Paternoster, *supra* note 28, Report Figure 5. The adjustments for case characteristics, see *id*., Report Figure 10F, are significant but not needed for the order-of-magnitude calculations being made here.
[46] See Dezhbakhsh, et al., *supra* note 44.
[47] Actually carrying them out is another problem and the subject of another paper. The primary reason death sentences are not carried out in Maryland has been changes in the rules after the trial.

Environmental Law

The Anti-Energy Litigation of the State Attorneys General

*By Marlo Lewis, Jr.**

Does Section 108 of the Clean Air Act (CAA) impose a "mandatory duty" on the Environmental Protection Agency to regulate carbon dioxide (CO_2), the principal greenhouse gas targeted by the Kyoto Protocol?

"Yes," claim the attorneys general (AGs) of Connecticut, Massachusetts, and Maine in a recent (June 4, 2003) lawsuit against the U.S. Environmental Protection Agency (EPA). The same AGs, joined by their counterparts in New York, New Jersey, Rhode Island, and Washington, have also filed a notice of intent to sue EPA for "failing" to regulate CO_2 under Section 111 of the CAA. In effect, the AGs assert that the Clean Air Act compels EPA to implement the Kyoto Protocol—a non-ratified treaty.

However, far from it being EPA's duty to regulate CO_2, EPA has no authority to do so. The plain language, structure, and legislative history of the Clean Air Act demonstrate that Congress never delegated such power to EPA.[1]

The CAA provides distinct grants of authority to administer specific programs for specific purposes. It authorizes EPA to administer a national ambient air quality standards program, a hazardous air pollutant program, a stratospheric ozone protection program, and so on. Nowhere does it even hint at establishing a climate change prevention program. There is no subchapter, section, or even subsection on global climate change. The terms "greenhouse gas" and "greenhouse effect" do not appear anywhere in the Act.

Definitional Possibilities Don't Cut It

Lacking even vague statutory language to point to, the AGs build their case on "definitional possibilities" of words taken out of context—a notoriously poor guide to congressional intent.

The AGs argue as follows:

1. CAA Section 302(g) defines "air pollutant" as "any…substance or matter which is emitted into or otherwise enters the ambient air." CO_2 fits that definition, and is, moreover, identified as an "air pollutant" in Section 103(g).
2. Sections 108 and 111 require EPA to "list" an air pollutant for regulatory action if the Administrator determines that it "may reasonably be anticipated to endanger public health and welfare."
3. The Bush Administration's *Climate Action Report 2002* projects adverse health and welfare impacts from CO_2-induced global warming, and EPA contributed to that report.
4. Hence, EPA must initiate a rulemaking for CO_2.

The AGs' argument may seem like a tight chain of reasoning, but it is not. No delegation of regulatory authority can be inferred from the fact that carbon dioxide meets an abstract definition of "air pollutant" that applies equally well to oxygen and water vapor. Indeed, the very text cited by the AGs—Section 103(g)—admonishes EPA not to infer such authority. That provision concludes: "Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements." If *nothing* in Section 103(g) can authorize the imposition of control requirements, then the passing reference therein to CO_2 as an "air pollutant" cannot do so.

As to the phrase "endanger public health and welfare," it proves too much. It applies equally well to many substances that EPA does not—and may not—regulate under Sections 108 and 111.

Section 108 gives EPA authority to set national ambient air quality standards (NAAQS), which determine allowable emission concentrations for certain pollutants. Section 111 gives EPA authority to set new source performance standards (NSPS), which determine allowable emission rates for certain pollutants from new stationary sources.

EPA regulates 53 ozone-depleting substances under Title VI of the CAA, and 189 hazardous air pollutants under Section 112. Such substances are emitted into the ambient air, and are believed to endanger public health and welfare. By the AGs' "definitional" logic, EPA could dispense with Title VI and Section 112 and just use Sections 108 and 111—a ridiculous proposition plainly at odds with congressional intent.

Congress amended the CAA and added Title VI and Section 112 precisely because existing authorities—including Sections 108 and 111—were unsuited to the tasks of controlling hazardous emissions and protecting stratospheric ozone. Congress would have to amend the Act again before EPA could implement a regulatory climate change prevention program.

Ignoring Context

To interpret a statute, one must not only read the words, but also pay attention to where they occur—their context [*Food and Drug Administration v. Brown and Williamson*, 529 U.S. 133 (2000)]. If Congress intended for EPA to regulate CO_2, we would expect to find "carbon dioxide" mentioned in one or more of the CAA's regulatory provisions. The AGs note that Section 103(g) describes CO_2 as an "air pollutant." However, they omit to say that 103(g), which contains the CAA's

sole reference to "carbon dioxide," is a non-regulatory provision. It directs the Administrator to develop "non-regulatory strategies and technologies" for preventing or reducing emissions of "multiple air pollutants," including, among others mentioned, CO_2.

The Supreme Court has held that, "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" [*General Motors Corp. v. U.S.* 496 U.S. 530, 538 (1990)].

Carbon dioxide's "disparate exclusion" from the CAA's regulatory provisions cries out for explanation. After all, CO_2 is not some arcane or newly discovered compound, but a gas emitted in vastly greater quantities than any of those listed for regulation in, for example, Sections 107-109, Section 112, or Title VI. Moreover, the potential of CO_2 emissions to enhance the natural greenhouse effect has been known to scientists since the 19th century, and Congress has taken an interest in the subject since the late 1970s. It is difficult to avoid the conclusion that Congress acted "intentionally and purposely" when it did not mention "carbon dioxide" in the CAA's regulatory provisions.

The AGs make no reference to Section 602(e), which contains the CAA's sole reference to "global warming." It, too, is a non-regulatory provision. It directs the Administrator to "publish" (i.e., research) the "global warming potential" of ozone-depleting substances. Section 602(e) also ends with a caveat: "The preceding sentence [referring to "global warming potential"] shall not be construed to be the basis of any additional regulation under this chapter [i.e., the CAA]."

The two caveats against inferring regulatory authority—one following the CAA's sole mention of "carbon dioxide," the other following the sole mention of "global warming"—are a matched pair. Since Congress adopted both provisions in 1990, we may presume that the pairing is deliberate. In any event, the CAA mentions carbon dioxide and global warming only in the context of non-regulatory provisions, and in each instance admonishes EPA not to construe the law as the AGs profess to construe it.

Exercise in Futility

The AGs of Connecticut, Massachusetts, and Maine contend that EPA must begin the process of setting national ambient air quality standards for carbon dioxide. However, the NAAQS program, with its state-by-state implementation plans and county-by-county attainment and non-attainment designations, targets pollutants that vary regionally and even locally in their ambient concentrations. The NAAQS program has no rational application to a gas such as CO_2, which is well mixed throughout the global atmosphere.

Consider the possibilities. If EPA set a NAAQS for CO_2 above current atmospheric levels, then the entire country would be in attainment, even if U.S. hydrocarbon fuel consumption were to suddenly double. Conversely, if EPA set a NAAQS for CO_2 below current levels, the entire country would be out of attainment, even if all power plants, factories, and cars were to shut down. If EPA set a NAAQS for CO_2 at current levels, the entire country would be in attainment—but only temporarily. As soon as global concentrations increased, the whole country would be out of attainment, even if U.S. emissions miraculously fell to zero.

Moreover, since even a multilateral regime like the Kyoto Protocol would only barely slow the increase in atmospheric CO_2 concentrations, it is inconceivable how any state implementation plan (SIP) could pass muster under CAA Section 107(a), which requires each SIP to "specify the manner in which national primary and secondary air quality standards will be ***achieved and maintained within each air quality control region*** in each State" *(emphasis added)*.

When certain words in a statute lead to results that are "absurd or futile," or "plainly at variance with the policy of the legislation as a whole," the Supreme Court follows the Act's "policy" rather than the "literal words" [*United States v. American Trucking Assn*, 310 U.S. 534, 543, (1939)]. Attempting to fit CO_2 into the NAAQS regulatory structure would be an absurd exercise in futility, and plainly at variance with the Act's policy of devising state-level remedies for local pollution problems—powerful evidence that when Congress enacted Section 108, it did not intend for EPA to regulate CO_2.

Legislative History

Legislative history also compels the conclusion that EPA may not regulate CO_2. When House and Senate conferees agreed on a final version of the 1990 CAA Amendments, they discarded Senate-passed language to make "global warming potential" a basis for regulation and establish CO_2 reduction as a national goal. Thus, when Congress last amended the CAA, it considered and rejected regulatory climate change prevention strategies. As the Supreme Court has stated: "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language" [*INS v. Cardozo-Fonseca*, 480 U.S. at 442-43 (1983)].

What about Section 111—does it obligate or allow EPA to establish performance standards for CO_2 emissions from power plants? Not a chance. In the 105th, 106th, and 107th Congresses, Senator Patrick Leahy (D-Vt.) introduced legislation to amend Section 111 and set performance standards for CO_2 emissions from power plants. Each time the bill failed to attract even one co-sponsor.

Junk Science Doesn't Cut It, Either

Has EPA "determined" that carbon dioxide emissions endanger public health and welfare, as the AGs claim? The Bush Administration's *Climate Action Report 2002* (CAR) is an alarmist document, forecasting that U.S. average tempera-

tures will rise as much as 9 degrees Fahrenheit in the 21st century, and EPA was a key contributor to the report. However, the CAR's scary climate scenarios are a rehash of the Clinton-Gore Administration's report, *US National Assessment of the Potential Consequences of Climate Variability and Change*, and the Bush Administration, in response to litigation by the Competitive Enterprise Institute, Senator James Inhofe (R-Okla.), and others, agreed that the National Assessment's climate scenarios are "not policy positions or statements of the U.S. Government."

The National Assessment/CAR climate scenarios rely on two non-representative climate models—the "hottest" and "wettest" out of some 26 models available to Clinton-Gore officials. In addition, as Virginia State Climatologist Patrick Michaels discovered, and National Oceanic and Atmospheric Administration scientist Thomas Karl confirmed, the two underlying models—British and Canadian—could not reproduce past U.S. temperatures better than could a table of random numbers. Models that cannot "hind-cast" past climate cannot be trusted to forecast future climate. At once biased and useless, the CAR flunks Federal Data Quality Act (FDQA) standards for utility and objectivity. Any rulemaking based upon it would be challengeable as arbitrary and capricious.

In any event, because the CAA provides no authority for regulatory climate strategies, EPA could not regulate CO_2 even if the CAR scenarios were based on credible science—which they are not.

Power Grab

What drives the AGs to peddle such legally challenged arguments? Partisan politics may be a factor. All seven AGs are Democrats. The CO_2 lawsuit will help keep the spotlight on a centerpiece of the Kerry (D-Mass.) and Lieberman (D-Conn.) presidential campaigns—criticism of the Bush Administration's non-regulatory approach to climate policy.

Regional economic warfare may also play a part. Coal is the most carbon intensive fossil fuel; CO_2 regulation would make coal-fired electricity—and the industries dependent on it—less competitive; and the AGs' states obtain most of their electricity from sources other than coal. Massachusetts gets 30 percent of its electricity from coal; Connecticut, 12 percent; and Maine, 8 percent. By comparison, West Virginia gets 98 percent of its electricity from coal; Kentucky, 97 percent; Indiana, 95 percent; Ohio, 87 percent; Delaware, 69 percent; Georgia, 64 percent; North Carolina, 63 percent; Pennsylvania, 59 percent; and Virginia, 52 percent. If successful, the AGs' suit would tend to shift economic power from the Midwest and Southeast to the Northeast.

Finally, the AGs would benefit personally if EPA were to classify CO_2 as a regulated pollutant. Instantly, tens of thousands of hitherto law-abiding and environmentally responsible businesses—indeed, all fossil fuel users—would become "polluters," and be in potential violation of the CAA. Since states have primary responsibility for enforcing the CAA, the AGs' prosecutorial domain would grow by orders of magnitude.

Missed Opportunity

The Bush Administration intends to fight the AGs' lawsuit, but to some extent this is a problem of the Administration's own making. Not only did the Administration publish an alarmist climate report, it apparently no longer honors its agreement with Inhofe et al. that the National Assessment climate scenarios do not represent U.S. Government policy.

Because the National Assessment/CAR climate impact scenarios flout FDQA standards of objectivity and utility, the Competitive Enterprise Institute petitioned the Administration to cease disseminating both documents. Instead of seizing this opportunity to disavow the CAR and knock down a key premise of the AGs' litigation, Administration officials have gone to bizarre lengths to preserve the report.

EPA, for example, claims it never disseminated the CAR and so cannot be compelled to cease doing so now. That is nonsense. EPA disseminates the CAR on its Web site, and conducted an extensive public notice and comment process to develop the report.

The White Office of Science and Technology Policy (OSTP), for its part, claims the National Assessment was actually produced by an "advisory committee" and, hence, is not "information" subject to review under the FDQA. That, too, is nonsense. The U.S. Global Change Research Act of 1990 assigns responsibility for production of a National Assessment report to a coordinating "council," acting through an interagency "committee," in both of which OSTP has a leadership role. Moreover, FDQA standards apply to any scientific report disseminated by federal agencies, regardless of who produced it, and OSTP transmitted the National Assessment to Congress and the President.

If victorious, the AGs' lawsuit will usher in an era of anti-energy litigation. The AGs do not deserve to win, but the Administration runs a great risk by refusing to challenge the AGs' scientific *bona fides*.

* Marlo Lewis (mlewis@cei.org) is a senior fellow at the Capital Enterprise Institute.

Footnotes

[1] This paper is drawn from a longer treatment available at http://www.cei.org/pdf/3383.pdf. Both papers are indebted to Peter Glaser's masterful analysis, *CO2—A Pollutant?* National Mining Association Legal Foundation, October 1998, www.co2andclimate.org/Articles/1999/pollutant.htm.

New Source Review (NSR): A Plain English Primer and Update on EPA's Recent Changes

*By Richard G. Stoll**

Introduction: Excitement Over NSR

In May, 2003, EPA received over 225,000 comments on a proposed regulation. This number covers every man, woman, and child in Lincoln, Nebraska. What is going on?

The 225,000 comments represent one stage of probably the hottest controversy EPA has dealt with in years: new source review (NSR) under the Clean Air Act (CAA). For those who may be confused by the public charges and counter-charges, I would like to provide some basic background.

I would also like to explain why some people are so excited. Here is an opening example. Assume a widget factory manager wants to modify his factory by reconfiguring some pipes and replacing some old parts. By doing this, he will both reduce the time the factory must shut down for maintenance and improve the factory's production efficiency.

If this modification is not subject to NSR, the project might be completed in a few months at a cost of $50,000. If the modification is subject to NSR, the project might be, after years of administrative permitting and followup litigation: (a) completed at a cost of $5,000,000; or (b) legally prohibited.

As you consider that example and read this article, keep in mind the following question: *what factory manager in his right mind would want NSR, and what opponent of the factory would in his right mind not want NSR?*

Three Preliminary Points

First, what is a "source"? Virtually every type of industrial, manufacturing, energy, electronic, hi-tech, and low-tech facility imaginable will have some type of air pollutant emissions associated with it and will therefore be regulated by the CAA. Each such facility is an air pollution "source" under the CAA.

Second, "new source review" is a misnomer. If all that were involved were truly "new" sources, NSR wouldn't be such a big issue. To describe the issue accurately, one should refer to "new *and modified* source review." Since everyone already calls the issue NSR I'll stick with that, but remember the "modified" component has created virtually all the recent controversy.

Third, whenever a company plans to construct a new source or modify an existing source, that construction or modification will either "trigger" NSR or it will not. Whether NSR will be triggered can have dramatic consequences, as the widget example shows.

Three NSR Attributes Provide Major Pain or Pleasure, Depending Upon Your Perspective

To help understand how NSR can have such dramatic consequences, three NSR attributes must be understood. First, a *permit* will be required if NSR is triggered. Second, that permit is a *preconstruction* permit. Third, if NSR is triggered, the facility will be required to install some form of *best technology*.

(1) Permit – Unwelcome Even In Mr. Rogers' Neighborhood?

CAA permits usually involve much time, money and trouble. One does not simply drop into an office, pay a fee, and saunter out with a permit. Rather, a great deal of legal process must be followed.

A permit application must be accompanied by a multitude of technical information. EPA (or a State EPA analog) staff will usually take months to digest the information and will almost always demand more information before they deem the application complete. EPA or State staff will then prepare a *proposed* permit with reams of background documentation. EPA or the State must then issue a public notice of the proposal, and provide a period (often 30-60 days, but sometimes more) for written public comment. An opportunity for a public hearing on the proposed permit is often provided.

At the risk of stating the obvious, the desires of a manufacturing facility's management are often not in perfect harmony with the desires of the facility's neighbors, environmental groups, and other interests. (Mr. Rogers always welcomed everyone to his neighborhood, but he never – at least explicitly – included in any song a welcome to coal-fired boilers.) It is common, therefore, for CAA permits to be hotly contested.

The CAA and similar State laws provide great opportunity for project opponents to throw monkey wrenches into facility owners' plans whenever a permit is required. The permit issuance process can be dragged out for years, as advocates demand more and more delays to consider more and more thousands of pages of objections and comments.

To make things worse (or better, depending upon your perspective), there is almost always an opportunity to *litigate* over the results of a final permit decision through the judicial review process. Judicial review can add years to the process.

(2) WAIT!!!! To Make Things Worse (or Better), the Permit Is a *Preconstruction* Permit

So you want to construct a new facility or modify an existing facility, and you learn that NSR is triggered. Then you must *wait*. The CAA is very explicit on this: you can be subject to major monetary penalties, and even thrown in jail, if you *so much as turn a spade of dirt* on the new project or modification until your final permit is issued.

In many other legal settings, a party needing a permit can at least start construction or modification while the application is pending, so long as he does not start actual operation of the new or modified facility before the permit is issued. Not so for NSR.

(3) Final Nail In Coffin (or Lily in Bouquet): A "Best Technology" Requirement

It is important to understand the concept of an "existing" pollution source, as contrasted to a "new" or "modified" source. Very generally, an existing source is a factory, plant, etc. that is already constructed and operating on the date certain laws become effective. A "new" source is one that begins construction after that date, and a "modified" source (described more fully below) is an existing source for which some form of modification is begun after that date.

In structuring the CAA Congress could have, but did not, adopt an approach requiring all existing pollution sources to install "best technology" for pollution control. Rather, Congress chose to rely primarily on an area-wide "air shed" or "ambient air quality" approach to regulating air pollution from existing sources. Under this approach, the degree to which existing sources must control their air emissions depends upon the quality of the "ambient," or "air shed" air, in that particular geographical area.

Under this approach, three existing widget factories identical in every material respect could be subject to dramatically different air pollution requirements depending upon where they are located. Existing factory #1, located where the "ambient" air exceeds the CAA's ambient standards, might be required to reduce its emissions by 90% through installing technology that cost $10 million. Existing factory #2, located where ambient air is very clean, might be subject to *no* control requirements. Existing factory #3, located where ambient air is moderately clean, might be required to spend $2 million.

The CAA takes a totally different approach, however, for new and modified sources that trigger NSR. Each such source, as a condition to obtaining its NSR permit, must install and maintain a form of *best technology* for air pollution control.

It is beyond the scope of this article to explain complicated details, but in some situations this best technology is called "best available control technology," or "BACT," while in other situations this best technology is called "lowest achievable emission rate," or "LAER." Here is the main point: either form of best technology will almost always be very expensive.

Primary NSR Issues Have Focused on "Modified" Sources

If a factory or plant is truly brand new, NSR issues are usually cut and dry. There are certain size thresholds exempting very small new sources from undergoing NSR, but little confusion is usually presented as to whether NSR is triggered. Moreover, those seeking to locate a brand new facility generally expect to deal with permitting delays, and can plan their designs to accommodate the best technology requirements reasonably economically.

Whether a particular change to an existing source will be considered a "modification" that triggers NSR is the issue stoking most of the flames. The CAA says very little about this; rather simply, the CAA says that any modification of an existing source that will cause an increase in air pollutant emissions will trigger NSR.

EPA regulations have long provided, however, that not every single modification that increases emissions by any amount will trigger NSR. Rather, EPA's regulations have provided three basic parameters to the issue of whether a change to an existing source will be deemed a "modification" triggering NSR.

First, EPA's regulations include numerical "significance" levels. Under the theory that Congress could not have intended that each and every pollutant emission increase – no matter how slight or *de minimis* – would trigger NSR, EPA's regulations specify that before NSR will be triggered, emissions must increase by specified "threshold" amounts (expressed in tons per year ("tpy")). The thresholds vary from pollutant to pollutant, and vary depending upon the quality of the ambient air in the area that the source is located.

Second, the regulations provide that NSR will be triggered only where there will be a *net* increase in emissions from a source above the threshold levels. Thus, assume a manufacturing plant has several air pollution emitting units. It desires to install an entirely new unit that will emit 100 tpy of a certain pollutant, and is willing to shut down two existing units that together emit 100 tpy of the same pollutant. Since there will be no *net* increase in emissions from the source, the project may in certain situations avoid NSR triggering.

Third, the regulations provide that certain types of changes will not, as a matter of definition, be deemed a "modification" that could trigger NSR. For instance, assume a threshold level for a certain pollutant is 100 tpy – that is, normally a change that would increase net emissions of that pollutant by 100 tpy would trigger NSR. *But if the change were one of the types of activities that the regulation had by definition stated did not constitute a "modification," even*

a change that would increase emissions by 10,000 tpy would not trigger NSR.

So What Is EPA Doing Now That Is Causing Such Angst?

As noted above, proponents and opponents of industrial facilities have good reason to feel passionately that NSR should or should not be triggered in a given situation. Well, EPA is in the process of changing and clarifying the nationally-applicable regulations that determine whether NSR is triggered in various modification situations. Since the outcome of EPA's rulemaking process (followed by judicial review) might either greatly increase or decrease the number of NSR events triggered throughout the U.S., advocacy groups on all sides of the NSR issue are swarming all over the EPA rulemaking process (and followup litigation).

Very generally, EPA has been issuing final and proposed rules designed to curtail the triggering of NSR for facility modifications. As the entire process unfolds after judicial review, however, there might be a major expansion of the types of modifications that would trigger NSR.

EPA issued one major *final* NSR rule (with several components) on December 31, 2002. EPA also issued one major *proposed* rule on December 31, 2002. EPA officials have also announced they intend to issue at least one and possibly two additional *proposed* rules in the next several months.

Points To Help Understand Implications of New Rules and Proposals

I would like to explain some basics in terms of a simple equation. As noted earlier, EPA regulations provide that a modification resulting in a net emission increase over a numeric threshold will trigger NSR. Assume for a certain pollutant, a net increase of 100 tons per year (tpy) or more will trigger NSR. So the critical question is whether y equals or exceeds x plus 100, where y is the tpy emitted after the modification and x is the tpy currently emitted. If y is less than x plus 100, NSR will not be triggered; if y equals or exceeds x plus 100, NSR will be triggered.

It is obvious that the numbers one assigns to x and y will be absolutely critical. One may assume this should be a fairly straightforward, non-controversial exercise, but it is not.

One problem is that virtually no source emits a pollutant at exactly the same rate and volume 24 hours a day, 365 days a year, year after year. In fact, if you reviewed a factory's history, you might see major swings in emission rates associated with fluctuating product demand. And if you tried to predict emissions into the future, you must also cope with uncertainties involving demand and efficiency improvements.

Higher *x*'s and Lower *y*'s.

So how do you settle on a figure for the current emissions (x) and the future emissions (y)? This is the first basic issue addressed by EPA's final NSR rule issued on December 31, 2002. EPA's new rule changes current rules and policies in a way that will result in fewer modifications triggering NSR. EPA has done this by making it easier for source owners to use (i) *higher* numbers for current emission assumptions (the x in the equation) and (ii) *lower* numbers for future emission assumptions (the y in the equation). As a matter of logic, if it is now easier to use both a higher x and a lower y, y will not equal or exceed x plus 100 as often as it would in the past.

To help source owners use a higher x, the new rules allow the owner to pick the two-year period out of the last ten years of plant operation with the highest tpy numbers. Under the old rules, source owners were generally required to use the most recent two years.

To help source owners use a lower y, the new rules allow the owner to use a projected *actual* emission level in estimating future tpy. This means that the source owner can take into account reasonable estimates of plant down time and non-operational time (such as projecting that certain emission-causing operations will occur only on certain hours on certain days). Under the old rules and policies, source owners were generally not allowed to take credits for projected plant down time; rather, they were required to assume that the plant would be continuously emitting under the maximum operational conditions that the plant was legally allowed to operate ("maximum allowable" emissions).

Going beyond the *x*'s and *y*'s.

Two additional components of the new final rule should also result in fewer modifications triggering NSR. Each component provides an approach under which modifications will avoid NSR even where they will produce a net emission increase of more than the threshold amount (that is, even where y equals or exceeds x plus 100, NSR will still not be triggered).

"PALs." The first new component is the "plantwide applicability limit," or PAL. This allows a source with several distinct pollution-causing units to obtain, by undergoing a permit review process, an overall emission limit for the source (taking account of the actual emissions from all emission units operating at the time). This overall limit is called the PAL, and it is good for ten years.

Once the 10-year PAL is in place, the source has tremendous flexibility to make modifications without triggering NSR. For it can engage in any number of discrete unit closings and constructions of new units and modifications of existing units without triggering NSR so long as the whole source will not in the aggregate at any time have actual emissions over the PAL level.

For example, assume the PAL established for a

source in one year is 1500 tpy. In the next year, the source shuts down three units, each of which were contributing 200 tpy. Then four years later, the source desires to add a unit that will emit 400 tpy and six years later, the source desires to add a unit that will emit 200 tpy.

Under the old rules, the new 400 tpy unit and the new 200 tpy unit would each independently have triggered NSR. Under the new rules, with the above-described PAL in place, they would not. Going back to the example at the beginning of the article, years of delay could be avoided and millions of dollars could be saved.[1]

"Clean units." The second new component is called the "clean unit" exemption. Very generally, the purpose is to protect facilities' major investments for ten years where they have installed expensive "best technology" with respect to an air pollution unit. Without getting into complicated details, the following example should illustrate.

Assume a source undertakes a modification in 2003 that triggers NSR, and the source spends $10 million to install the "best technology" requirement required by EPA during the permitting process. Then, in 2008, the source wants to undertake a modification that would increase net emissions by over the threshold number for the pollutants in question (100 tpy in the examples above).

Under the old rules, the 2008 modification would clearly trigger NSR. Under the new "clean unit" rules, the 2008 modification would not trigger NSR if certain conditions were met. Again, years of delays and millions of dollars might be saved.

"PCPs." An interesting element of the new final rule is the "pollution control project" (PCP) exemption. The current structure of federal environmental statutes – dating back to the 1970s – offers almost no opportunity for inter-media "tradeoffs" involving requirements from various statues (Clean Water Act, CAA, Resource Recovery and Conservation Act (RCRA), etc.). Similarly, there is almost no opportunity within each statute for "tradeoffs" between and among various standards and requirements.

For instance, assume under the CAA there are numeric standards for three pollutants, a, b, and c. Traditionally under CAA and EPA rules, a new source of these three pollutants would have to be reviewed to assure it would not cause violations of the ambient standards for each of the three pollutants. Even if a new source would result in *improvements* – even incredibly significant improvements – in the loadings to the atmosphere of pollutants a and b, if the source would slightly increase violations of pollutant c, its construction would be prohibited.

The PCP portions of the new rule are designed to provide some relief from this long-established principle. In carefully circumscribed circumstances, projects (including modifications) that might otherwise trigger NSR are excluded from NSR and otherwise allowed to proceed based on the "tradeoff" that there will be net environmental benefits.

The Biggest NSR Issue Right Now, Despite Its Name, Is Anything But "Routine"

The controversy surrounding the recent final rule pales in intensity to the controversy raised by the proposed rule EPA issued on December 31, 2002 – the "routine repair, maintenance, and replacement" (RMRR) proposal. Even though the CAA does not specify such an exemption, EPA's regulations have long provided that RMRR modifications are not modifications that trigger NSR.

The scope of this exemption is extremely critical, because modifications that qualify as RMRR are automatically deemed not to be modifications that trigger NSR, *no matter how many hundreds or thousands of tons of new pollution* may be associated with them. As environmental groups may with justification argue, RMRR if not carefully defined could in essence take the "modification" out of NSR.

EPA's rules have never defined RMRR, and EPA has instead established a regime over the last few years in which sources may obtain case-by-case determinations. EPA has brought enforcement actions in the last few years against sources that – EPA claims – made modifications that triggered NSR without seeking or obtaining the necessary NSR permit. The sources have defended against these enforcement claims by asserting their modifications qualified as RMRR.

Because the regulations have never defined RMRR and there has been so much confusion in the litigation, EPA is now trying to provide more certainty by proposing new regulations that would define RMRR. It is this proposal, published in the December 31, 2002 *Federal Register*, that drew the 225,000 comments.

The proposal offers two basic approaches. One relies on an annual dollar "allowance" under which defined types of expenditures could be made each year at a plant, and so long as the expenditures did not exceed some percentage of the total capital costs necessary to replace the facility, the work would be deemed RMRR. EPA's proposal does not mention a specific percentage figure, but EPA officials have mentioned percentages in the range of 10-30% in public discussions.

The second approach, known as the "equipment replacement provision," would focus on the type of equipment that was being replaced. A facility could replace equipment within a "process unit" and stay within the RMRR boundaries so long as the replacement equipment would serve the same basic function as the replaced equipment and the costs would not exceed a certain percentage (not yet specified) of

the costs of the relevant process unit.

The public comment period on the RMRR proposal closed in May, 2003, and it will probably be many months before EPA issues a final RMRR rule. One thing that is virtually as certain as the sun rising tomorrow: there will be long and protracted judicial review of the final rule, so whatever EPA says in the final rule may eventually be struck down by the courts.

More Proposed NSR Rules To Come

A number of inter-related issues are critical to the NSR program. It would have been nice if EPA had addressed all these issues in a single rulemaking so the interested public could have a better understanding of how the issues fit together and how the program as a whole might work. This would have also been a much more manageable approach for the rulemaking and judicial review processes, as commentors and litigators could have had one consolidated proceeding in which to address these inter-related issues.

It might have been nice, but it is not to be. EPA has not only bifurcated RMRR from the final rules issued on December 31, 2002, but has also deferred separate proposals on other issues. For key NSR issues known as "debottlenecking" and "aggregation" and "allowable PALs" EPA has announced it will issue proposed rulemakings over the next several months. (Perhaps by fall 2003.)

Even if EPA includes all the remaining issues in one proposal (which is not certain), there will thus be at least three separate NSR rulemaking and judicial review tracks. This multi-track approach is certain to cause much confusion and disruption among interested parties and state agencies. It may take a full-time brigade of lawyers just to keep score.

* Richard G. Stoll, Partner, Foley & Lardner, Washington, D.C

Footnotes

[1] One might note that if the source owner had timed the earlier unit shutdowns to coincide with the construction of the new units, NSR might have been avoided because there would be no *net* increase in emissions each time. This is true, but in order to obtain "netting" credit, the owner would still have to go through the *permitting* process unless the old units were completely shut down before construction of any kind began on the new units. Most clearly, the new PAL provisions give the source owner much greater flexibility in avoiding NSR, avoiding paperwork, and in timing shutdowns and startups when compared to the old rules.

Federalism & Separation of Powers

Comment: *Nevada Department of Human Resources v. Hibbs*

*By Michael S. Fried**

Editor's Note: Another perspective on the Hibbs case is offered by Amelia W. Koch and Steven F. Griffith, Jr. at page 104 of this issue.

Introduction

In a Term that has laid to rest the exaggerated claim that the Rehnquist Court is "conservative," perhaps the most surprising decision was in the arena of federalism, one area in which this Court has genuinely made some strides toward restoring the balance between federal and state power contemplated by the Constitution. *Nevada Department of Human Resources v. Hibbs*[1] did not merely refuse to extend the Court's recent Enforcement Clause case law in areas involving heightened constitutional scrutiny. Instead, it marked a significant expansion of congressional power even over the outer bounds recognized in the Voting Rights Act cases (which involved racial discrimination, subject to the highest level of scrutiny) and introduced several innovations in the Section 5 analysis that could allow for a far greater latitude for congressional Enforcement Clause power in a wide variety of areas.

I. The *Hibbs* Decision

The events giving rise to the *Hibbs* litigation began in 1997 when William Hibbs, an employee of the Nevada Department of Human Resources Welfare Division (the "Department"), requested leave to care for his wife. The federal Family and Medical Leave Act of 1993 (the "FMLA") requires that employers, expressly including state agencies,[2] offer eligible employees at least twelve weeks of unpaid leave each year for any of several reasons, including a spouse's "serious health condition."[3] While the Department granted Hibbs twelve weeks of leave, it ultimately terminated Hibbs when he failed to return to work after being informed that the leave had expired.

Hibbs brought suit against the Department in the District of Nevada, alleging that the Department had violated the leave provision of the FMLA. The district court granted summary judgment to the Department on the FMLA claim on sovereign immunity grounds. The Ninth Circuit reversed, holding that the leave provisions of the FMLA were validly enacted under Section 5 of the Fourteenth Amendment and, therefore, permissibly abrogated the states' sovereign immunity.

The Supreme Court affirmed the Ninth Circuit. Chief Justice Rehnquist, writing for the Court, observed that the Congress had clearly expressed its intent to abrogate the states' sovereign immunity in the FMLA.[4] Emphasizing that sex-based classifications are subject to heightened constitutional scrutiny,[5] the Court held that, in enacting the FMLA, the Congress had evidence of states' longstanding employment discrimination on the basis of sex, including ongoing discriminatory application of leave policies.[6] The FMLA leave provision extended beyond prohibiting unconstitutional conduct to affirmatively requiring leave minimums to all eligible employees without regard to discrimination, but the Court held, pursuant to *City of Boerne v. Flores*,[7] that the leave provisions of the FMLA were "'congruent and proportional'" responses to the infirmities identified by the Congress and, hence, proper prophylactic legislation under Section 5.[8] The Court found that the leave requirement was designed to "ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees"[9] and that the measure was "narrowly targeted at the fault line between work and family."[10] Finally, the Court concluded that the propriety of the measure was supported by the fact that it was limited in various ways and was not unduly expansive.[11] Thus, the Court held that it was valid Section 5 legislation and validly abrogated the sovereign immunity of the states.

Justice Stevens, the sixth vote in favor of the outcome in *Hibbs*, rejected the Court's Enforcement Clause rationale, but he concurred in the judgment on the view that the Congress can validly abrogate the States' sovereign immunity through Commerce Clause legislation.[12] Justice Souter, joined by Justices Ginsburg and Breyer, joined the opinion of the Court but wrote separately to reaffirm his broader view of the Enforcement Clause power.[13] Justice Kennedy wrote the principal dissent, which Justices Scalia and Thomas joined,[14] and Justice Scalia wrote a separate dissenting opinion.[15]

The significance of *Hibbs* must be evaluated in light of its place in the Court's Section 5 jurisprudence. A brief survey of the most significant cases in this area is therefore required at the outset.

II. The Enforcement Clause Case Law Before *Hibbs*

*A. The Pre-*Boerne *Case Law*

The ratification of the Reconstruction amendments unquestionably created a significant new federal role in the area of civil rights. The Court has long held that the congressional enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment are broad and important components of the new constitutional order.[16] Nonetheless, despite the substantial deference that has sometimes been afforded to congressional determinations in this area,[17] the Court has never authorized Enforce-

ment Clause legislation that is unrelated to redressing the substantive provisions of the respective amendments. *City of Boerne*, discussed in the next section, is the leading case of the Rehnquist Court on the scope of the Congress's Enforcement Clause powers, but the analysis must begin with the cases preceding that landmark decision.

The primary pre-*Boerne* authorities on the scope of the Enforcement Clause powers are a series of cases under the Voting Rights Act, beginning with *South Carolina v. Katzenbach*.[18] That case involved constitutional challenges to several Voting Rights Act remedies imposed upon "covered" jurisdictions, geographical areas determined according to a statutory formula to capture the places where "various tests and devices ha[d] been instituted with the purpose of disenfranchising Negroes . . . for many years."[19] The Court upheld the geographically tailored imposition of a suspension of voting tests (such as literacy examinations) that had been found to be applied in these areas as a pretext for unconstitutional racial discrimination in voting,[20] as well as a federal pre-clearance requirement for new voting qualifications in covered jurisdictions "to determine whether their use would perpetuate voting discrimination."[21] The Court also upheld the use of federal examiners to police compliance with constitutional requirements under certain circumstances.[22] All the challenged provisions in *South Carolina* were both geographically tailored to areas with demonstrated histories of unconstitutional discrimination and responsive to conduct that was determined to be a pretext for constitutional violations (or else provided machinery for enforcing the prohibitions against unconstitutional discrimination).

The Court returned to the enforcement power later the same Term in *Katzenbach v. Morgan*,[23] which upheld a nationwide prohibition against denying voting rights on grounds of illiteracy to any person who had completed the sixth grade in any state or Puerto Rico. The provision was directed toward addressing "the disenfranchisement of large segments of the Puerto Rican population in New York,"[24] which the Congress permissibly found to be caused by intentionally discriminatory application of literacy requirements.[25]

Oregon v. Mitchell[26] involved (1) a temporary nationwide prohibition against the imposition of literacy tests and other statutorily defined voting "tests or devices"; (2) a ban on state durational residency requirements in presidential elections; (3) an imposition of rules regarding absentee voting in such elections; and (4) a requirement that states extend the franchise to those eighteen or older.[27] A fractured Court upheld the nationwide ban on disfavored tests and devices, as well as the two presidential-election requirements. The primary opinion emphasized the "long history of the discriminatory use of literacy tests to disfranchise voters on account of their race" in allowing the prohibition against the tests and devices[28] and the special federal role in "creat[ing] and maintain[ing] a national government"—independent of any power under the Reconstruction amendments—in upholding the presidential election requirements.[29] Nonetheless, the Court struck the voting-age requirement, where "Congress [had] made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race."[30]

Finally, *City of Rome v. United States*[31] upheld application to the statutorily covered jurisdictions of an "effects" test that banned conduct with a racially disparate impact, despite the fact that the Constitution prohibits only intentional discrimination. The Court allowed this application as a prophylactic measure because "'Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.'"[32]

The foregoing line of Voting Rights Act cases thus upheld the power of the Congress under its Reconstruction amendment enforcement powers to prohibit conduct not violative of the substantive provisions of the amendments only under one of two circumstances: (1) where the Congress had permissibly found that the banned conduct was traditionally used as a pretextual means of intentionally discriminating in violation of the amendments (as in *Morgan* and *Oregon*); or (2) where the prophylactic measure was geographically tailored to the "areas where voting discrimination ha[d] been most flagrant"[33] (as in *South Carolina* and *City of Rome*). Where neither of these conditions were present, the Court has struck legislation as exceeding the enforcement power.[34]

The Court had thus never authorized any nationwide general prophylactic measure not involving specific conduct found to be a pretext for unconstitutional discrimination—even in the context of racial discrimination, which is subject to the highest level of constitutional scrutiny.[35] Indeed, five judges of the Second Circuit joined a pre-*Boerne* opinion concluding that, under the Supreme Court's precedents, "it is unclear whether . . . the 'results' methodology of [amended Section 2 of the Voting Rights Act, which imposes a nationwide effects test] is constitutionally valid."[36]

B. City of Boerne *and its Progeny*

Seminole Tribe v. Florida,[37] which held that the Congress cannot abrogate the states' sovereign immunity when legislating pursuant to its Article I powers, ushered in a new wave of Enforcement Clause cases, because the validity of legislation under the commerce power could not justify its application to creating private damages actions against non-consenting states. As it happens, *City of Boerne*, which struck down the Religious Freedom Restoration Act (the "RFRA") as exceeding the Section 5 power, was not such a sovereign immunity case, but it nonetheless was the first Supreme Court opinion to address the scope of the Section 5 power in the wake of *Seminole Tribe* and the first to return to the issue since 1980.

City of Boerne articulated much more expressly than the earlier precedents the limitations upon the Congress's power to enforce the Reconstruction amendments. It reemphasized that the scope of the power is ultimately a question for the judiciary[38] and that "Congress' power under § 5 . . . extends only to 'enforcing' the provisions of the Fourteenth Amendment."[39] While *City of Boerne* reaffirmed that the Congress could, where appropriate, prohibit conduct that was not itself unconstitutional, the Court held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[40] The Court held that the RFRA failed this test because it went beyond constitutional requirements in prohibiting government conduct adversely affecting religious practices.[41]

The Court applied and refined the *City of Boerne* test for Enforcement Clause legislation in several subsequent cases involving the propriety of congressional attempts to abrogate the states' sovereign immunity, including *Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank*,[42] *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*,[43] *Kimel v. Florida Board of Regents*,[44] and *Board of Trustees of University of Alabama v. Garrett*,[45] as well as one case outside the sovereign immunity context, *United States v. Morrison*.[46] In each of these cases (none of which involved legislative classifications subject to heightened scrutiny), the Court held that the challenged legislation had not been validly enacted under the Enforcement Clause, and thus could not abrogate sovereign immunity under *City of Boerne*.

City of Boerne and its progeny confirmed the limitations already implicit in the earlier Enforcement Clause precedents. Moreover, it confirmed that some expansive dictum in a few of the earlier cases[47] could not be read to vest the Congress with unreviewable power in this area, or the power to modify the substantive scope of the amendments themselves.

III. *Hibbs* and the Court's Enforcement Clause Jurisprudence

The *Hibbs* decision signals a substantial enlargement of the congressional enforcement power under the Reconstruction amendments beyond the outer bounds recognized in the Voting Rights Act cases decided by the Warren and Burger Courts. As shown above, the Court had never before sanctioned a nationwide ban on conduct that did not violate the Constitution, except where the conduct was validly found by the Congress to have been used as a pretext for unconstitutional discrimination. *Hibbs* broke this mold by allowing a nationwide prophylactic measure designed vaguely to effectuate the general policy of alleviating sex stereotypes in the employment leave context. In reaching this unprecedented holding, the Court liberalized the Section 5 analysis in two important respects.

First, the Court introduced a significant change in the role of past unconstitutional conduct by the states in the Section 5 analysis. As shown above, the pre-*Hibbs* cases authorized the use of historical patterns of state discrimination to justify geographically tailored responses to unconstitutional discrimination of specific jurisdictions. The dissenting opinion of Justice Kennedy demonstrates the weakened evidentiary methodology used by the *Hibbs* majority to establish such a historical pattern.[48] But apart from this alteration, the *Hibbs* Court uses the pattern for a different purpose—to allow prophylaxis as a general matter on an undifferentiated, nationwide basis, rather than to do so "confined to those regions of the country where [unconstitutional conduct] had been most flagrant."[49] As Justice Scalia summed up the innovation: "Prophylaxis in the sense of extending the remedy beyond the violation is one thing; prophylaxis in the sense of extending the remedy beyond the violator is something else."[50] This is not to say that the pre-*Hibbs* approach could never, in principle, have led to validation of a broader nationwide prophylactic rule, but such a rule would have been validated only by geographically local analyses of historical state discrimination across the entire nation, and would certainly have been a rare exception. The Court's alteration of the use of past discrimination in *Hibbs* would appear to ease enormously the imposition of nationwide prophylactic measures under the Enforcement Clause.

Second, the *Hibbs* Court's purported application of the *City of Boerne* congruence and proportionality standard dramatically expands the permissible scope of prophylactic legislation. While the pre-*Hibbs* cases allowed prophylactic remedies such as results tests where necessary to combat unconstitutional intentional discrimination, *Hibbs* appears to turn this approach on its head by authorizing the imposition of a remedy (a blanket leave minimum) that does not even have any disparate impact requirement on the ground that it could be necessary to prevent a disparate impact. The Court held that the Congress had a legitimate "remedial object" in preventing states from "provid[ing] for no family leave at all" because "such a policy would exclude far more women than men from the workplace."[51] In reaching this surprising holding, *Hibbs* notably shifted the focus of the congruence and proportionality inquiry from specific unconstitutional state conduct to a far more general policy of reducing the stigma of sex stereotypes.[52] Notably, the word "stereotype" or "stereotypical" does not occur at all in the opinions of the Court in *City of Boerne*, *Florida Prepaid*, *Kimel*, or *Garrett* (although it does appear several times in the *Garrett* dissent), but it occurs no less than fifteen times in the relatively short opinion of the Court in *Hibbs*. This important modification of the congruence and proportionality standard could have an enormous effect in future cases.

Significantly, this second aspect of the *Hibbs* analysis would appear not to be limited to contexts involving heightened scrutiny. The suspect character of a legislative classification is relevant to the ease or difficulty of demon-

strating a pattern of constitutional violations by states,[53] but there would appear to be no sound doctrinal justification for allowing broader or narrower prophylaxis depending on the level of scrutiny once a pattern of unconstitutional conduct has, in fact, been established.

Conclusion

Hibbs does not merely mark the end of the recent line of cases applying limits on the Congress's Enforcement Clause powers. Instead, it represents a significant innovation of doctrine over even the broadest precedents of the Warren and Burger Courts, which will likely result in a significant expansion of congressional enforcement powers in a variety of areas. The decision could undermine developments in the area of federalism that have formerly been considered signature doctrines of the Rehnquist Court.

* Michael S. Fried is an attorney in the Washington D.C. office of Jones Day. The views and opinions expressed herein are those of the author only and do not necessarily reflect the views of Jones Day.

Footnotes

[1] 123 S. Ct. 1972 (2003).
[2] *See* 29 U.S.C. §§ 203(x), 2611(4)(A)(iii), 2617(a).
[3] *Id.* § 2612(a)(1)(C).
[4] *See Hibbs*, 123 S. Ct. at 1977.
[5] *See id.* at 1978.
[6] *See id.* at 1980.
[7] 521 U.S. 507, 520 (1997).
[8] *Hibbs*, 123 S. Ct. at 1982 (quoting *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (citing *City of Boerne*, 521 U.S. at 520)).
[9] *Id.*
[10] *Id.* at 1983.
[11] *Id.* at 1983-84.
[12] *See id.* at 1984-85 (Stevens, J., concurring in the judgment).
[13] *See id.* at 1984 (Souter, J., concurring).
[14] *See id.* at 1986-94 (Kennedy, J., dissenting).
[15] *See id.* at 1985-86 (Scalia, J., dissenting).
[16] *See, e.g.*, *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).
[17] *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).
[18] 383 U.S. 301 (1966).
[19] *Id.* at 333-34.
[20] *Id.*
[21] *Id.* at 316.
[22] *See id.* at 320-21, 327-33.
[23] 384 U.S. 641 (1966).
[24] *Id.* at 645 n.3.
[25] *See id.* at 654 (noting "evidence suggesting that prejudice played a prominent role in the enactment of the requirement").
[26] 400 U.S. 112 (1970).
[27] *Id.* at 117-119 (opinion of Black, J.).
[28] *Id.* at 132.
[29] *Id.* at 134.
[30] *Id.* at 130.
[31] 446 U.S. 156 (1980).
[32] *Id.* at 214 (citation omitted).
[33] *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).
[34] *See, e.g.*, *Oregon*, 400 U.S. at 130 (opinion of Black, J.) (voting-age requirement); *see also James v. Bowman*, 190 U.S. 127, 139 (1903) (private interference with voting rights); Civil Rights Cases, 109 U.S. 3, 13-14 (1883) (private conduct); *United States v. Reese*, 92 U.S. 214, 221 (1875) (nationwide ban on interference with voting rights without race nexus).
[35] While *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), held that Section 5 legislation could, in the context of a Title VII claim, abrogate state sovereign immunity, it expressly noted that it was not addressing whether Title VII was valid Section 5 legislation. *See id.* at 456 n.11.
[36] *Baker v. Pataki*, 85 F.3d 919, 928 n.12 (2d Cir. 1996) (en banc) (opinion of Mahoney, J., concurring in the judgment); *see also* Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (noting that "[n]othing in [*Chisom*] addresse[d] the question whether § 2 . . . is consistent with the requirements of the United States Constitution").
[37] 517 U.S. 44 (1996).
[38] *See City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).
[39] *Id.* at 519.
[40] *Id.* at 520.
[41] *See id.* at 529-36.
[42] 527 U.S. 627 (1999) (involving the Patent and Plant Variety Protection Remedy Clarification Act).
[43] 527 U.S. 666 (1999) (involving the Trademark Remedy Clarification Act).
[44] 528 U.S. 62 (2000) (involving the Age Discrimination in Employment Act).
[45] 531 U.S. 356 (2001) (involving Title I of the Americans with Disabilities Act).
[46] 529 U.S. 658 (2000) (involving the civil remedy provisions of the Violence Against Women Act).
[47] *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).
[48] *See* 123 S. Ct. at 1987-92 (Kennedy, J., dissenting).
[49] *City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997).
[50] *Hibbs*, 123 S. Ct. at 1985 (Scalia, J., dissenting).
[51] *Id.* at 1983 (majority opinion).
[52] *See id.* at 1992 (Kennedy, J., dissenting).
[53] *See id.* at 1982 (majority opinion).

The Endangered Species Act: Does It Have a Stopping Point?

*By Jack Park**

Introduction

In several recent decisions, the United States Supreme Court has held that Congress cannot use its Commerce Clause powers to regulate certain activities. In two of these cases, the Court found that Congress had exceeded the powers granted to it in the Constitution.[1] In others, it managed to avoid such knotty constitutional questions through twists of statutory interpretation.[2] In *United States v. Lopez*, for example, the Court held that the Gun-Free School Zones Act of 1990 exceeded the authority of Congress to regulate commerce.[3] However, in *Solid Waste Agency v. United States Army Corps of Engineers* ("SWANCC"),[4] the Court "avoid[ed] . . . significant constitutional and federalism questions" by rejecting the Corps' attempt to use its power to promulgate regulations that extended the definition of "navigable waters" to include purely intrastate waters.[5]

These decisions prompt an examination of other statutes and regulations that are the product of Congress' exercise of its Commerce Clause powers, including the Endangered Species Act. Because the Act applies to animal species, it sometimes involves activities that are remote from interstate commerce. Nevertheless, the Act purports to regulate the use of private property.[6] *SWANCC*, which involved regulations promulgated under Section 404(a) of the Clean Water Act, suggests that there are limits to Congress' power to reach certain property, and *Lopez* and *Morrison* each held that some activities are simply beyond the reach of Congress. To date, however, the courts of appeals have been unreceptive to claims that, as applied, the Endangered Species Act exceeds Congress' authority under the Commerce Clause.

This article will discuss the court of appeals' decisions applying the Supreme Court's Commerce Clause jurisprudence to challenges to the Endangered Species Act. First, it will discuss the Supreme Court's recent Commerce Clause decisions. Next, it will examine the court of appeals' application of that jurisprudence to the cases before them. These decisions have strained the meaning of commerce and, thereby, leave no apparent stopping point to the application of the Commerce Clause in this context. Finally, this article will discuss some problems that have resulted from the court of appeals' holdings.

I. The Court's Commerce Clause Jurisprudence

The Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[7] The Fifth Circuit has observed, "Though seldom used in the nineteenth century, the Commerce Clause [has become] the chief engine for federal regulatory and criminal statutes in the latter two-thirds of the twentieth century."[8] As the Supreme Court has noted, post "Switch-in-Time" Supreme Court decisions involving New Deal statutes "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause."[9] Even so, the Court has pointed to the need to limit the scope of the Commerce Clause lest it "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[10] The Fifth Circuit identifies this "alarming and dangerous prospect" as well as the "need to identify judicially enforceable limits on the Commerce Clause" as the "motivating force" behind the Supreme Court's recent Commerce Clause jurisprudence.[11] In this regard, Judge Jerry Smith has noted, "Without any judicially enforceable limits and with inevitable political pressures, the Commerce Clause all too easily would become the general police power denied to Congress by the Constitution."[12]

After decades of leniency following the New Deal cases, the Court first began to re-establish limits in its decision in *Lopez*. There, the Court considered the Gun-Free School Zones Act of 1990, which prohibited the possession of firearms in a school zone. The Court identified three "broad categories of activity that Congress may regulate under its commerce power."[13] Those are: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce "even though the threat may come only from intrastate activities"; and (3) activities that "substantially affect" interstate commerce.[14] Because the Gun-Free School Zones Act neither regulated the channels of interstate commerce nor protected things in interstate commerce, the Court considered whether the activity in question substantially affected interstate commerce.

The Court concluded that the possession of a firearm in a school zone did not substantially affect interstate commerce. It rejected the contention that, because such possession could lead to violent crime, the costs of violent crime, its effect on travel, and its effect on the educational process added up to a substantial effect on interstate commerce. Rather, "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[15] Accepting the government's arguments to the contrary, the Court continued, would make it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. . . . [, and we would be] hard pressed to posit any activity by an individual that Congress is without power to regulate."[16]

Lopez is noteworthy not only because of its result, which declared an activity to be beyond the scope of Congress' power to regulate through the Commerce Clause, but also because of its concurring opinions. In the first, Justice

Kennedy, joined by Justice O'Connor, reviewed the Court's Commerce Clause jurisprudence against the backdrop of America's commercial and industrial history. Justice Kennedy invoked *stare decisis* as a "fundamental restraint on our power" that should "foreclose[ ] us from reverting to an understanding of commerce that would serve only an 18th-century economy."[17] Furthermore, he observed, *stare decisis*

> mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.[18]

Last, Justice Kennedy pointed to the federalism costs that are imposed when the federal government intrudes on areas traditionally left to the States. Writing separately, Justice Thomas recognized that returning to the original understanding of commerce would be difficult but suggested that the Court needed to reexamine the substantial effects test, although not in this case.[19]

The Court found another criminal activity to be outside the reach of Congress' Commerce Clause powers in *United States v. Morrison*.[20] There, the Court held that the creation of a federal civil remedy for gender-related violence that did not affect interstate commerce was beyond the power of Congress. As in *Lopez*, the only possible basis for invoking the Commerce Clause was the contention that such gender-motivated violence substantially affected interstate commerce. The Chief Justice rejected the "downplay[ing] [of] the role that the economic nature of the regulated activity plays in our Commerce Clause analysis."[21] After all, he explained, these types of crimes "are not, in any sense of the phrase, economic activity."[22] It is unnecessary to espouse a "categorical rule against aggregating the effects of any noneconomic activity"; however, the Chief Justice continued, it is worth noting that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[23] As in *Lopez,* the Court found that the aggregation principle admitted of no limitation on Congress' power and intruded into an area traditionally reserved to the States.

In the same term, the Court also resorted to statutory construction to avoid addressing the constitutionality of an expansive interpretation of the Commerce Clause in *Jones v. United States*.[24] There, the Court held that arson of an owner-occupied private residence did not satisfy the jurisdictional element of the statue.[25] It rejected an "expansive interpretation" of the statute, because, under it, "hardly a building in the land would fall outside the federal statute's domain."[26] Instead, citing "the concerns brought to the fore in *Lopez*," the Court avoided the constitutional question that would have arisen if federal power reached this instance of "'traditionally local criminal conduct.'"[27]

The conduct involved in *Lopez, Morrison,* and *Jones* was criminal. *SWANCC* was the first indication that the Court's concern about the scope of the Commerce Clause power applied in other contexts. In *SWANCC*, the Court avoided "significant constitutional and federalism questions" by holding that the Army Corps of Engineers exceeded its authority under the Clean Water Act when it defined "navigable waters" to include certain intrastate waters.[28] SWANCC*,* a consortium of 23 suburban Chicago cities and villages, sought to construct a landfill on the site of an abandoned sand and gravel pit. The pit property contained a "scattering of permanent and seasonal ponds of varying size [and depth]" that provided habitat for migratory birds.[29] The Corps refused to grant SWANCC a permit to discharge dredged or fill material or fill in some of the ponds.

The Corps' permitting authority derived from Section 404(a) of the Clean Water Act, which allows it to issue permits for the discharge of materials "into the navigable waters."[30] The term "navigable waters" is defined in statute,[31] Corps regulation,[32] and a Corps Rule.[33] As a general matter, the "navigable waters" include not only navigable rivers, but also their tributaries and adjacent wetlands, even if not themselves navigable. The Corps' denial of SWANCC's permit application, however, broadened that customary understanding to include "isolated ponds, some only seasonal, wholly located within two Illinois counties"[34] that were neither adjacent nor connected to navigable waters.

The Court concluded that the application of the Corps' Migratory Bird Rule to the SWANCC property was not supported by the Clean Water Act. The Court first determined that Congress had not adopted the expansive jurisdiction claimed by the Corps. It noted that it was appropriate to give the component of navigability some meaning, a standard that the ponds at issue could not meet. Such a reading was not only consistent with statute, but also with Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[35] Neither could the Corps' more expansive reading be justified as a valid exercise of its authority to promulgate rules.[36] Rather, the Court hesitated to endorse an "administrative interpretation [that] alters the federal-state framework by permitting federal encroachment upon a traditional state power."[37] The Corps sought to justify its Rule by pointing to its ability to regulate intrastate activities that substantially affect interstate commerce, but the Court was unreceptive. It pointed to the "significant constitutional questions" that would be raised if the Corps could regulate the "abandoned sand and gravel pit" involved in *SWANCC*, and it declined to sanction the "significant impingement of the States' traditional and primary power over land and water use" that would result from such regulation.[38] Accordingly, it held that the application of the Migratory Bird Rule to *SWANCC's* prop-

erty exceeded the Corps' authority.

In *Lopez* and *Morrison*, the Court found that certain activities were beyond the scope of Congress' Commerce Clause powers. In *Jones* and *SWANCC,* the Court relied on *Lopez* and *Morrison* to give a limiting construction to an overbroad application of a statute or regulation. In each case, the Court acted to prevent the federal government from encroaching on interests that had been, traditionally and primarily, left to the States.[39]

II. The Endangered Species Act

These Supreme Court decisions have prompted challenges to the application of the Endangered Species Act. The challenged applications involve the extension of federal regulatory power to intrastate properties, which must be connected to a substantial effect on interstate commerce to be sustained. Notwithstanding the difficulty of making such a connection, the courts of appeals have rejected these challenges, opting to put the protection of the Delhi Sands Flower-Loving Fly, red wolves, six species of subterranean invertebrates (such as the Bear Creek Cave Harvestman), the silvery minnow, and other such creatures ahead of the interests of the property holders.

In the Act, Congress prohibited the "taking" of any endangered species,[40] defining "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[41] The Fish & Wildlife Service has promulgated regulations that further define the terms "harass"[42] and "harm."[43] In addition, when the Fish & Wildlife Service and National Oceanic and Atmospheric Administration list a new species as threatened or endangered, they describe the kinds of activities that would constitute a taking. One author complains, however, that those descriptions are ambiguous and overlapping, stating that he:

> examined all of the final listings of species as endangered between January 1997 and May 1998. According to the agency's explanations in those listings, activities that could constitute a take include bulldozing, livestock grazing, grass mowing, plowing, road construction, off-road vehicle use, hazardous waste cleanup, pesticide use, mining, brush removal, water impoundment, predator control, dredging, timber harvesting, and low-level flights. Activities that would *not* constitute a take include road kills, camping, lawn maintenance, flood control, mining, housing construction, road construction, pest control activities, controlled burns, horseback riding, pesticide use, boating, fishing, birdwatching, livestock grazing, residential lighting, removal of insects from birdbaths, and hiking.[44]

The first post-*Lopez* Commerce Clause-based challenge to the Endangered Species Act came in *National Ass'n of Home Builders v. Babbitt* ("NAHB").[45] There, the D.C. Circuit rejected a challenge to the application of the Act to protect a purely intrastate animal, the Delhi Sands Flower-Loving Fly. The Fly's habitat lies exclusively within two California counties[46] and includes the site of a proposed state-of-the-art, earthquake-proof hospital and primary burn care center that the County of San Bernardino wanted to build. The County moved the hospital complex 250 feet north and created a habitat preserve and a flight corridor in an attempt to obtain a permit from the Fish & Wildlife Service. The Service, however, balked at the County's plans to redesign a highway interchange to allow for emergency vehicle access to the new hospital.

A divided panel of the D.C. Circuit upheld the application of the Act. Writing for the majority, Judge Wald reasoned that the application of the Act could be justified as a regulation of both the channels of interstate commerce and an activity that substantially affects interstate commerce. As to the latter ground, Judge Wald explained that Congress could prevent the destruction of biodiversity in order to "protect[ ] the current and future interstate commerce that relies upon it" and control adverse effects of unbridled interstate commerce.[47] Judge Henderson, concurring, rejected the channels rationale, pointing out that the Flies are "entirely *intra*state creatures. They do not move among states either on their own or through human agency."[48] However, Judge Henderson asserted, the loss of biodiversity affects interstate commerce and the protection of the flies therefore regulates interstate commercial development activity.

In justifying the protection of biodiversity, Judge Wald pointed to the tangible and intangible benefits of variety in plants and animals. The extinction of a species, the present value of which is unclear, results in the loss of "what economists call an 'option value'—the value of the possibility that a future discovery will make useful a species that is currently thought of as useless."[49] While our limited knowledge regarding these possible uses makes it "impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce. . . . , we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce."[50] Judge Henderson disagreed, noting the possibility that a species will have no economic value, but she likewise asserted that Congress could use its Commerce Clause powers to protect biodiversity. She explained that the "interconnectedness of species and ecosystems" makes it "reasonable to conclude that the extinction of one species affects others."[51] Protecting a "purely intrastate species" therefore "substantially affect[s] land and objects that are involved in interstate commerce," and Congress has a "'rational basis' for concluding that the 'taking' of endangered species 'substantially affects' interstate commerce."[52]

Judge Sentelle dissented, rejecting the biodiversity rationale. He noted that Judge Henderson had rejected Judge Wald's rationale and joined her in reasoning that "we cannot

then 'say that the protection of an endangered species [the economic value of which is unknown] has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value.'"[53] He further rejected Judge Henderson's biodiversity rationale, finding it to be "indistinguishable in any meaningful way from that of Judge Wald."[54] He explained that her focus on "the interconnectedness of species and ecosystems" failed because the "Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.'"[55] While the Framers may not have known the term "ecosystems," they "certainly [knew] as much about the dependence of humans on other species and each of them on the land as any ecologist today. An ecosystem is an ecosystem, and commerce is commerce."[56] Furthermore, he observed, there is no logical stopping point to either Judge Wald's or Judge Henderson's rationales.

Subsequently in *Rancho Viejo v. Norton*,[57] the D.C. Circuit upheld the application of the Act to protect the arroyo southwestern toad. Rancho Viejo sought to build a residential development in San Diego County, California, on toad habitat. The Fish & Wildlife Service refused the developer's request for a permit that proposed to use portions of a streambed as a borrow area to provide fill and declined to use offsite sources. The district court relied on *NAHB* in granting summary judgment for the United States.[58] On appeal, the D.C. Circuit relied on *NAHB's* second rationale, that protecting the Flies "'regulate[d] and substantially affect[ed] commercial development activity which is plainly interstate,"[59] in upholding the application of the Act.

Construction of a housing development is plainly a commercial activity, the court noted. It dismissed Rancho Viejo's contention that the effect of preserving the toads on interstate commerce was too attenuated to be substantial, shifting the burden to Rancho Viejo to show that "its project and those like it are without substantial interstate effect."[60] The court minimized the fact that the arroyo toad and the project were located solely in California, pointing to the fact that the materials and labor for the project would have a substantial connection to interstate commerce. In addition, the court endorsed Judge Wald's "race to the bottom" rationale.[61]

Last, since *NAHB* was decided before *Morrison* and *SWANCC*, the court went on to distinguish those decisions. It held, "Nothing in the facts of *Morrison* or *Lopez* suggests that focusing on plaintiff's construction project is inappropriate or insufficient as a basis for sustaining this application of the ESA."[62] It deemed Rancho Viejo's reliance on *SWANCC* to be "even further from the mark" given the commercial nature of Rancho Viejo's proposed project.[63] The court construed the statute, and, thereby, the regulated activity, to be "*takings, not toads.*"[64]

In *Gibbs v. Babbitt,*[65] the Fourth Circuit Court of Appeals rejected a challenge to a regulation promulgated by the Fish & Wildlife Service that limited the taking of red wolves on private lands. Those wolves had been reintroduced into the Alligator River National Wildlife Refuge in North Carolina, but had migrated from the Refuge onto private lands, where they sometimes preyed on livestock and pets. In fact, the Service estimated that about 41 of the approximately 75 wolves in the wild lived on private land.[66] The Service permitted the taking of red wolves on private land "'provided that such taking is not intentional or willful, or is in defense of that person's own life or the lives of others.'"[67]

The Fourth Circuit upheld the regulation, reasoning that, while it did not regulate either the channels of interstate commerce or things in interstate commerce, it did regulate an activity that substantially affected interstate commerce. The majority found an economic nexus from two elements, the desire to protect commercial and economic assets such as livestock that motivated the taking, and a "quite direct" relationship between red wolf takings and interstate commerce.[68] The majority aggregated the takings, noting that while the "taking of one red wolf on private land may not be 'substantial,' the takings of red wolves in the aggregate have a sufficient impact on interstate commerce to uphold this regulation."[69] The fact that the "regulation is but one part of the broader scheme of endangered species legislation" further reinforces this aggregate impact.[70] Furthermore, the protection of wolves on private land was necessary because the wolves wandered; without such protection the "entire program of reintroduction and eventual restoration of the species" might founder.[71]

Judge Luttig, dissenting, disagreed with the majority's conclusion that the taking of wolves on private property substantially affected interstate commerce. In his view, no commercial activity was involved in the taking. Instead, "[w]e are not even presented with an activity as to which a plausible case of future economic character and impact can be made."[72] Judge Luttig suggested that the majority's view of the Commerce Clause power was more like the dissents in *Lopez* and *Morrison* than the majority opinions. *Lopez* and *Morrison*, he concluded, compel the invalidation of the regulation. He explained, "The affirmative reach and the negative limits of the Commerce Clause do not wax and wane depending upon the subject matter of the particular legislation under challenge."[73]

More recently, in *GDF Realty Investments, Ltd. v. Norton*,[74] the Fifth Circuit Court of Appeals upheld the application of the Endangered Species Act to real property in Travis County, Texas, near Austin. The property owner desired to develop the property by building a shopping center, a residential subdivision, and commercial office buildings, but it was home to several endangered species, including six subterranean invertebrate creatures (the "Cave Species"). The Fish & Wildlife Service denied the property owner's application for an incidental taking permit, and the owner filed

suit contending that the application of the Endangered Species Act to the Cave Species was unconstitutional. The district court granted summary judgment in favor of the Fish & Wildlife Service, concluding that, because of the commercial character of the proposed development, the application of the Act was substantially related to interstate commerce.[75]

On appeal, the Fifth Circuit concluded that the Act is "an economic regulatory scheme" and that the prohibition on taking the Cave Species was an integral part of it.[76] Therefore, it held, "Cave Species takes may be aggregated with all other ESA takes."[77] The court rejected the district court's reliance on the connection between the proposed commercial development and interstate commerce explaining, "[L]ooking primarily beyond the regulated activity in such a manner would 'effectually obliterate' the limiting purpose of the Commerce Clause."[78] In addition, the court found that the scientific interest in the Cave Species had a "negligible" effect on interstate commerce that was "too attenuated" to rise to the level of a substantial relationship.[79] Likewise, it deemed "[t]he *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, [to be] simply too hypothetical and attenuated . . . to pass constitutional muster."[80] In the end, however, the court concluded that, because the Act's taking provision is economic in nature, the *de minimis* effects of the taking of the Cave Species could be aggregated with all other takings to produce the necessary substantial effect on interstate commerce.

Finally, in *Rio Grande Silvery Minnow v. Keys,*[81] the Tenth Circuit held that the Bureau of Reclamation had the discretion to reduce previously contracted deliveries of water in order to protect the silvery minnow, an endangered species. The water deliveries arose from statutorily-authorized water projects that allowed the diversion and transfer of water among many rivers and reservoirs. The City of Albuquerque and other entities entered into contracts with the Secretary of the Interior allowing them to draw water from this system for municipal, domestic, and industrial uses. The plaintiffs contended that, in order to preserve the water flows necessary to support the silvery minnow, the Bureau of Reclamation could limit the previously-contracted water deliveries and change the operations of its reservoir facilities. The Tenth Circuit majority concluded that, as a matter of contract interpretation, the Bureau of Reclamation had the discretion to reduce contract deliveries.[82]

While the Tenth Circuit's decision primarily involves matters of contract interpretation, the Endangered Species Act provides the basis for the claim. In its conclusion, the majority waxes elegiac:

> Scientific literature likens the silvery minnow, to a canary in a coal mine, the "last-remaining endemic pelagic spawning minnow in the Rio Grande basin." As its population has steadily declined and now rests on the brink of extinction since its listing in 1994, we echo *Hill's* "concern over the risk that might lie in the loss of *any* endangered species." . . . Like all parts of that puzzle [which the court cannot solve, *i.e.,* the importance of a particular species], the silvery minnow provides a measure of the vitality of the Rio Grande ecosystem, a community that can thrive only when all of its myriad components—living and non-living—are in balance.[83]

Judge Kelly's dissent, however, asserted that the majority's contractual interpretation "renders the contracts somewhat illusory."[84] Furthermore, its holding is in "considerable tension" with the Reclamation Act and Supreme Court decisions, which "recogniz[e] that the federal government generally must respect state-law water rights and lacks any inherent water right in water originating in or flowing through federal property."[85] He continued, "Under the court's reasoning the ESA, like Frankenstein, despite the good intentions of its creators, has become a monster."[86]

These decisions reflect great creativity in upholding expansive interpretations of the scope of the Commerce Clause power. The judges of the courts of appeals have seen themselves as variously protecting the channels of interstate commerce, biodiversity, and the country from harmful products, preventing a race to the bottom by the States, aggregating the effects of noneconomic activity, and shifting the focus from the effect of the taking to its motivation. The effect of these decisions is to uphold the application of federal regulations to private property or interests, and that effect comes with certain costs that are not taken into account.

III. The Costs of Federal Regulation

The rejection of challenges to the application of the Endangered Species Act by the courts of appeals, and the resulting protection of the Delhi Sands Flower-Loving Fly, arroyo toad, red wolf, subterranean insects, and silvery minnow, raises concerns regarding constitutional interpretation, federalism, and basic economics. As a matter of constitutional interpretation, the expansive readings of the Commerce Clause threaten to leave no stopping point to the Clause's application, something that the Supreme Court has warned against. Those expansive applications of federal power reach into areas that have traditionally and primarily been the responsibility of the states. Finally, because of the way the Act works, such applications produce perverse economic incentives.

The decisions of the courts of appeals display an inappropriately expansive view of the Commerce Clause power. In reaching their conclusions, the courts have aggregated activities that cannot easily be characterized as commercial. Such aggregation has been undertaken despite Supreme Court precedent to the contrary. In *Citizens Bank v. Alafabco, Inc.*,[87] for example, the Court explained that its decision to aggregate debt-restructuring transactions (easily classified as commercial activities) to satisfy the test for "involving

commerce" in the Federal Arbitration Act was "well within our previous pronouncements on the extent of Congress' Commerce Clause power."[88] Conversely, the Court has found that possession of a handgun and gender-motivated violence are not commercial activities, so their effects could not be aggregated to find the necessary interstate commerce nexus.[89] Indeed, in *Morrison*, the Chief Justice pointed out that, while the Court was not "adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity," it had previously "upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature."[90] Viewed in that light, the taking of a red wolf may be motivated by the desire to protect something of commercial value from the wolf's depredations but is not itself commercial, and any trade in wolf pelts, which would be commercial, can be independently regulated.[91]

The court's alternative focus on the activity that results in the taking is likewise flawed. Judge Ginsburg explained this focus as he addressed the taking of the arroyo southwestern toad by the housing development in *Rancho Viejo*:

> I think it clear that our rationale for concluding the take of the arroyo toad affects interstate commerce does indeed have a logical stopping point, though it goes unremarked in the opinion of the court. Our rationale is that, with respect to a species that is not an article in interstate commerce and does not affect interstate commerce, a take can be regulated if—but only if—the take itself substantially affects interstate commerce. The large-scale residential development that is the take in this case clearly does affect interstate commerce. Just as important, however, the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.[92]

Others, however, have been prosecuted for more attenuated takings. In *Gibbs v. Babbitt*, plaintiff Richard Mann was prosecuted for shooting a red wolf that he feared would threaten his cattle.[93] Likewise, the Commerce Clause reached a farmer who grew wheat for his own operation's consumption.[94] A homeowner's improvement of his property affects its value in the clearly commercial resale market.[95] In addition, one could find that the activity of hiking affects interstate commerce through the related travel and market in clothing. In sum, the exceptions advanced by Chief Judge Ginsburg may be, at best, trivial and, at worst, non-existent.

In any event, the expansive reading of the Commerce Clause in these cases intrudes on state interests. In *SWANCC*, the Court declined to allow the Corps to claim jurisdiction over the ponds at the landfill site in order to avoid "a significant impingement of the States' traditional and primary power over land and water use."[96] In *Gibbs v. Babbitt,* the court's ruling pre-empted North Carolina statutes that "facially conflict[ed]" with the taking regulation, but also gave a greater degree of protection to North Carolina's citizens and their property.[97] The *Gibbs* majority further rejected the contention that the application of the taking regulation in favor of the red wolves adversely affected the federal-state balance, advancing the national interest in the protection of scarce resources.[98] Even so, the application of the Act reaches deep into the interior of the States, and, in *NAHB* and *Silvery Minnow*, actively thwarts the interests of the local and State governments.

Furthermore, the application of the Act to private property can produce perverse economic results. The Delhi Sands Flower-Loving Fly colony in California delayed construction of a new hospital and cost taxpayers some $3.5 million,[99] but the Act remains inflexible.[100] Likewise, the United States may be liable for breaching its water delivery contracts,[101] but the Act still remains inflexible. These perverse effects follow from the Act's distortion of incentives and restriction of tradeoffs. Richard Stroup, senior associate at the Political Economy Research Center ("PERC"), explains that, while the Act allows the government to determine how a private landowner may use his land, it does not require the government to bear the costs of these decisions. Since the land is "almost a free good" to the government, the government can be "lavishly wasteful of some resources (such as land) while ignoring other ways of protecting the species (such as building nest boxes)."[102] Stroup points to one landowner who manages his land for wildlife (particularly wild turkeys), but also clear-cuts timber on other portions of his property to reduce the possibility that the woodpeckers would nest there.[103] The clear-cutting violated no law and permitted the landowner to profit from the timber sale while preserving those portions of the property from the woodpeckers that might otherwise nest there and turn the land into a public zoo or forest preserve.

The harm that results from overly broad applications of the Endangered Species Act can be cured only by the Supreme Court. The courts of appeals for the D.C., Fourth, Fifth, and Tenth Circuits have upheld the application of the Act against the interests of the State of New Mexico, county governments, and private landowners. In brief, the Act has no stopping point in their hands, and only the Supreme Court can trump their view, if it chooses to do so.

* Jack Park is an assistant Attorney General of the State of Alabama. The views and opinions expressed herein are those of the author only and do not necessarily reflect the views of the State of Alabama.

Footnotes

[1] *See United States v. Morrison*, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

[2] *See*, *e.g.*, *Jones v. United States,* 529 U.S. 848 (2000).

[3] 514 U.S. at 551 (finding that the Act "neither regulates a commercial activity nor contains a requirement that the possession [of a

firearm] be connected in any way to interstate commerce").
[4] 531 U.S. 159 (2001).
[5] *Id.* at 162, 174.
[6] One commentator explains: "With one exception, the regulatory provisions of the Endangered Species Act (ESA) apply to the federal government, not to private parties. That exception, however, is a doozy. Section 9 of the ESA makes it illegal for any one to 'take' an endangered species." John Copeland Nagle, *The Meaning of the Prohibition on Taking an Endangered Species*, BRIEFLY . . . , Sept. 1998, at 1, 1.
[7] U.S. CONST. art. I, § 8, cl. 3.
[8] *United States v. Ho,* 311 F.3d 589, 596 (5th Cir. 2002).
[9] *United States v. Lopez*, 514 U.S. 549, 556 (1995).
[10] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).
[11] *Ho*, 311 F.3d at 597.
[12] *Id.*
[13] *Lopez*, 514 U.S. at 558.
[14] *Id.* at 558-59.
[15] *Id*. at 567.
[16] *Id*. at 564.
[17] *Id*. at 574 (Kennedy, J., concurring).
[18] *Id.*
[19] *Id.* at 601-02 (Thomas, J. concurring).
[20] 529 U.S. 598 (2000).
[21] *Id.* at 610.
[22] *Id.* at 613.
[23] *Id.*
[24] 529 U.S. 848 (2000).
[25] *See* 18 U.S.C. § 844(i). Unlike the statutes at issue in *Lopez* and *Morrison*, the arson statute contains a jurisdictional element requiring the establishment of an interstate commerce nexus.
[26] *Jones*, 529 U.S. at 857.
[27] *Id*. at 858 (citation omitted).
[28] *Solid Waste Agency v. U.S. Army Corps of Eng'rs* ("SWANCC"), 531 U.S. 159, 162, 174 (2001).
[29] *Id.* at 163.
[30] 33 U.S.C. § 1344(a).
[31] *See* 33 U.S.C. § 1362(7); *see also United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985) (holding that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term").
[32] *See* 33 C.F.R. § 328.3(a)(3) (1999) (defining "waters of the United States" to include: "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce").
[33] *See SWANCC*, 531 U.S. at 164 (noting issuance by the Corps of a so-called "Migratory Bird Rule," which covers intrastate waters that "are or would be used as habitat" by various migratory birds or endangered species or are used to "irrigate crops sold in interstate commerce") (citation omitted).
[34] *Id.* at 171.
[35] *Id.* at 172.
[36] *Cf. id*. at 164 n.1 ("The Corps issued the 'Migratory Bird Rule' without following the notice and comment procedures outlined in the Administrative Procedure Act.").
[37] *Id.* at 173.
[38] *Id.* at 174.
[39] *See*, *e.g.*, *id.* (noting the "States' traditional and primary power over land and water use"). The protected interests are not limited to the criminal law and land and water use, but include family law and education. *See* United States v. Lopez, 514 U.S. 549, 564-66 (1995) (discussing family law and education).
[40] 16 U.S.C. § 1538(a)(1).
[41] 16 U.S.C. § 1532(19).
[42] 50 C.F.R. § 17.3 (1975) ("Harass in the definition of 'take' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.").
[43] *Id.* ("Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."). In *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.,* 515 U.S. 687 (1995), the Court upheld the regulatory definition of "harm" against a facial challenge.
[44] Nagle, *supra* note 6, at 7.
[45] 130 F.3d 1041 (D.C. Cir. 1997).
[46] *See* U.S. Fish & Wildlife Service, *Delhi Sands Flower-loving Fly: Rhaphiomidas Terminatus Abdominalis*, at http://endangered.fws.gov/i/I0V.html (last modified Nov. 20, 2000); *see also NAHB,* 130 F.3d at 1060 (Sentelle, J., dissenting) (noting that "there are fewer than 300 breeding individuals of this species, all located within forty square miles in southern California" and hospital construction "would harm a colony of six to eight flies").
[47] *NAHB,* 130 F.3d at 1052.
[48] *Id.* at 1058 (Henderson, J., concurring).
[49] *Id.* at 1053 (opinion of Wald, J.).
[50] *Id.* at 1053-54.
[51] *Id.* at 1059 (Henderson, J., concurring).
[52] *Id.* (citation omitted).
[53] *Id.* at 1064 (Sentelle, J., dissenting) (citation omitted).
[54] *Id.* at 1065.
[55] *Id.*
[56] *Id.*
[57] 323 F.3d 1062 (D.C. Cir. 2003).
[58] *Id.* at 1066.
[59] *Id.* at 1067 (quoting *NAHB*, 130 F.3d at 1058 (Henderson, J. concurring)). The court observed: "In focusing on the second *NAHB* rationale, we do not mean to discredit the first [*i.e.,* protection of biodiversity]. Nor do we mean to discredit rationales that other circuits have relied upon in upholding endangered species legislation." *Id.* at 1067 n.2.
[60] *Id.* at 1069.
[61] *Id.* at 1069 n.7. Judge Wald suggested that "the states are motivated to adopt lower standards of endangered species protection in order to attract development." *NAHB*, 130 F. 3d at 1055.
[62] *Rancho Viejo*, 323 F.3d at 1072.
[63] *Id*. at 1071.
[64] *Id.* at 1072.
[65] 214 F.3d 483 (4th Cir. 2000).
[66] *See id.* at 488 & n.1.
[67] *Id.* at 488 (citation omitted).
[68] *Id.* at 492.
[69] *Id.* at 493.
[70] *Id.*
[71] *Id.* at 494.
[72] *Id.* at 508 (Luttig, J. dissenting).
[73] *Id.* at 510.
[74] 326 F.3d 622 (5th Cir. 2003)
[75] GDF Realty Invs., Ltd. v. Norton, 169 F. Supp. 2d 648, 664 (W.D. Tex. 2001).
[76] *GDF Realty Invs., Ltd*, 326 F.3d at 640.
[77] *Id.*
[78] *Id.* at 634.
[79] *Id.* at 637.
[80] *Id.* at 638.
[81] 333 F.3d 1109 (10th Cir. 2003).
[82] *Id*. at 1130-31.
[83] *Id.* at 1138.
[84] *Id.* at 1157 (Kelly, J. dissenting).
[85] *Id.* at 1157-58.
[86] *Id.* at 1158.
[87] 123 S. Ct. 2037 (2003).
[88] *Id.* at 2040.
[89] *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).
[90] *Morrison,* 529 U.S. at 613 (emphasis added).
[91] *See Andrus v. Allard,* 444 U.S. 51, 63 & n.19 (1979).

[92] 323 F.3d 1062, 1080 (D.C. Cir. 2003) (Ginsburg, C.J., concurring).
[93] *Gibbs v. Babbitt*, 214 F.3d 483, 489 (4th Cir. 2000); *see also Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988) (upholding a civil penalty assessed for Christy's killing of a grizzly bear that had moved toward his herd of sheep).
[94] *Wickard v. Filburn,* 317 U.S. 111 (1942).
[95] *But cf. Jones v. United States,* 529 U.S. 848 (2000) (holding that arson of an owner-occupied private residence does not affect interstate commerce). Alternatively, if Chief Judge Ginsburg's example is correct, the owner who moved dirt to landscape on property that he rented out could run afoul of the Endangered Species Act. *Cf. Russell v. United States*, 471 U.S. 858 (1985) (finding the interstate commerce nexus satisfied by arson of rental property).
[96] 531 U.S. 159, 174 (2001) (stating that "'regulation of land use [is] a function traditionally performed by local governments'") (citation omitted) (alteration in original).
[97] *See* 214 F.3d at 488-89.
[98] *Id.* at 499-506.
[99] *NAHB*, 130 F.3d 1041, 1060 (D.C. Cir. 1997) (Sentelle, J., dissenting).
[100] *Cf. id.* at 1057 n.1 (Henderson, J., concurring) ("[T]he extent of inconvenience the County experiences if the unlawful taking is prevented is irrelevant so long as the prevention is authorized under the Commerce Clause.") (internal citation omitted).
[101] *See Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003).
[102] RICHARD STROUP, ECO-NOMICS: WHAT EVERYONE SHOULD KNOW ABOUT ECONOMICS AND THE ENVIRONMENT 6-7 (2003); *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 714 (1995) (Scalia, J., dissenting) ("The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.").
[103] STROUP, *supra* note 102, at 56-57.

Federalism & Separation of Powers: Supreme Court 2002-2003 Term*

By Tara Ross

Sprietsma v. Mercury Marine, 123 S. Ct. 518, 537 U.S. 51 (2002). *Decided: Dec. 3, 2002.*

In 1995, Jeanne Sprietsma was killed when she fell from a motor boat and was struck by its propeller blades—the boat had not been equipped with a propeller guard. Sprietsma's husband filed a wrongful death suit against the manufacturer of the boat, alleging that it was defectively designed because it did not include the guard. The Illinois Supreme Court affirmed a lower court dismissal of the case, holding that the Federal Boat Safety Act of 1971 (FBSA) preempted Sprietsma's state common-law tort claims. The Supreme Court unanimously reversed the decision.

The Court held that the FBSA's preemption clause "is most naturally read as not encompassing common-law claims." 123 S. Ct. at 526. The clause provides that a state "'may not establish . . . a law or regulation . . . that is not identical to a regulation prescribed under [the FBSA].'" *Id.* at 524 (citation omitted). The wording of the pre-emption clause, the Court added, "indicate[s] that Congress pre-empted only positive enactments." *Id.* at 526. The FBSA's savings clause reinforces this interpretation of the statute. It states that compliance with the FBSA "does not relieve a person from liability at common law or under State law." *Id.* at 524 (citation omitted). The Court also rejected respondent's assertion that the common-law claims were preempted by a Coast Guard decision not to regulate propeller guards. Instead, the Court noted, the Coast Guard's actions (or lack thereof) merely emphasized "the lack of any 'universally acceptable' propeller guard for 'all modes of boat operation.'" *Id.* at 528. Last, the Court held that the common-law claims are not "implicitly pre-empted by the entire statute." *Id.* at 527. In contrast to other statutes that have been held to preempt state law, the "the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies." *Id.* at 529.

Pierce County v. Guillen, 123 S. Ct. 720, 537 U.S. 129 (2003). *Decided: Jan. 14, 2003.*

The Hazard Elimination Program ("Section 152") was established by Congress to provide states with funds for road hazard improvement projects. Participating states are required to conduct surveys of public roads, identify hazardous conditions, and assign priorities to needed repairs. To encourage an honest evaluation of road conditions, a federal law ("Section 409") made various provisions to restrict the release of this information to the public. The issues in *Guillen* arise from litigation surrounding a fatal car accident in Pierce County, Washington, and the plaintiffs' attempts to obtain data about road conditions through Washington's Public Disclosure Act ("PDA"), despite claims that the data is protected by Section 409. The Washington Supreme Court determined that Section 409 "purported to protect from disclosure any documents prepared for state and local purposes, so long as those documents were also collected for [Section 152] purposes." 123 S. Ct. at 727. Based on this interpretation, the court held that Section 409 "violates [the "Constitution's] federalist design . . . insofar as it makes state and local traffic and accident materials and data nondiscoverable . . . , simply because they are *also* 'collected' and used for federal purposes."[1] The Supreme Court reversed and remanded in part.[2] Justice Thomas delivered the opinion for an unanimous Court.

Justice Thomas first addressed the scope of Section 409. He held that Section 409 protects information "actually compiled *or* collected for [Section 152] purposes, but does not protect information that was originally compiled or collected for purposes unrelated to [Section 152] and that is currently held by the agencies that compiled or collected it." *Id.* at 730. In other words, if one agency compiles the information, but another later "collects" it for Section 152 purposes, it will be privileged in the hands of the latter agency, but not the first. *Id.* Justice Thomas explained, "[S]tatutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth." *Id*. However, if "'Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'" *Id.* (citation omitted). Of the possible interpretations of the original statute together with a 1995 amendment, this one is the most narrow reading that also gives effect to the amendment.

Turning to the constitutional question, Justice Thomas noted that Congress has authority under the Commerce Clause "'to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'" *Id.* at 731 (citation omitted). Section 409 can rationally be seen as legislation "aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce." *Id.* at 732. Given states' reluctance to collect needed information prior to the adoption of Section 409, "Congress could reasonably believe" that adopting Section 409 "would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads." *Id.* at 731-32. Section 409, Justice Thomas concluded, is a valid exercise of congressional power under the Commerce Clause.

Eldred v Ashcroft, 123 S. Ct. 769, 537 U.S. 186 (2003). *Decided: Jan. 15, 2003.*

In 1998, Congress passed the Copyright Term Extension Act (the CTEA), which extended the term of existing and future copyrights. Petitioners filed a facial challenge to the CTEA, claiming that the retroactive aspects of the bill exceeded Congress' power under the Copyright Clause of the Constitution.[3] The D.C. Circuit affirmed a dismissal by the lower court,

ruling that "[w]hatever wisdom or folly the plaintiffs may see in the particular 'limited Times' for which the Congress has set the duration of copyrights, that decision is subject to judicial review only for rationality."[4] The Supreme Court affirmed. Justice Ginsburg delivered the opinion of the Court, in which the Chief Justice, and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas joined. Justices Stevens and Breyer filed dissenting opinions.

Text, history, and precedent, Justice Ginsburg held, support the conclusion that Congress is empowered to "prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future." 123 S. Ct. at 778. First, she rebutted petitioners' claim that, although the baseline term in the CTEA "qualifies as a 'limited Time'" for future copyrights, "existing copyrights extended to endure for that same term are not 'limited.'" *Id.* Such a conclusion, she argued, would "read[ ] into the text of the Copyright Clause the command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'" *Id.* Second, "[h]istory reveals an unbroken congressional practice" of granting copyright term extensions "so that all under copyright protection will be governed evenhandedly." *Id.* Third, although the Court has not yet considered this issue in the context of copyrights, previous cases have "found no constitutional barrier to the legislative expansion of existing patents." *Id.* at 780. Last, the CTEA "is a rational enactment," and the Court may not "second-guess" congressional policy judgments. *Id.* at 782-83.

Justice Ginsburg next addressed specific novel arguments of the petitioners. She disagreed that, although the term is *literally* a "limited Time," the consistent extensions "effectively [create] perpetual copyrights." *Id*. at 783. No showing has been made, she argued, that the CTEA is an attempt to "evade or override the 'limited Times' constraint," nor is there evidence that it "crosses a constitutionally significant threshold'" that previous extensions did not. *Id.* The Justice also dismissed application of the *Feist* principle that "copyright protection is unavailable to 'a narrow category of works in which the creative spark is utterly lacking or [trivial].'" *Id.* at 784 (citation omitted). *Feist*, she held, addressed whether a work is "eligible for copyright protection at all." *Id.* Next, the CTEA does satisfy the preambular language of the Copyright Clause, as Congress had "a rational basis" for concluding that the CTEA "'promotes the Progress of Science.'" *Id.* at 785. The Justice disagreed that extending a copyright without additional consideration "bestows an unpaid-for benefit on copyright holders . . . in violation of the *quid pro quo* requirement." *Id.* at 786. Given legislative history on this subject, authors "would reasonably comprehend [as part of the bargain], . . . a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time." *Id.* In sum, she held, the CTEA is a permissible exercise of congressional power under the Copyright Clause.

Cook County v. United States *ex rel.* Chandler, 123 S. Ct. 1239, 538 U.S. ___ (2003). *Decided Mar. 10, 2003.*

A former employee of Cook County, Illinois, sued the county under the federal False Claims Act ("FCA"). The plaintiff filed a *qui tam* action on behalf of the United States to recover funds that she claimed were fraudulently obtained by the County in its administration of a drug treatment program. The County sought dismissal, arguing that it is not a "person" subject to liability under the FCA. The District Court initially denied the motion, but reconsidered following the Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[5] The District Court then dismissed the case, holding that a "County, like a State, could not be subjected to treble damages." *Id.* at 1243. The Seventh Circuit reversed, finding that the County is a "person" under the FCA and "subject to the same penalties as other defendants," including treble damages.[6] The Supreme Court affirmed. Justice Souter delivered the opinion for a unanimous Court.

Justice Souter observed that the meaning of the term "person" in the FCA has remained unchanged since the statute was first passed in 1863. *Id.* at 1243-44. The County, he noted, concedes that private corporations were included in the term at the time the FCA was passed, but argues that municipal corporations "were not so understood until six years later," when *Cowles* v. *Mercer County*,[7] was decided. *Id.* at 1244. *Cowles*, Justice Souter argued, merely announced an understanding already in place. The Justice first rebutted several textual arguments that "person," as used in the FCA, was intended to be used in a more limited sense. Second, Justice Souter noted that, although the FCA was written to prevent a specific type of fraud not engaged in by municipalities, "in no way does it affect the fact that Congress wrote expansively, meaning 'to reach all types of fraud . . . that might result in financial loss to the Government.'" *Id.* at 1246 (citation omitted). Last, Justice Souter addressed the alternative claim that punitive damages may not be assessed against a municipality unless expressly authorized by statute. In 1986, the FCA was amended to allow treble damages. This change, Justice Souter noted, "turn[ed] what had been a 'remedial' provision into an 'essentially punitive' one." *Id.* (citation omitted). This punitive character provides a reason "not to read 'person' to include a State," but it does not necessarily show "congressional intent to repeal implicitly the existing definition of that word, which included municipalities." *Id.* He additionally noted that the FCA's damages have a "compensatory side, serving remedial purposes," which lessens the "force [of any punitive impact] in arguing against municipal liability." *Id.* at 1246-47. Finally, statutory interpretation disfavors "'repeals by implication.'" *Id.* at 1248 (citation omitted).

Kentucky Ass'n of Health Plans v. Miller, 123 S. Ct. 1471, 538 U.S. ___ (2003). *Decided: Apr. 2, 2003.*

In 1994, the Kentucky state legislature enacted the Kentucky Health Care Reform Act, which contained an "any willing provider" provision.[8] Later, in 1996, an "any willing provider" provision was also added for chiropractors.[9] Plaintiffs,

seven HMOs, filed a suit for injunctive relief, claiming that both provisions are preempted by ERISA. The district court granted defendant's motion for summary judgment, concluding that the provisions are saved from preemption because they "regulate insurance" under ERISA's savings clause.[10] The Sixth Circuit affirmed the decision of the lower court. The Supreme Court affirmed the Sixth Circuit. Justice Scalia delivered the opinion for a unanimous Court.

Justice Scalia noted that the first step in determining whether statutes are saved from preemption is to "ascertain whether they are 'laws . . . which regulate insurance' under § 1144(b)(2)(A)." *Id.* at 1475 (alteration in original). In order to fall under ERISA's savings clause, he held, a "state law must be 'specifically directed toward' the insurance industry." *Id.* In addition, "insurers must be regulated 'with respect to their insurance practices,'" because § 1144(b)(2)(A) "saves laws that regulate *insurance*, not insurers." *Id.* (citation omitted). The Kentucky statutes are "specifically directed toward" insurers, despite the contention of petitioners that "they regulate not only the insurance industry but also [providers]." *Id.* The Justice observed, "Regulations 'directed toward' certain entities will almost always disable other entities from doing, with the regulated entities, what the regulations forbid; this does not suffice to place such regulation outside the scope of ERISA's savings clause." *Id.* at 1476. Second, Justice Scalia rebutted the contention that the insurers are not regulated "with respect to an insurance practice" because the statutes "focus upon the relationship between an insurer and *third-party providers*," rather than controlling "the actual terms of insurance policies." *Id*. Petitioners' argument, the Justice noted, relies upon a case analyzing § 2(b) of the McCarran-Ferguson Act; however, "ERISA's savings clause . . . is not concerned (as is the McCarran-Ferguson Act provision) with how to characterize *conduct* undertaken by private actors, but with how to characterize *state laws* in regard to what they 'regulate.'" *Id.* at 1476-77. In this case, Kentucky's laws "regulate" insurance "by imposing conditions on the right to engage in the business of insurance." *Id.* at 1477. In order to be covered by the savings clause, Justice Scalia added, the conditions "must also substantially affect the risk pooling arrangement between the insurer and the insured . . . . Otherwise, any state law aimed at insurance companies could be deemed a law that 'regulates insurance.'" *Id*.

Justice Scalia concluded, "Our prior decisions construing § 1144(b)(2)(A) have relied, to varying degrees, on our cases interpreting §§ 2(a) and 2(b) of the McCarran-Ferguson Act"; however, "[w]e believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance . . . [and] added little to the relevant analysis." *Id.* at 1478. He continued, "Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a 'law . . . which regulates insurance' under § 1144(b)(2)(A), it must satisfy two requirements. . . . [First, it] must be specifically directed toward entities engaged in insurance. . . . . [Second, it] must substantially affect the risk pooling arrangement between the insurer and the insured." *Id.* at 1479 (first alteration in original). Since Kentucky's law satisfies each of these requirements, Justice Scalia held, it is not preempted by ERISA.

Franchise Tax Bd. of Cal. v. Hyatt, 123 S. Ct. 1683, 538 U.S. ___ (2003). ***Decided: Apr. 23, 2003.***

Gilbert Hyatt moved from California to Nevada in 1991 shortly before receiving substantial fees related to certain patented inventions. After his move, California's Franchise Tax Board commenced an audit against him for 1991-92 state income taxes. The Tax Board's audit determined that Hyatt was a California resident until 1992 and had underpaid state income taxes; it assessed additional taxes and penalties against him. Hyatt protested the assessments formally in California, but also sued the Tax Board in a Nevada district court for intentional torts and negligence allegedly committed during the audit. The Tax Board claimed that sovereign immunity, as well as the Full Faith & Credit Clause, entitled it to a dismissal of the case, as it would be immune from tort liability under California law. Both the district court and the Supreme Court of Nevada denied the Tax Board's motion for dismissal with respect to the intentional torts. The Supreme Court affirmed. Justice O'Connor delivered the opinion for a unanimous Court.

Justice O'Connor explained that the Court's "'[Full Faith and Credit Clause] precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.'" *Id.* at 1687 (citation omitted). While the Clause "'is exacting' with respect to '[a] final judgment . . . rendered by a court' . . . it is less demanding with respect to choice of laws." *Id.* (citation omitted) (first and second alterations in original). The Clause "does not compel '"a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."'" *Id.* (citations omitted). Nevada's substantive law may be selected in a "constitutionally permissible manner" if it has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* (citations omitted) (internal quotation marks omitted). Such significant contacts are "manifest in this case." *Id.* at 1688 (citation omitted).

The Tax Board does not dispute these contacts; instead, it urges the Court to adopt a rule requiring a state court to extend full faith and credit to a "sister State's statutorily recaptured sovereign immunity from suit when a refusal to do so would 'interfere with a State's capacity to fulfill its own sovereign responsibilities.'" *Id.* (citation omitted). Justice O'Connor, applying *Nevada* v. *Hall*,[11] refused to adopt such a rule. First, she stated, *Hall* found that "the Constitution does not confer sovereign immunity on States in the courts of sister States." *Id.* at 1689. This ruling, the Justice held, is left undisturbed since the Tax Board has not requested a reexamination of that ruling. Second, *Hall* found that the Clause does not require a state to apply a sister state's sovereign immunity statutes "where such application would violate [the forum state's] own legitimate

public policy." *Id.* In *Hall*, the Court found that "a suit against a State in a sister State's court 'necessarily implicates the power and authority' of both sovereigns." *Id.* The rule desired by the Tax Board in this case "would elevate California's sovereignty interests above those of Nevada," but there is no "principled distinction" between the states' interests in *Hall* and in this case. *Id.* at 1689-90. In sum, Justice O'Connor held, "we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause." *Id.* at 1690.

Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 538 U.S. ___ (2003). *Decided: May 27, 2003.*

Hibbs brought suit against the Nevada Department of Human Resources and others alleging violations of the Family and Medical Leave Act of 1993 (FMLA). The district court granted summary judgment to the defendants, based partially upon a finding that the claim was barred by Nevada's Eleventh Amendment sovereign immunity.[12] The Ninth Circuit reversed the district court holding. The Supreme Court affirmed. The Chief Justice delivered the opinion of the Court, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined. Justice Souter filed a concurring opinion, in which Justices Ginsburg and Breyer joined. Justice Stevens filed an opinion concurring in the judgment. Justice Scalia filed a dissenting opinion. Justice Kennedy filed a dissenting opinion in which Justices Scalia and Thomas joined.

Congress, the Chief Justice began, may abrogate a state's sovereign immunity "if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Id.* at 1977. Since the "clarity of Congress' intent here is not fairly debatable," the Court must determine only whether the statute is valid under the Fourteenth Amendment. *Id.* Under Section Five, Congress may enforce the substantive guarantees of Section One, including equal protection of the laws. This authority includes the ability to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Id.* Such legislation, however, must be "an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.'" *Id.* (citation omitted). The two are distinguished through application of the *City of Boerne* test: Section Five legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 1978 (citation omitted).

The Chief Justice reviewed evidence presented to Congress at the time FMLA was enacted. The evidence, he observed, indicates that "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." *Id.* at 1979. Congress could "reasonably conclude" that existing state leave policies were insufficient and seek to enact its own remedy. *Id.* at 1981. The remedy enacted, the Chief Justice found, is "'congruent and proportional to the targeted violation.'" *Id.* at 1982 (citation omitted). The alternative, a statute mandating gender equality in family leave provisions, "would not have achieved Congress' remedial object," as states could simply have refused to give employees any family leave at all. *Id.* at 1983. Because FMLA is "narrowly targeted" and limits which employees are entitled to take advantage of the leave provisions, the Chief Justice concluded, it "can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Id.* at 1983-84 (citation omitted).

Justice Kennedy's dissent agreed that Congress may not "define the substantive content of the Equal Protection Clause; it may only shape the remedies warranted by the violations of that guarantee." *Id.* at 1986 (Kennedy, J., dissenting.) However, the Justice warned, "[t]his [dual] requirement has special force in the context of the Eleventh Amendment," and the Court should show "far more caution" before it finds the FMLA to be a "congruent and proportional remedy to an identified pattern of discrimination." *Id.* The Court, he stated, failed to show that FMLA combats gender-based discrimination.[13] To the contrary, the Justice argued, "the States appear to have been ahead of Congress in providing gender-neutral family leave benefits." *Id.* at 1989. Even if there had been discrimination, the remedy offered in FMLA is not a "congruent and proportional" remedy—instead, it is an entitlement program.

Lawrence v. Texas, 123 S. Ct. 2472, 539 U.S. ___ (2003). *Decided: June 26, 2003.*

Two police officers were dispatched to a residence in Houston, Texas, in response to a reported weapons disturbance. The police officers entered the residence to find petitioners engaged in a sexual act. The petitioners were charged under Texas Penal Code § 21.06(a), making it a crime to engage in "deviate sexual intercourse with another individual of the same sex." *Id.* at 2476. The Texas state courts rejected petitioners' contention that the statute violated their rights under the Fourteenth Amendment.[14] The Supreme Court reversed and remanded. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice O'Connor filed a concurring opinion. Justice Scalia filed a dissenting opinion, in which the Chief Justice and Justice Thomas joined. Justice Thomas also filed a separate, dissenting opinion.

The question before the Court, Justice Kennedy stated, is whether petitioners "were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." *Id. Bowers v. Hardwick*[15] failed to "appreciate the extent of the liberty at stake." *Id.* at 2478. Instead, Justice Kennedy stated, the Court "demean[ed]" the claim of the petitioners by misstating it as merely "whether there is a fundamental right to engage in consensual sodomy." *Id.* The *Bowers* Court, he continued, justified its holding by addressing the "ancient roots" against such conduct, but it "overstated" this history. *Id.* at 2478, 2480. Homosexual conduct has been condemned for centuries, but much

of this condemnation is based upon "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* at 2480. The question here, however, is whether the state may "enforce these views . . . through operation of the criminal law." *Id. Bowers* failed to acknowledge the "emerging recognition" that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* Further, *Bowers* has been the subject of "substantial and continuing" criticism, both domestically and abroad. *Id.* at 2483. *Bowers v. Hardwick* is overruled.

Justice Scalia's dissenting opinion noted that the Texas statute "undoubtedly imposes constraints on liberty." *Id.* at 2491 (Scalia, J., dissenting). However, the Justice stated, the Fourteenth Amendment "*expressly allows* States to deprive their citizens of 'liberty,' *so long as 'due process of law' is provided*." *Id.* (citation omitted). The substantive due process doctrine holds that the "Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* The Court has held that "*only* fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are '"deeply rooted in this Nation's history and tradition."'" *Id.* at 2492 (citations omitted). In contrast, "[a]ll other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest." *Id. Bowers* concluded that homosexual sodomy does not implicate this type of fundamental right. Nothing in this case, Justice Scalia observed, has contradicted the finding in *Bowers*. To the contrary, the Court relies upon "'laws and traditions in the past half century'" reflecting "'*an emerging awareness*'" regarding this issue. *Id.* at 2494. Rather than address this point, Justice Scalia continued, the Court rests its holding on a "contention that there is no rational basis for [the Texas] law." *Id.* at 2495. Texas sought to "further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable'—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity." *Id.* (internal citation omitted). As *Bowers* held, this is a "legitimate state interest." *Id.* The Court's holding to the contrary "effectively decrees the end of all morals legislation." *Id.*

Footnotes

***** Includes summaries of several of the Court's primary federalism cases for the 2002-2003 term. More thorough case summaries (along with summaries of cases, concurrences, and dissents not included here) are also available in the practice group's quarterly updates, available at: http://www.fed-soc.org/Publications/practicegroupnewsletters/federalism/federalism.htm.

[1] *Guillen v. Pierce County*, 31 P.3d 628, 633 (Wash. 2001).

[2] The Court determined that it did not have jurisdiction with regard to a separate tort action also before the Court. Pierce County v. Guillen, 123 S. Ct. 720, 728 (2003).

[3] The Copyright Clause provides that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Petitioners also claimed that the CTEA violated the First Amendment. Both the D.C. Circuit and the Supreme Court rejected the petitioners' First Amendment claim.

[4] *Eldred v. Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001).

[5] 529 U.S. 765 (2000) (holding that states are not "persons" subject to qui tam actions under the FCA).

[6] *See* United States *ex rel. Chandler v. Cook County*, 277 F.3d 969, 980-81 (7th Cir. 2002).

[7] 74 U.S. (7 Wall.) 118 (1869).

[8] The statute provided: "Health care benefit plans shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and is willing to meet the terms and conditions for participation established by the health benefit plan." KY. REV. STAT. ANN. § 304.17A-110(3) (Banks-Baldwin 1995).

[9] The statute provides: "A health benefit plan that includes chiropractic benefits shall: . . . (2) Permit any licensed chiropractor who agrees to abide by the terms, conditions, reimbursement rates, and standards of quality of the health benefit plan to serve as a participating primary chiropractic provider to any person covered by the plan." KY. REV. STAT. ANN. § 304.17A-171(2) (Banks-Baldwin 1999).

[10] *Ky. Ass'n of Health Plans, Inc. v. Nichols*, 227 F.3d 352 (6th Cir. 2000). The sections were repealed by the Kentucky legislature effective July 1, 1999; however, the Sixth Circuit determined that the appeal was not moot as the repealed provisions had been replaced with the same requirements in a new statute. The new "any willing provider" provision is located at KY. REV. STAT. ANN. § 304.17A-270 (Banks-Baldwin 1999).

[11] 440 U.S. 410 (1979).

[12] *See Hibbs v. HDM Dep't of Human Res*., 273 F.3d 844, 849 (9th Cir. 2001).

[13] The evidence of discrimination considered by Congress, Justice Kennedy argued, concerned private or federal discrimination, not discrimination by state employers. *Hibbs*, 123 S. Ct. at 1987-89 (Kennedy, J., dissenting).

[14] Claims were considered under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Petitioners also claimed the statute violated a provision in the Texas Constitution.

[15] 478 U.S. 186 (1986).

FINANCIAL SERVICES

PATRIOT GAMES: COMMON MYTHS ABOUT THE USA PATRIOT ACT

*BY HON. MARY BETH BUCHANAN**

Editor's note: After 9/11, Congress enacted the USA PATRIOT Act. The Act's provisions have given rise to many allegations about its contents and effects. More than 27 states and 140 local governments have passed resolutions opposing it. On July 30, 2003, the American Civil Liberties Union filed suit challenging some of the Act's provisions. This article is a condensed version of a longer piece the author penned for use by U.S. attorneys and officials at the Department of Justice.

MYTH: Thousands of people were rounded up after September 11, 2001 and detained for long periods of time without any criminal charges.

As the Director of Public Affairs of the Department of Justice recently explained:

> "[A]bout 750 foreign nationals" were detained. "Thousands" would imply two or three thousand for which there is no basis in fact. All were in the country illegally, and all were charged with immigration and/or criminal charges. In addition, most of them — approximately 500 to date — have been deported, not "let go" or "released." That an alien was deported rather than prosecuted does not mean that the alien had no knowledge of or connection to terrorism. In many cases, the best course of action to protect national security may have been to remove potentially dangerous individuals from the country and ensure that they could not return."

MYTH: The USA PATRIOT Act permits the indefinite detention of immigrants on minor visa violations.

The USA PATRIOT Act ("PATRIOT Act") gives the Attorney General the power to detain aliens suspected of terrorism and also delineates the process by which detentions are to be reviewed. The AG must certify them as a threat to the national security of the United States. The certification must be based upon reasonable grounds to believe that the alien has or will commit espionage or sabotage; attempt an overthrow of the government; has or will commit terrorist acts; or is otherwise engaged in activities that threaten national security. Following detention, the Attorney General must place the alien in removal proceedings or file criminal charges against the alien. This must be done within seven days following commencement of the detention or the alien must be released. In situations where the alien is not likely to be deported within "the reasonably foreseeable future," the alien "may be detained for additional periods of up to six months, only if the release of the alien will threaten the national security of the United States or the safety of the community or any other person."

MYTH: The USA PATRIOT Act empowers the government to start monitoring e-mails and web surfing by ordinary citizens.

The PATRIOT Act authorizes courts to issue pen register and trap and trace orders that are valid "anywhere within the United States" and apply to facilities other than telephone lines. The court must have jurisdiction over the crime being investigated and the government must certify that the information "likely to be obtained" is "relevant to an ongoing criminal investigation." With such orders, the government is not permitted to intercept the content of the communication and is restricted to obtaining routing and addressing information. A search warrant issued by a court is required to read the contents of email, if the email message is unopened and less than 180 days old.

MYTH: The USA PATRIOT Act is a present danger to the constitutional rights and privacy rights of library users.

The PATRIOT Act permits an agent to apply for, and the Foreign Intelligence Surveillance Act (FISA) court to issue, a court order to produce "tangible things," which could include the records of library users. It also permits the FISA court to order the installation of pen register or trap and trace devices on wire or electronic communications media, which could include library computers with Internet access and email capability. Contrary to the myth, however, these devices only reveal the electronic addresses of the users of these media; they do not give law enforcement agents access to the contents of communications that are transmitted over them.

A February 2003 report prepared by the Congressional Research Service states: "Moreover, a Justice Department response to House Judiciary Committee questioning suggests that thus far exercise of the authority of Section 215 in a library context has been minimal or nonexistent."

MYTH: The Electronic Surveillance Provisions of the USA PATRIOT Act enables law enforcement to conduct "roving wiretaps."

Prior to the advent of the USA PATRIOT Act, the government was permitted to conduct "roving wiretaps." A court

order authorizing a wiretap did not have to specify the person whose assistance in the surveillance was required (e.g., a specific telecommunications carrier), where the court found that there was "probable cause to believe that the [target's] actions could have the effect of thwarting interception from a specific facility." Each time a terrorist used a new phone, the government was required to apply to the FISA court for a new order directing the telecommunications carrier associated with the new phone to assist the government with the wiretap. The USA PATRIOT Act simply amended the Foreign Intelligence Surveillance Act to conform to the parallel provision found in the Federal Wiretap Statute.

MYTH: The USA PATRIOT Act enables the government to conduct large-scale investigations of U.S. citizens for "intelligence purposes."

The Federal Rules of Criminal Procedure permit the disclosure of grand jury information with other agencies only when "the matters involve foreign intelligence or counterintelligence or foreign intelligence information...to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties." Under the Federal Rules of Criminal Procedure, the federal official to whom the grand jury information is disclosed "may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information."

The USA PATRIOT Act requires that the government must provide the district court with written notice that the disclosure was made and identify those to whom the disclosure was made. Prior to the PATRIOT Act amendments, the government was permitted to disclose grand jury information to other attorneys for the government. No notice of the disclosure to the district court was required.

MYTH: Various provisions of the USA PATRIOT Act violate the Fourth Amendment.

The USA PATRIOT Act added subsection (b) to Title 18, United States Code, Section 3103a. The statute provides that notice of search and seizure may be *delayed* (not eliminated) where:

> "(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result;
>
> (2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication, or,..any stored wire or electronic communication, except where the court finds reasonable necessity for the seizure; and
>
> (3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may be extended by the court for good cause."

An "adverse result" consists of: the endangerment of the life or physical safety of another individual; flight; the destruction of evidence; the intimidation of potential witnesses; or placing an investigation is serious jeopardy. Delayed notification under Section 3103a(b) depends wholly and solely upon judicial approval. The section also provides for delayed notice and not the absence of notice. Section 3103a(b) also comports with the common law "knock and announce" requirement. The constitutionality of the doctrine was upheld in *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

MYTH: The USA PATRIOT Act is unconstitutional.

To date, no provision of the PATRIOT Act has been held unconstitutional.

* Hon. Mary Beth Buchanan is United States Attorney for the Western District of Pennsylvania.

Congress Moves Forward on Ambitious Financial Services Agenda

*By Alec D. Rogers**

On the heels of the 107th Congress, which enacted the most sweeping securities law reforms since the 1930s and created a new federal program to bolster the commercial property insurance market, the 108th Congress could have been forgiven if it had chosen to focus its energies on other topics in its first few months. Instead, led by energetic House Financial Services Committee and subcommittee Chairmen, it has continued to pursue an ambitious agenda for further changes to the nation's financial services system. This article will survey the most significant financial services topics before Congress this session.

Deposit Insurance Reform

Although the current deposit insurance system is generally thought to be sound, there is general agreement that the time is ripe for undertaking several related reforms, many of which are fairly noncontroversial. These include merging the Bank Insurance Fund with the Savings Association Insurance Fund. There is also general consensus for reforming the methods by which premiums are charged to insured institutions, and giving the Federal Deposit Insurance Corporation more flexibility generally.

Completion of this task continues to be held up by the debate over whether Congress ought to increase the amount of insurance coverage (either by raising it outright, indexing it for inflation, or both) or whether it should remain at the current $100,000 limit. The Bush administration, the Federal Reserve and the Comptroller of the Currency are opposed to any increase in the coverage limits, while the Federal Deposit Insurance Corporation supports indexing it to inflation. Some in the community banking industry wish to first increase it and then index it to inflation. This more controversial proposal has been tied to the other, less controversial ones mentioned above.

On April 2, 2003, the House passed reform legislation along the above lines, with an increase in coverage to $130,000 per account and provision for future increases tied to the rate of inflation by a vote of 411-11. In contrast, the Senate Banking Committee has held a hearing, but has not taken any legislative action on deposit insurance reform in the 108th Congress.

Financial Institution Regulatory Relief

Both the House Financial Services Committee and the House Judiciary Committee have considered and reported legislation that would remove regulatory barriers on financial institution activity, H.R. 1375. The bill addresses a variety of regulatory barriers that remain in such areas as interstate banking, the cross marketing restrictions on the merchant banking operations of financial holding companies, and reducing the post approval time for bank acquisitions and mergers. It also reduces what the Federal Reserve characterizes as unnecessary reports. The House may take H.R. 1375 up this fall. No similar legislation has been introduced, however, in the Senate. As a result, it will be difficult to make more progress in this area during the 108th Congress.

Fair Credit Reporting Act

The Federal Fair Credit Reporting Act (FCRA), originally enacted in 1970, governs the conduct of credit reporting agencies and the rights of consumers to view and challenge mistakes on their credit reports. Federal Trade Commission Chairman Timothy Muris and others have credited it with fostering the growth of the modern credit system. Given the import of credit to consumer purchasing, and that of consumer purchasing to economic growth, "well functioning credit markets are an essential component of economic prosperity," Muris testified before the Senate Banking Committee.

Key components of this act are expiring this year, prompting Congress to act on their reauthorization. Like many reauthorizations, this affords Congress a chance to review the Act's operations and ponder the need for legislative changes. Accordingly, this act has been the subject of eight congressional hearings, and over a dozen separate bills.

On June 30, 2003, the Bush Administration released its own proposal for amending the FCRA, including its support for permanently reauthorizing the act's preemption of state regulation in certain matters, which is strongly supported by many financial institutions. Such items as the prescreening of consumer reports, the length of time in which credit rating agencies must investigate consumer disputes, the duties of credit information furnishers, and the age of information allowed to be used in credit reports are set by federal law to the exclusion of state regulation. This particular issue, whether states should have the ability to create tougher consumer protections than afforded under federal law, has been the focus of much of the discussion over FCRA reauthorization.

To compensate for preempting state action, the administration proposes to enhance consumer protections at the federal level. Consumers would be given free annual access to their credit reports to check for errors, be provided with clearer explanations of their credit scores and the rationale for them, and have enhanced ease in "opting out" of information sharing. The administration's proposal also contains measures to help consumers fight identity theft. These include a "one call" system that would mandate that credit reporting bureaus report identity theft issues to other bureaus and remove disputed charges where a police report had been filed.

The House Committee on Financial Services voted overwhelmingly to report H.R. 2622, which would make those expiring provisions of the Fair Credit Reporting Act permanent. It also increases protections against identity theft and consumer access to credit information. The House is likely to bring the bill up for consideration in the fall. The Senate has yet to act on similar legislation. The September 30, 2003 expiration date for key FCRA provisions makes likely the compromises that will be necessary for quick passage.

Check Truncation

Each year, the U.S. banking system processes the cashing and clearing of 50 million paper checks. Paper checks are physically transported from the presenting bank to the payor bank, and returned if the account upon which the check was drawn lacks sufficient funds. This system of physically moving so much paper imposes significant transaction costs on the financial system that are ultimately born by its customers. Although banks employ greater use of technology in this process, current law requires that physical checks still be sent to the payor bank unless an institution has agreed to handle the payments electronically. Obtaining consent to electronic processing by all of the institutions in the system is a long and slow process, and has proven to be a significant obstacle to moving towards an all-electronic system.

The House and Senate have each passed their versions of legislation that would end the practice of physically routing checks from the institution where they were cashed back to the original drawer. Instead, electronic versions would be sent. Institutions would have the opportunity to "opt out" and request paper versions instead, but rather than being the actual checks, they would simply be provided with paper summaries containing the pertinent information.

The measure is strongly supported by the Federal Reserve, which provided model legislation for such a system. In its transmittal letter accompanying the draft legislation, Chairman Alan Greenspan stated "The proposed legislation should improve the efficiency of the payments system by enabling banks to expand the use of electronics in the collection and return of checks." If a fully electronic checking system been in place on September 11, 2001, when terrorists struck the World Trade Center and the Pentagon, banks would have been able to avoid the disruption that occurred in the nation's checking system, according to Greenspan.

This legislation has broad, bi-partisan support in Congress. The House passed H.R. 1474 by a vote of 405-0, and the Senate passed its version, S. 1334, by unanimous consent. Differences in the two bills still need to be reconciled by a conference committee comprised of members from both chambers, and the bills passed in identical form before they can be sent to the White House for the President's signature. The Bush Administration supports the measures. Although there does not seem to be any particular urgency, the reduced costs, increased systemic security and relatively little opposition make chances for passage good during the 108th Congress.

Conclusions

Of the legislation mentioned, the check truncation and Fair Credit Reporting Act reauthorization measures described above have the best chance of achieving passage in the 108th Congress. Deposit insurance reform may continue to be held up over the question of increasing the coverage amounts. Finally, while the House has shown some interest in reducing regulatory barriers to financial services, the Senate has not shown any to date. Other financial issues, such as the oversight and regulation of Government Sponsored Enterprises after recent allegations of fraud at Freddie Mac, may occupy Congress's attention this fall, and reduce the chances for action in areas where the need for reform may appear less pressing.

* Alec Rogers is a Senate staffer and the publications Vice Chair of the Federalist Society's Financial Services Practice Group. Any views expressed in this article are solely those of the author.

Free Speech and Election Law

Supreme Court Update: 2003 2nd Quarter

*by Todd Overman**

The following cases, each with free speech or election law implication, were decided by the Court since April 2003.

FEC v. Beaumont, 123 S. Ct. 2200 (2003). ***Cert. Granted: November 18, 2002. Oral Argument: March 25, 2003. Decided: June 16, 2003.***

Since 1907, corporations have been prohibited from contributing directly to candidates in federal elections. *See* 2 U.S.C. Section 441b(a)-(b) (2002). However, corporations are free to establish and administer political action committees ("PACs") that can make contributions and expenditures in connection with federal elections. 441b(b)(2)(C). A nonprofit advocacy corporation, North Carolina Right to Life, Inc. ("NCRL"), sued the Federal Election Commission ("FEC") challenging the constitutionality of Section 441b and its implementing regulations. NCRL is a 501(c)(4) corporation and provides counseling to pregnant women and advocates alternatives to abortion. It is funded primarily by individual contributions, but NCRL does receive some contributions from business corporations. In accordance with the prohibition on corporation contributions, NCRL established a PAC to contribute directly to federal candidates. The District Court granted summary judgment to NCRL and held Section 441b unconstitutional as applied to the corporation, as to both direct contributions to federal candidates and independent expenditures in connection with federal elections. A divided Fourth Circuit Court of Appeals affirmed, treating NCRL as materially indistinguishable from the nonprofit advocacy corporation at issue in the Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Fourth Circuit reasoned that "[t]he rationale utilized by the Court in [*Massachusetts Citizens for Life*] to declare prohibitions on independent expenditures unconstitutional as applied to [the advocacy corporation involved there] is equally applicable in the context of direct contributions." 278 F.3d 261, 282 (2002). Interestingly, the FEC petitioned for *certiorari* only on the issue of the constitutionality of the ban on direct contributions.

Justice Souter began the majority opinion (vote of 7-2) reflecting on the prohibition of direct corporate political contributions throughout the twentieth century. Citing the need to combat the corruptive influence of corporation contributions, Souter explained that the "first federal campaign finance law" in 1907 acted on President Theodore Roosevelt's call for an outright ban, not half measures. Souter stated that not only has the ban endured, but the original rationales for the law are still present today. Specifically, "[i]n barring corporate earnings from conversion into political 'war chests,' the ban was and is intended to 'prevent corruption or the appearance of corruption.'" 123 S. Ct. at 2206. Justice Souter also reasoned that another basis for regulating corporate electoral involvement is to hedge against their use as conduits for circumvention of valid contribution limits. *Id.* at 2207. In the area of campaign contributions, the Court noted the deference afforded to Congress to regulate the "plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages." *Id.*

In the present case, Justice Souter indicated that the Court's decision in *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982) all but decided the issue against NCRL's position. *National Right to Work* held as constitutional Section 441b(b)(4)(A)'s restriction barring a corporation from soliciting contributions to a PAC established by the corporation, except from stockholders or other specified categories of persons. In that case, the Court specifically rejected the argument made by NCRL that deference to congressional judgments about proper limits on corporate contributions should turn on the wealth of particular corporations or the details of corporate form. *Id.* at 2208. Justice Souter distinguished *Massachusetts Citizens for Life* as holding that Section 441b's prohibition on independent expenditures, not contributions, was unconstitutional as applied to a nonprofit advocacy corporation. Here, the "concern about the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations." *Id.* at 2209. Souter pointed to such 501(c)(4) corporations as the AARP, the NRA, and the Sierra Club, as examples of nonprofit advocacy corporations with substantial influence and ability to amass political war chests. Lastly, Justice Souter rejected NCRL's argument that the application of the corporate contribution ban should be subject to a strict level of scrutiny, as Section 441b does not merely limit contributions, but bans them on the basis of their source. Citing *Buckley v. Valeo*, 424 U.S. 1 (1976), Souter explained the distinction between the level of scrutiny applied to contributions and expenditures, and suggested that NCRL was wrong in characterizing Section 441b as a complete ban. In an endorsement for PACs, Justice Souter concluded by stating that Section 441b allows corporations and unions to make political contributions "without the temptation to use corporate funds for political influence . . . and it lets government regulate campaign activity through registration and disclosure . . . without jeopardizing the associational rights of advocacy organizations' members." *Id.* at 2211.

Virginia v. Hicks, 123 S. Ct. 2191 (2003). ***Cert. Granted: January 24, 2003. Oral Argument: April 30, 2003. Decided: June 16, 2003.***

In 1997, the Richmond City Council privatized the streets of Whitcomb Court, a low-income housing development, and conveyed the streets to the Richmond Redevelopment and Housing Authority ("RRHA"). In accordance with the conveyance, and in line with Richmond's overall goal of combating crime and drug dealing, the RRHA enacted a policy authorizing the Richmond police to serve notice on any person lacking "a legitimate business or social purpose" for being on the property and to arrest for trespassing any person who remains or returns after having been so notified. The RRHA posted "No Trespassing. Private Property" signs on each apartment building and along the streets of Whitcomb Court. The RRHA policy went beyond policies of other public housing units by barring unwanted visitors from the grounds and buildings, and also formerly public streets and sidewalks. Respondent Kevin Hicks, a nonresident of Whitcomb Court, was given written notice barring him from Whitcomb Court. Subsequently, Hicks sought permission on two occasions to enter the property, and was twice denied by the property manager. In January of 1999, Hicks trespassed again, and was arrested and convicted.

The issue presented to the Court was whether the RRHA's trespass policy was facially invalid under the First Amendment's overbreadth doctrine. The Virginia Supreme Court concluded that the RRHA policy was unconstitutionally overbroad. The Court granted the Commonwealth's petition for *certiorari*, and Justice Scalia delivered the opinion for a unanimous Court. Initially, Justice Scalia noted that Hicks was not contending that he was engaged in constitutionally protected speech, but rather that the RRHA policy barring him from Whitcomb Court was overbroad and could not be applied to him or anyone else. The Virginia Supreme Court found that the policy provided the property manager "unfettered discretion" in determining who may use RRHA's property, and specifically faulted an "unwritten rule" that required persons wishing to hand out fliers to obtain the property manager's permission. *Id.* at 2196. Based upon this objection, the Virginia Supreme Court declared the *entire* RRHA trespass policy overbroad and void – including the written rule that those who return after receiving notice are subject to arrest. However, the Court stated that under the overbreadth doctrine, the trespass policy, *taken as a whole,* must be substantially overbroad judged in relation to its plainly legitimate sweep. *Id.* at 2198 (emphasis added). The Court reasoned that Hicks failed to carry the burden of demonstrating that any First Amendment activity fell outside the "legitimate business or social purpose" that permitted entry. Furthermore, in this case, it was Hicks' nonexpressive conduct – his entry in violation of the notice-barment rule - not his speech, for which he was punished as a trespasser. The Court concluded by noting that "[R]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Id.* at 2199. Here, even assuming the invalidity of the unwritten rule, Hicks did not show "that the RHHA trespass policy as a whole prohibits a 'substantial' amount of protected speech in relation to its many legitimate applications." *Id.*

Interestingly, Justice Scalia's opinion left open the possibility that the policy could be challenged on other grounds upon remand. *Id.* For instance, the Court suggested that the policy could be challenged by someone who has been prevented from picketing or otherwise engaging in constitutionally protected expression. Nonetheless, supporters of the decision stated that the Court's ruling sent a message that would bolster the efforts of public housing authorities to protect their property and residents through policies designed to keep unwanted visitors away.

Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003). ***Cert. Granted: January 10, 2003. Oral Argument: April 23, 2003. Dismissed: June 26, 2003.***

On the last day of 2002-03 term, the Court dismissed by a 6-3 vote Nike's appeal of the California Supreme Court's decision that the lawsuit brought by Marc Kasky in 1998 could proceed to trial. The dismissal disappointed many legal analysts who were hoping for the Court to produce a major ruling clarifying what type of statements amount to commercial speech. Justices Stevens, Ginsburg, and Souter issued a separate opinion explaining why they thought the Court's decision dismissing the case was justified. Justice Stevens indicated that the factors supporting a dismissal were that the California Supreme Court never entered a final judgment, that neither party could invoke federal court jurisdiction, and that the lack of a full factual record developed at trial limited the Court's ability to effectively decide such important constitutional issues. Justice Kennedy filed a dissent, as did Justice Breyer, with whom Justice O'Connor joined. Justice Breyer disagreed with the reasons put forth by Justice Stevens for dismissing the case and argued that the case was ripe for review.

On September 12, 2003, the parties announced that they had agreed to settle the lawsuit. As part of the settlement, Nike agreed to make additional workplace-related program investments totaling $1.5 million. Nike's contribution will go to the Washington D.C. based Fair Labor Association for program operations and worker development programs focused on education and economic opportunity. Free speech proponents were obviously disappointed that the settlement ended the lawsuit without resolving the important First Amendment applications to corporate speech.

U.S. v. American Library Association, Inc., 123 S. Ct. 2297 (2003). ***Probable Jurisdiction Noted: November 12, 2002. Oral Argument: March 5, 2003. Decided: June 23, 2003.***

To combat the growing problem of children's access to internet pornography in public libraries, Congress

enacted the Children's Internet Protection Act ("CIPA"). Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs filtering software to block images that constitute obscenity or child pornography. In 2002, the two assistance programs, E-rate and LSTA, provided $58.5 million and $149 million, respectively, to assist 95% of the nation's libraries in providing public Internet access. CIPA also permits the library to disable the filter "to enable access for bona fide research or other lawful purposes." 20 U.S.C. Section 9134(f)(3); 47 U.S.C. Section 254(h)(6)(D). After a trial, a three-judge panel from the Eastern District of Pennsylvania ruled that CIPA was facially unconstitutional and enjoined the withholding of federal assistance for failure comply with CIPA. Specifically, the district court held that the filtering software was a content-based restriction on access to a public forum, and was therefore subject to strict scrutiny. The court then determined that the use of software filters was not narrowly tailored to further the government's compelling interest of protecting minors from obscenity and child pornography. Justice Rehnquist, writing for the plurality, reversed the court's decision.

Framing the analysis under the framework of *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), Justice Rehnquist stated that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." 123 S. Ct. at 2303. However, Congress may not "induce" the recipient "to engage in activities that would themselves be unconstitutional." *Id.* (citing *Dole*, 483 U.S. at 210). After examining the traditional functions served by public libraries, Rehnquist concluded that Internet access in public libraries was neither a "traditional" nor a "designated" public forum. *Id.* at 2304. The Court reasoned that libraries provide Internet access for the "same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." *Id.* at 2305. Therefore, the requirement of filtering software was not held to the heightened standard of strict scrutiny. In response to the dissent's concern of the filtering software's tendency to "overblock" constitutionally protected speech, the plurality noted the relative ease by which a library patron can request to have the filter disabled. Lastly, the Court rejected the appellees unconstitutional condition claim on the basis that Congress may insist that "public funds be spent for the purposes for which they were authorized. Especially because public libraries have traditionally excluded pornographic material from their other collection, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust.*" *Id.* at 2308. Justice Rehnquist also noted that if public libraries wish to offer unfiltered Internet access, they are free to do so without federal assistance.

Looking Ahead to 2003-2004 Term

- On June 5, the Supreme Court set oral arguments in *McConnell v. FEC* for September 8, 2003. In a one-paragraph order, the Court also announced that said arguments would last for four hours. The expedited schedule could allow the Court to issue a ruling before the first presidential caucuses and primaries – the first being January 19, 2004 in Iowa.

- On April 30, 2003, a petition for *certiorari* was filed by the Department of Justice and the Elk Grove Unified School District in **Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003).** In an unusual move, Mr. Newdow also filed a petition for *certiorari* in order to provide the Court with subject matter jurisdiction to review the constitutionality of the Pledge of Allegiance. In *Newdow*, a divided Ninth Circuit ruled that the phrase "under God" in the Pledge of Allegiance was an endorsement of God, and that the Constitution forbids public schools or other governmental entities from endorsing religion. In February, the Ninth Circuit panel denied the government's petition for rehearing and petition for rehearing *en banc*, and set the stage for eventual Supreme Court review.

FEC News & Notes

- The FEC held a hearing on the generally secret methods it uses to investigate candidates and political organizations accused of violating campaign finance laws. Among the topics under review were guidelines for including respondents in a complaint, confidentiality rules, and motions before the commission. Commissioner Bradley Smith summed up the purpose of the hearing by saying, "we should not mistake secrecy and unfairness for robust enforcement."

- In a 5-0 vote, the FEC said Nevada Sen. Harry Reid's son, Rory Reid, could raise hard money for his father's campaign and soft money for the Nevada Democratic Party. Despite the ban on raising "soft money" by agents of federal campaigns, the commission found that Reid would not be acting as an agent of his father's campaign when raising for the state party, and that his status as the senator's son would not be enough on its own for him to be considered an agent of the senator's campaign. Rory Reid is a Clark County commissioner in Nevada and former chairman of the Nevada's Democratic Party.

- Senators McCain and Feingold introduced the Federal Election Administration Act of 2003. The Act would abolish the FEC and replace it with a new agency, entitled the Federal Election Administration (FEA). Under the proposal, the FEA would be comprised of three members – a chairman and two members – each appointed by the president with the advice and consent of the Senate. The Chairman

would serve a term of ten years and have broad authority to manage the agency, and the members would serve six year terms and could not be from the same political party. In addition, enforcement proceedings would be conducted before administrative law judges, where the ALJs would have the authority to make findings of fact and reach conclusions of law.

State Items of Interest

- The Massachusetts Legislature repealed the state's Clean Elections Law as part of a compromise budget plan reached in conference committee. The House voted 118 to 37, and the Senate 32 to 6, on the budget compromise that repealed a law that voters overwhelmingly approved in 1998. If Gov. Mitt Romney chooses not to veto the budget provision, then only two states, Arizona and Maine, will have Clean Elections Laws that apply to state office holders.

- Free speech battles are brewing at college campuses across the country. Assisted by the Philadelphia-based, Foundation for Individual Rights in Education ("FIRE"), censored students are filing lawsuits challenging unconstitutional speech codes at their universities. For instance, students are challenging as too broad or vague Pennsylvania's Shippensburg University's speech codes that declare words or actions that are "inflammatory, demeaning or harmful to others" as undeserving of protection. Also, at Texas Tech University, students have filed a lawsuit challenging the school's speech codes and policy quarantining free speech to a small gazebo. Similar "free speech zones" have appeared at the University of Houston, University of Maryland, and Florida State University. Once challenged, schools appear to back down, as West Virginia University and the University of Texas-Austin recently declared the entire campus a free speech zone.

* Todd R. Overman is an associate with the law firm of Hogan & Hartson, LLP in Washington, D.C., and is a member of the Executive Committee of the Free Speech & Election Law Practice Group.

Heartache Over HIPAA

*By Eric Schippers**

Churchgoers in a small New England town were astonished by an announcement from the pulpit last Sunday that due to new federal medical privacy legislation there no longer would be a prayer list or mention of ailing parishioners or family members in church. According to the pastor, those in need would remain anonymous and be assigned a random number for which the congregation could offer prayer.

In Massachusetts, a mother's call to her pediatrician's office grew heated recently when a nurse, citing the new federal privacy laws, repeatedly refused to release the results of medical tests performed on the woman's seven-month-old son.

At Mt. Sinai Hospital in New York, the anxious parents of a 26-year-old comatose patient in severe liver failure were unable to find out important details about his condition and treatment because he had not yet signed a release form required under the new federal privacy legislation.

These are but a few of the countless unintended consequences of the law known as HIPAA and its extensive privacy regulations which took effect on April 14.

Congress originally passed the Health Insurance Portability and Accountability Act (HIPAA) in 1996 with the laudable goals of standardizing electronic billing and health care claims, allowing a terminated employee to temporarily maintain his or her company's medical coverage, and curtailing the runaway marketing of private health information to outside companies. Unfortunately, Congress and the U.S. Department of Health and Human Services (HHS) didn't stop there.

In August 2002, HHS sought to establish national standards for medical privacy by adding to HIPAA a long list of new personal privacy protections, including prohibiting the use or disclosure of an individual's health information unless specifically authorized by that individual. On top of the already thousands of ambiguous and burdensome regulations included in HIPAA, the law soon ballooned into a gargantuan monolith to Big Government, bearing a price tag for business community compliance at nearly $43 billion, according to estimates by the American Hospital Association.

While the regulations most directly impact the health care industry, including hospitals, doctors, insurers, pharmacies and their "business associates" — such as law firms and billing agencies — all companies in America are having to rethink the way they administer their health insurance plans and conduct their human resources.

While many of the complicated provisions in the law remain open to interpretation, the fear of draconian civil and criminal penalties — ranging from a $100 fine per violation up to $250,000 in fines and 10 years in prison — has many nervous business owners and health care administrators going overboard to comply:

- In some offices, memos are no longer being circulated for co-worker baby showers, nor are "Get Well Soon" cards for sick employees, as they are seen as violating an employee's personal medical privacy.
- Doctor's offices are removing sign-in sheets and are no longer calling out patient names in their waiting rooms.
- At most businesses, employees must sign authorization forms before a human resources person can discuss medical benefits, including helping to decipher complicated medical claim forms. And, before a human resources person can talk to an employee about his or her family member's medical problem, that family member must sign his or her own disclosure form.
- Pharmacies around the country have installed private rooms for customers to ask questions about prescriptions, as well as glass barriers to muffle their chatter behind the counter. To pick up a prescription for a family member one has to be able to recite the specific drug's name and what it has been prescribed for.
- Hospitals, doctor's offices and pharmacies have spent millions training staff on the new provisions (including custodians, valets, even candy stripers), printing privacy procedure manuals and customer consent forms, and updating computers and filing procedures.
- At hospitals, before patients are admitted they must read five-to-seven page manuals detailing their privacy rights and sign a form acknowledging that they've read them. Patients must then sign another form granting the hospital the right to list them on its patient directory before any information can be given out to someone calling or wishing to visit the patient, including family members and clergy.
- Separate express authorization forms for the release of information in hospitals are needed for every provider consulted down the line, including the anesthesiologist, lab technician, etc. This gets a little tricky if the patient comes into the hospital incapacitated or is comatose.
- Health-care providers are rewriting contracts and agreements with every company they do business with, including florists, marketing firms, and law firms, subjecting them to the same strict privacy standards.

As one nursing home administrator put it to the *Bismark Tribune,* preparations by the business community for enactment of the regulations were "more extensive and expensive than Y2K."

American sociologist Robert K. Merton, who in 1936 famously theorized on the "law of unintended consequences," explains that the "imperious immediacy of interest" is a root cause of this phenomenon. What that means, according to Rob Norton, former economics editor of *Fortune* magazine, is that "an individual wants the intended consequence so much that he purposefully chooses to ignore any unintended effects." This is all too frequently the case with Congress.

America is in the midst of a privacy frenzy. With the advent of the Internet, which brought spam, identity theft and other privacy intrusions home to consumers, Congress is being besieged with calls for urgent new privacy laws. While America's concern over privacy has merit, Congress is rushing to pass legislation without truly examining the high cost to society of overly-burdensome privacy regulations.

The provisions in HIPAA are so broad that one wonders what would happen if a congressman or the President is suffering from a life-threatening ailment. Would a newspaper or television reporter be subject to criminal penalties for leaking the story without express authorization? And what about that long list of names posted outside of hospitals and at "Ground Zero" in the days after the September 11 tragedy? The list goes on and on.

HIPAA was originally intended to save billions by unifying and standardizing complexities of the health care industry. In the end, it will cost consumers billions as business owners pass along this latest unfunded federal mandate.

As Tanya Ask with Blue Cross Blue Shield of Montana — which will spend about $3 million complying with HIPAA — put it to *The Missoulian*: "It's additional protection, but additional protection comes with a price."

* Eric Schippers is Executive Director of the Alexandria, Va.-based Center for Individual Freedom Foundation, a non-partisan constitutional advocacy group that fights to protect and defend individual freedoms and rights in the legal, legislative and educational arenas. For more information, visit www.cfif.org.

Intellectual Property

State Sovereign Immunity and the Enforcement of Intellectual Property Rights

*by Steven Tepp**

"If angels were to govern men, neither external nor internal controls on government would be necessary." - Federalist #51

The doctrine of sovereign immunity is an ancient legal principle, dating back to feudal Europe, when power flowed from the King down through the nobility and very little trickled down to the peasantry. It is rooted in the premise that to submit to the jurisdiction of a court implies that one is subservient or inferior to the power of that court.

Because the American model of government is founded on a premise opposite to that of feudal structures, that power flows up from the people to the States and then to the Federal Government, the application of sovereign immunity is far less intuitive. Indeed, the modern application of this doctrine is controversial precisely because it is fundamental to the relationship of the government to the people and of the Federal Government to the States.

It is the latter relationship that this article considers. Despite the philosophical inconsistencies, sovereign immunity is unquestionably a component of our legal tradition and, indeed, our Constitution. It is not the existence of state sovereign immunity, but its scope and the circumstances under which it may be overcome that are discussed. This article reviews the evolution of the application of this legal principle to the enforcement of intellectual property, particularly copyright. This article concludes that the Court's recent decisions rest on newly tilled and possibly unstable ground, and that the practical effects of these decisions is inequitable by any measure.

I. Background

In the United States, state sovereign immunity is articulated by the Eleventh Amendment to the Constitution,[1] but its meaning remains the subject of much discussion. In June of 1999, the Supreme Court handed down a trio of rulings that, taken together, dramatically altered the landscape of the enforceability of federal law with regard to States.[2] In order to fully appreciate the context of these rulings, it is necessary to review the prior precedent and developments in the law.

The Eleventh Amendment was adopted in 1795 as a direct response to the Supreme Court's ruling in *Chisholm v. Georgia* (2 Dallas 419 (1793)). In that case, the Court permitted a suit by a citizen of South Carolina against the unwilling State of Georgia. The ruling generated political controversy. Many of the States were substantially in debt and the fiscal implication of being subject to suit for overdue loans was dire. The Eleventh Amendment was adopted less that two years later and specifically reversed the ruling of the Court.[3]

The United States passed its first Copyright Act in 1790. There is no decision in the ensuing 172 years that failed to subject States to the full range of remedies available under the Copyright Act on the grounds of sovereign immunity.[4]

In 1962, the Eighth Circuit dismissed a copyright infringement suit against a state agency on sovereign immunity grounds.[5] The court held that the defendant school district was an instrumentality of the State of Iowa and that as such it was immune from suit in federal court for its infringement of musical compositions.[6] The period of apparent immunity did not last long.

Just two years later, the Supreme Court issued its ruling in *Parden v. Terminal Railway of Alabama*.[7] In that case, employees of a state-owned railroad sued the State of Alabama in federal court under the Federal Employees' Liability Act (FELA). FELA specifically created a cause of action in federal court against "every common carrier by railroad" for damages suffered by employees from job-related personal injuries.

The Court engaged in a three-step analysis. First, the Court discussed whether Congress intended to subject States to suit under FELA. The Court reasoned that the express language of the statute created a cause of action against "every common carrier," and absent express language to the contrary, a statutory exception should not be presumed. Thus, the Court determined that Congress did intend to subject States to suit in federal court under FELA.

Second, the Court considered whether Congress had the power to subject a State to suit in federal courts notwithstanding the Eleventh Amendment. The Court found that in giving Congress the power to regulate interstate commerce, the States had surrendered any sovereign immunity that would impede that regulation. Therefore, in acting under its Commerce Clause power, Congress could abrogate state sovereign immunity.

Finally, the Court queried whether Alabama's operation of a railroad in interstate commerce after its waiver of sovereign immunity implied that the State had consented to suit in federal court under FELA. Finding that it did, the Court held that "when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it

subjects itself to that regulation as fully as if it were a private person or corporation."[8]

Because the Copyright Act, in language very similar to FELA, provided for suit against "any person"[9] who infringed a copyright, the decision in *Parden* left little doubt that States could be sued for copyright infringement. Further, despite the existence of copyright and/or patent laws in many States, all the States agreed to allow Congress to provide exclusively federal protection for those forms of intellectual property.[10] Thus, just as in *Parden*, the States had surrendered any sovereign immunity that would impede that protection.

More than twenty years after *Parden*, in *Atascadero State Hospital v. Scanlon*,[11] the Court reversed itself on the legislative requirements necessary to find congressional intent to abrogate state sovereign immunity. In that case a disabled person sued a state hospital in federal court for alleged employment discrimination. The suit was brought pursuant to the Rehabilitation Act of 1973, which provided for remedies against "any recipient of Federal assistance," a class that arguably included States.

The Court held that in the instant case, the Eleventh Amendment barred recovery from the State because a "general authorization for suit in federal court is not the kind of unequivocal language sufficient to abrogate the Eleventh Amendment."[12] Rather, what is required for congressional abrogation of state sovereign immunity is that the federal statute be "unmistakably clear" that States are included in the defendant class.

Under this more stringent test, the language of the Copyright Act failed to abrogate state sovereign immunity.[13] Thus, there was reason to believe that States might be immune to suits for damages under the Copyright Act.

As a result of that uncertainty, Congress acted. In 1990 Congress enacted the descriptively-named Copyright Remedy Clarification Act (CRCA).[14] That law added to Title 17 a provision which states in clear terms that States "shall not be immune, under the Eleventh Amendment of the Constitution...or any other doctrine of sovereign immunity, from suit in Federal Court...for a violation of the exclusive rights of a copyright owner...."[15] Two years later, similar legislation was also enacted with regards to patents and trademarks.[16] Thus, once again, the apparent immunity was removed.

The Supreme Court issued another significant ruling in 1989 in *Pennsylvania v. Union Gas Co.* (*Union Gas*).[17] That case involved a suit by a private company against Pennsylvania for third-party liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to recover certain costs to clean a spill of coal tar into a creek.

The Court considered two questions. First, did CERCLA clearly abrogate state sovereign immunity? The Act provided for the liability of "persons" and included within its definition of that term, "States." This provision, along with the presence in the Act of language excepting States from liability in particular circumstances, satisfied the Court that the law was unmistakably clear in its intent to make States liable in all but the excepted instances. Thus, the Court quickly concluded that CERCLA did properly purport to abrogate state sovereign immunity.

The second question the Court considered was whether Congress had authority to enact such an abrogation. CERCLA was enacted pursuant to Congress' Article I, sec. 8 authority, specifically, the Commerce Clause. A plurality of the Court found that "to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable."[18]

This ruling strengthened the hand of copyright owners. By direct analogy the CRCA and its patent and trademark analogs, which were, of course, also adopted pursuant to Article I, sec. 8 authority, would be upheld as a valid exercise of congressional authority and effectively abrogate state sovereign immunity from damages for copyright infringement.

The series of positive developments for copyright owners ended with the *Union Gas* decision. Seven years later, the Court handed down its ruling in *Seminole Tribe of Florida v. Florida*. (*Seminole Tribe*).[19] That case involved a suit by an Indian Tribe under the Indian Gaming Regulatory Act to compel the State of Florida to engage in good faith negotiations with the Tribe. The Act was adopted pursuant to Congress' Article I, sec. 8 authority, the Indian Commerce Clause.

The Court considered the same two issues it had considered in *Union Gas*. The first was whether Congress has "unequivocally expresse[d] its intent to abrogate [state] immunity."[20] The Act left little room for discussion. It instructed that district courts would have jurisdiction to hear cases arising from the failure of a State to engage in good faith negotiations. Obviously, only States could be defendants in such an action and therefore Congress, in enacting this provision, intended the States' immunity to be abrogated.

The second issue was whether Congress had authority to enact such an abrogation? Because the Act was adopted pursuant to Article I authority, the *Union Gas* decision was strong support for the constitutionality of the Act in this case. However, the Court overruled *Union Gas*, finding that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government."[21] After *Seminole Tribe*, congressional authority to abrogate state sovereign immunity could be found in section five of the Fourteenth Amendment.

This ruling cast a shadow on the constitutionality of the CRCA. That Act was most intuitively an exercise of Congress' Article I power. Now, in order to sustain the CRCA, it was necessary to find sufficient authority in the Fourteenth Amendment.

It was to the scope of Congress' Fourteenth Amendment authority that the Supreme Court turned the following year in *City of Boerne v. Flores*.[22] In that case the Supreme Court considered the constitutionality of the Religious Freedom Restoration Act.[23] Congress had enacted RFRA to overrule a previous Court decision and apply the strict scrutiny test to State and local laws of general applicability with an incidental effect on the free exercise of religion. RFRA had been enacted pursuant to Congress' power under section five of the Fourteenth Amendment. The case was brought under RFRA by the Archbishop of a Catholic Church who was denied a permit to expand the church building by the Historic Landmark Commission of the city of Boerne.

The issue before the Court was whether RFRA was a valid exercise of Congress' Fourteenth Amendment authority. The Court found that it was not because it read RFRA as seeking to alter the substantive meaning of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment.

> "The design of the Amendment and the text of Section 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation."[24]

The Court went on to expound upon what standards Congress must adhere to in order to remain within the bounds of its Fourteenth Amendment power. The key to this analysis is that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[25]

While this was not a sovereign immunity case, it is crucial to sovereign immunity analysis because, after *Seminole Tribe*, Congress could abrogate state sovereign immunity only pursuant to the Fourteenth Amendment. Thus, this case set the stage for the courts to review the constitutionality of the CRCA or parallel legislation concerning patents and trademarks.

II. The 1999 Decisions

The Supreme Court did just that in a triad of 5-4 decisions on June 23, 1999. The decision in *Alden*[26] undergirded the other two decisions. In that case, John Alden and other employees of the State of Maine filed suit in federal court against that state for violation of the overtime provisions of the Fair Labor Standards Act, a federal law. In light of the Supreme Court's decision in *Seminole Tribe*, the District Court dismissed the action. The dismissal was upheld by the Court of Appeals.

Petitioners then filed the same action in state court in Maine. The state trial court dismissed the suit on grounds of sovereign immunity and the Maine Supreme Judicial Court affirmed. The United States Supreme Court also affirmed.[27]

The Court's holding in this case went well beyond the routine recognition that a State is a sovereign entity that maintains an immunity to lawsuits by private parties to which it has not consented. The importance of the Court's holding is the broad applicability of state sovereign immunity to the State's own courts as well as to federal courts.

Specifically, the Court reasoned that the Eleventh Amendment was not the origin of state sovereign immunity. Rather,

> the States' immunity from suit [in the State's own courts and in federal courts] is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today...except as altered by the plan of the Convention or certain constitutional Amendments.[28]

In this view, then,

> [t]he Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.[29]

In light of this interpretation, it is fair to ask whether the Eleventh Amendment retains any operational effect?

The Court concluded its opinion with an implicit recognition of the potential for states to unfairly profit from its ruling, noting several limits on its holding. First, states may waive their immunity and Congress may provide incentives for such waiver, as provided in *South Dakota v. Dole* (483 U.S. 203 (1987)).[30] Second, the immunity "bars suits against States, but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."[31] Additionally, injunctive and declaratory relief are not precluded by state immunity.[32]

These limitations fail to offset the violence done to the ability of intellectual property right owners to vindicate their rights. As will be discussed below, the Court's rules for congressional incentives for States to waive their immunity place make it difficult for this avenue to be effective. The no-

tion that the sovereign immunity of States does not extend to entities that are not States is hardly a limitation. And while injunctive and declaratory relief can prevent future infringement of a particular work, they do nothing to compensate the right holder or deter future infringement of other works. Thus, owners of intellectual property can take little comfort in the Court's high-minded but unrealistic declaration that "[w]e are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."[33]

In the second of the June 23 cases, the Court applied the principles of its recent decisions to the trademark parallel of the CRCA in *College Savings*.[34] In that case, College Savings Bank sued the State of Florida in federal court under Section 43(a) of the Lanham Act for alleged misrepresentations made by Florida concerning its college tuition savings plans.[35] In light of the Supreme Court's decision in *Seminole Tribe*, the District Court granted Florida's motion to dismiss on sovereign immunity grounds. The Third Circuit affirmed. The Supreme Court also affirmed.

The Court first turned to the question of whether the Trademark Remedy Clarification Act (TRCA) abrogated state sovereign immunity. As already noted, Supreme Court precedent admits only one source of constitutional authority from which Congress may abrogate state immunity; the enforcement power in section five of the Fourteenth Amendment.[36]

The Fourteenth Amendment instructs in relevant part that "No State shall...deprive any person of...property, without due process of law."[37] Because the Court held that College Savings did not allege deprivation of a property right within the meaning of the Fourteenth Amendment, the avenue of congressional abrogation of state immunity was closed.[38] The Court did not hold that trademarks are not property. Just the opposite, in fact:

> The Lanham Act may well contain provisions that protect constitutionally cognizable property interests- notably, its provisions dealing with infringement of trademarks, which are the "property" of the owner because he can exclude others from using them.[39]

However, the Court recognized that College Savings was not suing for trademark infringement, but for misrepresentation. The right to be free from misrepresentation is not, the Court held, a property right within the meaning of the Fourteenth Amendment.[40]

Next, the Court turned to the question of implied state waiver of its immunity.[41] Invoking the precedent of *Parden*, College Savings sought to demonstrate that Florida had impliedly waived its immunity by participating in a scheme that is enforceable in federal court.[42] The Court not only rejected this argument, it overruled *Parden* and renounced the doctrine of implied waiver of state immunity as "ill conceived."[43]

The Court's holding requires that a state's waiver be explicit and voluntary in order to be effective. However, Congress may provide incentives to the State by conditioning use of discretionary authority such as the Spending Clause and the Compact Clause on state waiver.[44] Nonetheless, the Court apparently disapproves of the use of at least some Commerce Clause authority in this manner:

> In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity....[W]e think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed- and the voluntariness of waiver destroyed- when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.[45]

In the third of the three opinions issue on June 23, *Florida Prepaid*,[46] College Savings Bank sued the State of Florida in federal court, claiming infringement of its patent on its methodology of financing college tuition. Despite the Supreme Court's ruling in *Seminole Tribe*, the District Court denied Florida Prepaid's motion to dismiss. The District Court held that Congress had abrogated the State's immunity in this case by virtue of the Patent and Plant Variety Protection Remedy Clarification Act (PRCA). The Federal Circuit affirmed. The Supreme Court reversed.

The question presented was whether Congress' attempt to abrogate state sovereign immunity was valid. The Court considered this question under the two-part test articulated in *Seminole Tribe*:

> first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity,"...and second, whether Congress has acted "pursuant to a valid exercise of power."[47]

The first part of the test was met easily, as the statute was very clear on the point. The second part of the test, however, was not met to the Court's satisfaction.

As noted above, current Supreme Court precedent admits only one source of constitutional authority from which Congress may abrogate state immunity: the enforcement power in section five of the Fourteenth Amendment. It was on this basis that College Savings Bank sought to have the statute upheld. The Court acknowledged that patents are property within the meaning of the Fourteenth Amendment.[48] However, the Court held that the legislative enactment at issue in this case did not fall within Congress' Fourteenth Amendment power for several reasons.

First, as the Court held in *City of Boerne*, Congress "must identify conduct transgressing the Fourteenth

Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[49] The Court found that Congress failed to meet this burden because it did not identify a pattern of patent infringement by states.[50]

Second, the Court recognized that patent infringement by a state is not a violation of the Fourteenth Amendment if the state provides a remedy, that is, due process.[51] Because the statute was drafted to apply to all states, without regard to state-provided remedies, the Court held that it went beyond the power conveyed by the Fourteenth Amendment.[52]

Third, the Court noted that "a state actor's negligent act that causes unintended injury to a person's property does not 'deprive' that person of property within the meaning of the Due Process Clause."[53] Because a claim for patent infringement requires no showing of intent in order for the plaintiff to prevail, the Court held that the legislative enactment at issue in this case was again overbroad.[54]

This decision applied the general rule articulated in *City of Boerne* and the high barriers erected by that application spelled almost certain doom for the CRCA, which is closely analogous to the PRCA that the Court struck down.

Although the Supreme Court has not ruled directly on the constitutionality of the CRCA, the Fifth Circuit applied the Supreme Court's recent rulings in *Chavez v. Arte Publico Press*.[55] That case involved a suit by an author claiming copyright infringement of her book by the University of Houston, a state university.

The court followed the analysis in *Florida Prepaid*, first inquiring whether Congress identified a pattern of infringement by States. While noting that the legislative history in support of the CRCA was somewhat more substantial than that of the PRCA, the court found that the record was still inadequate to support the legislative enactment. Second, the court noted that in adopting the CRCA Congress "barely considered the availability of state remedies for infringement. Thus, the Fifth Circuit refused to enforce the CRCA.

The same result was reached in another Fifth Circuit case, *Rodriguez v. Texas Comm'n on the Arts*,[56] in a laconic opinion that presumably is based upon the same rationale as that circuit's decision in *Chavez*. Given the current Supreme Court precedent, it is likely that *Chavez* was properly decided and that the CRCA is no longer effective.

III. The Current Situation

Owners of intellectual property have but one arrow left in their quiver to prevent or deter infringement of their intellectual property rights by States. That arrow is injunctive relief against particular employees of the State. Although the doctrine of state sovereign immunity has been dramatically strengthened in recent years, the Court has thus far retained the injunctive relief available under the reasoning of a 1908 case, *Ex parte Young*.[57] The reasoning behind this rule is that when a state official acts in violation of valid federal law, that official is by definition acting outside the scope of his official duties. For, clearly, a State cannot lawfully authorize one of its employees to act in violation of valid federal law. And, an employee of a State is cloaked with the State's immunity only when acting within the scope of his duties. Therefore, an employee of a State who acts in violation of a valid federal law is not immune and may be enjoined from that activity.

The *Ex parte Young* doctrine provides only very limited relief however, because it provides no compensation for the damages already inflicted upon a copyright owner due to past infringement by a State. Nor is it clear, given the Court's movement in recent years, that this doctrine will remain in force.

The practical question that is begged by the legal analysis is; are the States taking advantage of their immunity to infringe copyrights? Given the legal structure that the Supreme Court has erected, one might very well expect the answer to be in the affirmative. And it may very well be so. Unfortunately, the extent of State infringements is largely unknown at this time. That information has not traditionally been collected, nor is it conveniently available from a single or few sources.

The General Accounting Office, at the request of Senator Hatch, sought to answer this question by researching how many cases of alleged infringement by states have occurred since 1985. It identified 58 lawsuits out of 105,000 cases filed in district court during that time.[58] It is highly unlikely that this represents the true number of disputes. As the GAO itself conceded,

> [I]dentifying all past accusations of intellectual property infringement against states over any period is difficult, if not impossible, because there are no summary databases providing such information. The published case law is an incomplete record, because (1) both the federal and state courts report only those cases in which decisions were rendered and (2) state courts usually report only appellate decisions...Furthermore, accusations that are made through such mechanisms as cease-and-desist letters that were resolved administratively without a lawsuit being filed would not appear in the published case law.[59]

The GAO failed to mention perhaps the most important factor; prior to 1999 States had good reason to believe that they were subject to the full range of remedies for infringement of intellectual property and likely regulated their behavior accordingly. What appears certain is that so long as States remain immune from suits for damages from copyright infringements, the number of infringements by States is likely to increase.

Without this information, it will be impossible to fulfill the Court's mandate to Congress to show a pattern of infringements by States. In subsequent cases, the Court has not hesitated to, under the rubric of this new requirement, reopen the legislative record of laws enacted years before the *Florida Prepaid* decision and second-guess Congress' use of its Fourteenth Amendment authority.[60] In effect, it may be logistically impossible to satisfy the Court's demands for legislative findings to support abrogation of state sovereign immunity.

IV. Legislative Responses

The Court's rulings have not escaped the notice of Congress. Just as the CRCA and its patent and trademark counterparts were enacted to counter the Court's ruling in *Atascadero*, Congress has begun consideration of legislation to reverse the effect of the 1999 rulings.

The first such legislation was S. 1835, the Intellectual Property Protection Restoration Act. It was introduced by Senator Leahy in the 106th Congress. The centerpiece of this bill was an attempt to provide an incentive for States to waive their sovereign immunity. Specifically, the provision would have withheld from States the ability to enforce their intellectual property in the absence of a waiver by that State of its immunity from suits for damages under federal intellectual property laws. In light of the Court's reassertion in *College Savings* that Congress may condition the receipt of a gratuity, such as federal spending, in order to give States an incentive to waive their immunity, this approach appears sound.[61]

S. 1835 was the subject of discussion during a hearing in the House Judiciary Committee's Intellectual Property Subcommittee on July 20, 2000. It was not enacted, but was introduced by Senator Leahy in substantially similar form in the 107th Congress as S. 1611. The Senate Judiciary Committee held a hearing on that bill on February 27, 2002. The bill engendered substantial discussion and negotiations among interested parties without a consensus emerging. In the 108th Congress, Representatives Lamar Smith and Howard Berman have taken the lead, introducing virtually the same legislation again in the form of H.R. 2344. They held a hearing on the bill on June 17, 2003 in the House Judiciary Committee's Intellectual Property Subcommittee, of which they are Chairman and Ranking Member, respectively.

While the political obstacles of this legislation are daunting, it is clear that those in Congress who recognize the need to support private property rights in intellectual property will not abandon the issue.

V. Conclusion

It is only logical that without an alteration the status quo, infringements by States are likely to increase. One need not assume, as the Court implicitly did in *Alden*,[62] that the only scenario for such an increase is an affirmative decision by States to flaunt the law of the land. More likely is the scenario that States and state employees will simply become more and more lax, secure in the knowledge that they can incur no penalty save an order to cease the infringing activity.

Barring a reversal of these 5-4 decisions, only Congress has the power to remedy the existing imbalance and it is appropriate that it do so. State's rights must surely be respected, but the current state of affairs is unjust and unacceptable. State sovereign immunity should not be allowed to become a tool of injustice.

* Steven Tepp is a Policy Planning Advisor with the U.S. Copyright Office. The views expressed in this article are entirely those of the author and do not necessarily represent the views of the Copyright Office. Special thanks to Jule Sigall and David Carson for their editorial assistance and guidance. Any remaining errors are solely the fault of the author.

Footnotes

1 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XIV.

2 *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666 (1999)(*College Savings*), *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999)(*Florida Prepaid*), *Alden v. Maine*, 527 U.S. 706 (1999)(*Alden*).

3 *See Alden* for an in-depth discussion of the circumstances surrounding the adoption of the Eleventh Amendment.

4 *Copyright Liability of States and the Eleventh Amendment*, A Report of the Register of Copyrights, p. 90, (June, 1988).

5 *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962).

6 *Id*. at 783.

7 377 U.S. 184 (1964)(*Parden*).

8 *Id*. at 196.

9 17 U.S.C. '101 (1909).

10 *See* U.S. CONST., Art. I, Sec. 8, Cl. 8.

11 473 U.S. 234 (1985)(*Atascadero*).

12 *Id*. at 246.

13 In 1976, between the *Parden* decision in 1964 and the *Atascadero* decision in 1985, Congress enacted major revisions to the Copyright Act for the first time since 1909. As past of those amendments, the relevant language was moved from section 101 to section 510(a), and changed from "any person" to "anyone." In either case, it is clear that this was not the type of highly specific language the *Atascadero* Court demanded in order to find abrogation of state sovereign immunity.

14 Pub. L. 101-553.

15 17 U.S.C. 511.

16 35 U.S.C. 271(h), 296; 15 U.S.C. ''1122, 1125(a)(2).

17 491 U.S. 1 (1989).

18 *Id*. at 19-20.

19 517 U.S. 44 (1996).

20 *Id*. at 55 *quoting Green v. Mansour*, 474 U.S. 64, 68 (1985).

21 *Id*. at 72.

22 521 U.S. 507 (1997)(*City of Boerne*).

23 42 U.S.C. 2000*bb* et seq.(RFRA).

24 *Id*. at 519.

25 *Id*. at 520.

26 527 U.S. 706 (1999).

27 *Id*. at 711.

28 *Id*. at 713.

29 *Id*. at 728, 29.

[30] *Id.* at 755.
[31] *Id*. at 756.
[32] *Id*. at 757.
[33] *Id*. at 755.
[34] 527 U.S. 666 (1999).
[35] College Savings Bank alleged that Florida's tuition savings plans were infringing its patent on it plan. That claim was addressed by the Court in the *Florida Prepaid* decision, discussed below.
[36] *Id*. at 672.
[37] U.S. Const., Amend. XIV.
[38] *College Savings* at 675.
[39] *Id*. at 673.
[40] *Id*.
[41] *Id*. at 675-87.
[42] *Id*. at 676.
[43] *Id*. at 680.
[44] *Id*. at 686.
[45] *Id* at 687.
[46] 527 U.S. 627 (1999).
[47] *Id.* at 635.
[48] *Id*. at 637.
[49] *Id*. at 639.
[50] *Id.* at 640.
[51] *Id*. at 643.
[52] *Id*.
[53] *Id*. at 645(citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986)).
[54] *Id*. at 646.
[55] 204 F.3d 601 (5th Cir. 2000).
[56] 199 F.3d 279 (5th Cir. 2000).
[57] 209 U.S. 123 (1908).
[58] *Intellectual Property, State Immunity in Infringement Actions*, GAO-01-811, p. 66 (Sept., 2001).
[59] GAO at 7-8.
[60] See *Kimel v. Florida Board of Regents*, 586 U.S. 62 (2000)(holding that the legislative record of the Age Discrimination in Employment Act of 1967 did not justify the act=s abrogation of state sovereign immunity); *Board of Trustees of the University of Alabama v. Garrett*, 513 U.S. 356 (2001) (holding that the legislative record of the Americans with Disabilities Act of 1990 did not justify the act's abrogation of state sovereign immunity); *Nevada Dept. of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003) (holding that the legislative record of the Family and Medical Leave Act of 1993 did justify the act's abrogation of state sovereign immunity).

It is acknowledged that the Court in each of the above cited cases couched its analysis in terms of the scope of Congress' authority under the Fourteenth Amendment, not in terms of second-guessing Congress' legislative policy judgments. Of course, the Court has in the past believed it was not "substituting the judgment of the court for that of the legislature" only to be viewed differently in historical perspective. *Lochner v. New York*, 198 U.S. 45, 56-57 (1905).
[61] See note 31, *supra*.
[62] See note 34, *supra*.

Eldred v. Ashcroft: The Supreme Court's Mickey Mouse Copyright Decision

*By David Applegate**

Recently decided by the Supreme Court is the case of *Eldred v. Ashcroft*,[1] which challenged the constitutionality of the 1998 Sonny Bono Copyright Term Extension Act ("the CTEA").[2] In brief, the CTEA extended the duration of existing U.S. copyrights by an additional twenty years, just as many were otherwise about to expire. Some observers saw corporate copyright holders like the Walt Disney Company as beneficiaries (copyrights on the earliest Mickey Mouse cartoons would otherwise have begun expiring at the end of this year), and a group of citizens with interests in enlarging and preserving the public domain brought suit challenging the CTEA's constitutionality.

In the Supreme Court, Petitioners in *Eldred* contended that this Congressional extension of copyright terms, the eleventh in forty years, violates the Copyright Clause of the U.S. Constitution in at least three particulars and the First Amendment in at least two. Chief among their arguments was that the CTEA exceeds the limits of Congressional power under the Constitution, which provides that copyrights be for "limited" times.

The government and its many *amici*[3] maintained, on the other hand, that the CTEA's copyright extension provisions represent a proper exercise of Congressional power, consistent with the Constitution and both legislative and judicial precedent. One *amicus* did not take sides substantively, but agreed with petitioners simply in urging the Supreme Court to clarify the law and the Constitutional limits on the power of Congress to extend copyright terms.[4]

I. A Brief History of the Copyright Act

Up until the Statute of Anne in 1710[5], English copyright law gave a legal monopoly to publishers, not authors, for the works that they printed. Out of concern that American publishers might otherwise obtain the same kind of monopoly power, the framers of the U. S. Constitution designed the Copyright Clause to "prevent the formation of oppressive monopolies"[6] by giving copyrights to authors, not publishers, and by limiting their duration. To this end, Article I, section 8, clause 8, of the U. S. Constitution empowers Congress in pertinent part "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."[7] The first U. S. copyright law, passed in 1790,[8] limited the initial term of protection to 14 years, renewable for an additional 14, the same as the Statute of Anne. Since 1831, however, Congress has repeatedly extended the "limited Times" for which U.S. copyrights subsist. In 1831 it extended the initial term to 28 years, renewable for 14, for a total of 42 years of protection[9]; in 1909 it extended the renewal term to 28 years as well, for a total of 56; and from 1962 to 1974 it extended the term incrementally nearly annually, reaching a maximum term of 70 years in 1976.[10]

In 1976, to conform more closely with international norms under the Berne Convention, Congress changed the methodology for computing copyright terms entirely, going to a "life plus" system for new works by individual authors and ensuring at least 75 years total protection for all other works, including those already published.[11] In 1998, the CTEA extended these terms by yet another twenty years, for a minimum of life plus 70 years for identifiable individual authors and to 95 years in most other cases.[12] In the sense that it extended the terms of subsisting copyrights, the CTEA applies both prospectively and retroactively.

II. A Brief History of the Eldred Litigation

In 1999, plaintiffs Eric Eldred and others[13] sued in United States District Court for the District of Columbia for a declaration that the CTEA violates the text and spirit of the Copyright Clause, is inconsistent with the First Amendment, and violates the "public trust" doctrine,[14] which in part prohibits redistributing public goods from broad public uses to restricted private benefit. After permitting plaintiffs to amend the complaint twice, Judge June Green on October 28, 1999, found the CTEA constitutional, granted judgment on the pleadings for the government, and denied Eldred's cross-motion for summary judgment. In her ruling,[15] she found that (1) the First Amendment gives no right to use the copyrighted works of others; (2) the "limited Times" provision of the Copyright Clause is subject to the discretion of Congress; and (3) the public trust doctrine applies only to the context in which it originally arose, that of navigable waters.

Joined by several *amici curiae*,[16] plaintiffs then appealed to the D. C. Circuit. First, they argued, the CTEA fails the intermediate scrutiny test required to protect freedom of expression under the First Amendment. Second, they said, the retroactive aspect of term extension violates the originality requirement of copyright by granting new monopolies to what are by then "unoriginal" works. Third, they argued, the CTEA violates both the preamble and the "limited times" requirement of the Copyright Clause because retroactive extensions do not promote the creation of new works and because a perpetual increase in terms is by definition not "limited."[17]

In a 2-1 decision by Judge Douglas Ginsburg, with Judge David Sentelle dissenting, the D. C. Circuit agreed with the government and upheld the District Court in its entirety.[18] Relying on the Supreme Court's decision in *Harper*

& Row[19] and its own decision in *United Video*,[20] the D.C. Circuit found that plaintiffs lacked any First Amendment right to exploit the copyrighted works of others; that if a work is sufficiently "original" to merit copyright protection in the first place, then it remains "original" for purposes of renewal; and that the introductory language of the Copyright Clause — "to promote the Progress of Science and useful Arts" – does not constitute a limit on Congressional power.

In dissent, Judge Sentelle agreed with Eldred and urged the court to hold instead that Congressional power under the Copyright Clause, like that under the Commerce Clause, [21] is subject to "outer limits." According to Judge Sentelle, the CTEA exceeds those limits because there is "no apparent substantive distinction between permanent protection and permanently available authority to extend originally limited protection."[22]

Following denial of rehearing and denial of rehearing *en banc*, Eldred on October 11, 2001, petitioned the U. S. Supreme Court for *certiorari*. On February 19, 2002, the U. S. Supreme Court granted Eldred's petition.

III. Arguments Before the Supreme Court

Petitioners' brief before the Supreme Court made three main arguments. First, they argued that the CTEA's blanket retroactive extension of existing copyrights violates both the purpose ("to promote the Progress of Science and the useful Arts") and the means ("by securing for limited Times to Authors and Inventors the exclusive Right to their respective writings and Discoveries") set forth in the Copyright Clause. Second, they argued that both the CTEA's retroactive and prospective extensions of copyright terms violate the First Amendment. Third, they argued that the prospective and retroactive extensions of the CTEA are inseverable, so that the Court should invalidate the CTEA in its entirety.[23] The many *amicus* briefs in support of Eldred's position dealt primarily with issues particular to each *amicus,* from First Amendment arguments in favor of a larger public domain to libertarian arguments against government-conferred monopolies to economic arguments that the benefits from the CTEA's copyright extension will likely not outweigh its costs.[24]

IV. Supreme Court Decision

1. Majority Opinion

On January 15, 2003, in a 7-2 majority opinion by Justice Ruth Bader Ginsburg, the Supreme Court telegraphed its holding in its opening sentence: "This case concerns the authority the Constitution assigns to Congress to prescribe the duration of copyrights."[25] The Constitution having assigned to Congress the authority to prescribe the duration of copyrights, then as a matter of federalism one might presume that the Court should be disinclined to interfere – and in fact it was. In each of four previous major copyright extension – 1831, 1909, 1976, and 1998 – the Court noted, Congress had extended copyright terms retroactively as well as prospectively. So in placing existing and future copyrights in parity in the CTEA, the Court held, Congress acted within its Constitutional authority.[26]

a. Constitutionally - Copyright Clause

Moving first to Eldred's contention that the retroactive aspect of the CTEA violates the language of the Copyright Clause, the Court found that text, history, and precedent all confirm that the Copyright Clause empowers Congress to prescribe the same "limited Times" for copyright protection for all copyright holders, present and future.[27] The Court saw at the outset no reason to interpret the word "limited" in the Constitution to mean anything other than "confined within certain bounds," "restrained," or "circumscribed," rather than "fixed" or "unalterable," as Eldred's position would suggest.[28] It then cited the unbroken practice of Congress of extending the term of patent and copyright protection and of applying extensions retroactively to then-existing patent or copyright terms.[29] In sum, the majority found that an extension of a copyright term for a limited time was in itself a "limited Time."

Having satisfied itself "that the CTEA complies with the 'limited Times'" prescription, the majority then turned to whether the CTEA is "a rational exercise" of the legislative power conferred upon Congress, and on this point the majority was significantly deferential to Congress.[30] In substance, the majority accepted record suggestions that the primary motive of Congress in enacting the CTEA was to bring U. S. copyright law into harmony with the European Union, which provides copyright protection for life plus 70 years.[31] In addition, the Court found, Congress was motivated by demographic, economic, and technological changes, chief among them the extended life spans of authors, their children, and copyrighted works themselves, thanks to improved communications technology. On these grounds, the majority found, "the CTEA is a rational enactment" that "we are not at liberty to second-guess … " even if it might otherwise seem foolish or ill advised.[32]

The majority then rejected, one by one, Eldred's arguments that the CTEA's extension of copyright terms was in effect perpetual[33] and that Congress cannot extend existing copyright terms without extracting some new consideration from the author.[34] With respect to the former, however, the majority did little other than to assert a conclusion: "[the 1831, 1909, and 1976] Acts did not create perpetual copyrights, and neither does the CTEA."[35] With respect to Eldred's consideration argument, the majority rejected all three of Eldred's subsidiary points.

First, the majority rejected Eldred's argument that the CTEA violates the "originality" requirement of copyright by granting new monopolies to what are by then "unoriginal" works simply by observing that the *Feist* case on which Eldred relied for the definition of originality "did not touch on the duration of copyright protection."[36] Second, the ma-

jority conceded Eldred's point that the Copyright Clause is both a grant and a limitation on Congressional power, but stressed that "it is generally for Congress, not the courts, to decide how best to pursue" the Clause's objectives of promoting the "Progress of Science."[37]

Finally, the majority also found that it "can demur to petitioners' description" of the Copyright Clause as establishing a *quid pro quo* for copyright protection and yet still find that part of that *quid pro quo* is that an author (or the author's heirs or estate) will receive the benefit of any retroactive extensions while the copyright is till extant.[38] The majority distinguished both *Stiffel Co.*[39] and *Bonito Boat*[40], on which Eldred had relied, on the grounds that both involved the patent (not copyright) laws, that neither involved term extensions, and that patents and copyrights do not entail the same exchange: immediate disclosure is not the objective of the patent's grant, but merely the bargained for exchange; whereas for copyright holders, immediate disclosure is the grant's objective.[41] Moreover, the majority noted, a patent prevents another from making full use of the patent's knowledge until the patent term expires, whereas a copyright permits such use.

b. Constitutionally - First Amendment

The majority then quickly rejected Eldred's arguments that the CTEA violates the First Amendment. First, the majority said, the close proximity in time of adopting both the First Amendment and the Copyright Clause indicates that Congress saw the two as compatible, not in conflict.[42] Second, as the Court of Appeals had observed, the majority found that copyright law contains its own free speech protections: the distinction between ideas, which are not protectible, and particular expressions of ideas, which are; and the "fair use" exception to copyright, which permits qualified uses of copyrighted material even during the copyright term.[43]

Third, the majority observed, the CTEA itself supplements free speech protection by permitting libraries and similar institutions to distribute copies of certain published works during the last twenty years of any copyright term and by exempting small businesses from having to pay performance royalties on music played from licensed facilities.[44] Finally, the majority discounted Eldred's reliance on the *Turner* case[45] by noting that *Turner* refused to force cable television operators to carry the signals of broadcast stations, whereas the CTEA "does not oblige anyone to reproduce another's speech against the carrier's will."[46]

In sum, a solid 7-2 majority of the Supreme Court said, both the prospective and the retroactive aspects of the CTEA represent rational exercises by Congress of its Constitutional authority under the Copyright Clause.

2. Dissents

In separate dissents, reaching different conclusions from different reasoning, Justices Stevens and Breyer found fault with both Congress and the majority. Based on his reading of precedent, Justice Stevens would invalidate only the retroactive aspect of the CTEA; Justice Breyer, on the basis of a cost-benefit analysis, would invalidate the CTEA in its entirety.

a. Justice Stevens

The reasoning of Justice Stevens is straightforward, if suspect, proceeding from the assumption that the Court's role in reviewing Congressional grants of "monopoly privileges to authors, inventors and their successors" is less limited than understood by the majority.[47] Starting from that premise, Justice Stevens observes that, in 1964, the Court held that a State "could not 'extend the life of a patent beyond its expiration date'."[48] In his view, the same reasons apply to Congress as to the states, and "[i]f Congress may not expand the scope of a patent monopoly, it also may not extend the life of a copyright beyond its expiration date."[49]

First, Justice Stevens says, both the Constitution itself and nearly two centuries of Supreme Court precedent demonstrate that the Patent and Copyright Clause, as applied to patents, has two and only two purposes: to encourage new inventions and to add knowledge to the public domain.[50] "Because those twin purposes provide the only avenue for congressional action under the Copyright/Patent Clause of the Constitution," he continues, "any other action is manifestly unconstitutional."[51]

Second, Justice Stevens cites three cases[52] for the proposition that these twin purposes apply to copyrights as well: "the overriding purpose of providing a reward for authors' creative activity is to motivate that activity and 'to allow the public access to the products of their genius after the limited period of exclusive control has expired.' [citing *Sony*]"[53] *Ex post facto* extensions of copyright terms, such as those implemented by the CTEA, he concludes, "result in a gratuitous transfer of wealth from the public to authors, publishers, and their successors in interest" and "do not even arguably serve either of the purposes of the Copyright/Patent Clause."[54] Therefore, to the extent that the CTEA "purport[s] to extend the life of unexpired copyrights, it is invalid."[55]

The remainder of his dissent Justice Stevens devotes to rejecting the government's four arguments that retroactive extension of copyright is Constitutional: (1) that the 1790 Copyright Act applied to works already produced, (2) that later Congresses have repeatedly retroactively extended both patents and copyrights, (3) that retroactive extensions promote the useful arts by providing an incentive to restore old movies, and (4) that as a matter of equity, term extensions should be retroactive as well as prospective.

Justice Stevens rejects the first argument after reviewing the history of the first U. S. patent and copyright

statutes, both adopted in 1790. The first copyright statute, says Justice Stevens, did not extend existing state or common law copyrights; it created an entirely new federal statutory right that in some cases may have increased pre-existing protections but in other cases reduced them.[56] As such, "the question presented by this case does not even implicate the 1790 Act, for that act created, rather than extended, copyright protection."[57]

Justice Stevens dismisses the government's reliance on previous Congressional patent term extensions, some of them after the patents had already expired, on the grounds that those extensions were "patently unconstitutional" and therefore undermine rather than support the majority's "reliance on this history as 'significant.'"[58] Previous retroactive extensions of expired copyrights, although relevant, he finds, are not conclusive, especially since the Court has not previously passed upon their Constitutionality.[59] The 1831 copyright term extension, in particular, he finds, was flawed because its legislative history indicates that it was based on an assumption — that copyrights, resulting from the sweat of the brow of the authors, should be perpetual – that the Court declared improper just three years later.[60]

Moving to the government's next argument, Justice Stevens finds at least three reasons why providing an incentive to restore old movies does not justify the CTEA. First, he says, such restoration does not even arguably promote the creation of new works by authors or inventors; second, if valid, this justification would apply equally strongly to works whose copyrights have already expired, which no one seriously proposes doing; and third, the remedy offered -- a blanket extension of all copyrights -- simply bears no relationship to the alleged harm.[61] Finally, Justice Stevens notes, rather than arguing for extending copyrights retroactively as well as prospectively, equity argues more strongly in favor of not altering the pre-established copyright bargain between authors and the public in the first place. In sum, he would invalidate the retroactive provisions of the CTEA.

b. Justice Breyer

For his part, Justice Breyer looks at the CTEA from both an economic and a legal viewpoint. Its economic effect, he says, "is to make the copyright term not limited, but virtually perpetual," and its "primary legal effect is to grant the extended term not to authors," as the Copyright Clause specifies, "but to their heirs, estates, or corporate successors."[62] Most important, he finds, "its practical effect is not to promote, but to inhibit, the progress of 'Science' — by which word the Framers meant learning or knowledge."[63] And because legal distinctions, in Justice Breyer's opinion, are often matters of degree, he would find that the CTEA's failings of degree are so serious that they render it unconstitutional.[64]

First, because the Constitution is a single document and both the Copyright Clause and the First Amendment seek the same ends (the creation and dissemination of information), Justice Breyer proposes a more restrictive test than the majority when considering claims, as here, that a copyright statute seriously restricts the dissemination of speech. Such a statute would lack the constitutionally required rational support, Justice Breyer proposes, if (1) the significant benefits it bestows are private, not public; (2) it threatens significantly to undermine the "expressive values" that the Copyright Clause embodies; and (3) it lacks justification in any significant Copyright Clause-related objective.[65] Justice Breyer then finds that the CTEA fails this proposed test.

Justice Breyer begins applying this test by examining the economic costs of copyright term extension. After noting that the overriding justification of copyright law is to promote the common knowledge, not to reward individual authors,[66] he argues that the CTEA unacceptably imposes (1) higher than necessary royalties (by extending the term during which they are payable) and (2) the "prohibitive" cost of seeking permission to use older works for which the copyright holders may be expensive to track down, impossible to find, or obstinate or avaricious in considering whether to grant permission.[67] The CTEA's exemption for limited reproduction during the last twenty years of an extended copyright term fails sufficiently to ameliorate these costs, he says, because the exemption is too limited and too expensive to apply. Moreover, neither that exemption nor the Copyright Act's pre-existing doctrine of fair use will help those whose access to older works has already been lost from lack of preservation.[68]

At the same time as these costs increase, Justice Breyer continues, the benefits of term extension diminish. First, the economic value of the CTEA's 20-year term extension, he argues, is minuscule, amounting to a present value of 7 cents for every one percent chance of earning an annual $100 royalty for the length of the twenty-year extension.[69] An economically-motivated author, he observes rhetorically, "could do better for his grandchildren by putting a few dollars into an interest-bearing account."[70] And, of course, "in respect to works already created – the source of many of the harms previously described – *the statute creates no economic incentive at all*."[71]

Likewise, in Justice Breyer's view, Congress's purported goal of increasing international uniformity in copyright terms does not afford a meaningful benefit. For all works made for hire, all works created before 1978, all anonymous works, and all pseudonymous works, he observes, the CTEA actually creates disharmony with copyright terms in the European Union; only with respect to new, post-1977 works attributed to natural persons do the new terms coincide.[72] And even though the CTEA may promote a limited partial harmony with the European Union, the European Union is not subject to U. S. Constitutional constraints and the Union's interest in copyright term uniformity reflects its own internal concerns, which the U. S. does not necessarily share. In

Justice Breyer's view, therefore, no rational legislature could find that the very limited benefit of partial international uniformity the CTEA advances justifies the costs of term extension.[73]

The third suggested benefit of the CTEA's term extension – increased incentive to publishers to redistribute and republish older copyrighted works – Justice Breyer finds refuted by the basic purpose of the Copyright clause, which assumes that the disappearance, not the existence, of the copyright monopoly will encourage creation of new works; by the Court's own precedents (primarily *Sony*[74] and *Stewart*[75]); by the words "limited" and "Authors" in the text of the Copyright Clause; by empirical record evidence suggesting that newer, less expensive versions of works can be expected when their copyrights expire; and by logic itself, which admits no stopping point to the argument — *i.e.,* the same arguments that justify a 20-year term extension would also justify perpetual copyright.[76]

Justice Breyer rejects the fourth purported benefit of the CTEA — to help Americans sell their works abroad — as being grounded in the Commerce Clause, not in the Copyright Clause,[77] and therefore unable to withstand Eldred's Copyright Clause challenge. In his final argument on the benefits side, Justice Breyer sees no merit in the majority's reliance on demographic, economic, and technological changes to justify copyright term extension. Technological improvements in communication, Justice Breyer reasons, argue against term extension rather than in favor of it; the 1976 Act's "life plus" system already extends terms as lifespans increase; and the fact that adults may now have children later in life "is a makeweight at best" that still fails to explain why life plus fifty years is an insufficient bequest to an author's children and grandchildren.[78] In sum, in Justice Breyer's view is that, "[t]here is no legitimate, serious copyright-related justification for this statute."[79]

In parts III and IV of his dissent, Justice Breyer makes plain that he shares the majority's concern with unduly intruding upon the decision-making powers of Congress but that he does not consider it an unwarranted intrusion to find the CTEA unconstitutional. In support of his position, he relies upon (1) his analysis of the Copyright Clause's objectives, (2) the total implausibility of any incentive effect of the CTEA's term extension, and (3) the CTEA's apparent failure to provide any meaningful international uniformity. Unlike Justice Stevens, Justice Breyer would therefore hold the CTEA unconstitutional in its entirety, not only as it applies retroactively.[80]

Conclusion

In their particulars, both the majority's and the dissent's reasoning are subject to criticism. The majority seems unduly facile in refusing to acknowledge that a perpetually expandable "limited" time, whether measured by economic analysis or by common sense, amounts to the same thing as an "unlimited" time, and in seeking refuge behind unchallenged previous extensions of copyright terms when it admits that it has never been called on to rule upon them. And in rejecting Eldred's three subsidiary arguments why Congress cannot extend existing copyright terms without extracting some new consideration from the author, the majority seemingly failed to grasp the subtlety of at least one of them.[81]

The Stevens dissent, on the other hand, makes a terrible gaffe in misreading *Stiffel* (a federalism case, not a term limitation case); as the majority notes, this reads out of context a portion of a sentence that says in its entirety that a State may not extend a patent beyond the term prescribed by Congress because, in the field of patents, federal law is supreme. In addition, Justice Steven's rejection of the government's "old movies" argument is internally inconsistent: contrary to his assertion in the text, his own footnote suggests that restoration of old films does help promote new works by authors, because both DVD re-releases he describes include new (and presumably creative) derivative and ancillary works.[82]

The strong point of the Stevens dissent, however, stems from his last observation: that neither judicial deference to Congress concerning the appropriate length of copyright nor the validity of earlier retroactive term extensions is at issue in *Eldred*.[83] Instead, "the question presented [under the Copyright Clause] by the certiorari petition merely challenges Congress' power to extend retroactively the terms of existing copyrights."[84] Just because Congress has acted (in Justice Stevens's view) unconstitutionally in the past without challenge, therefore, the Court need not permit Congress to do so when the question is squarely raised in a proper case.

Of all the opinions, Justice Breyer's dissent is probably the most satisfactory, for both its conclusion and its analysis. If "limited Times" is to mean anything in the Copyright Clause, then it must mean some length of time (nontrivially) less than perpetual. Yet, from a rational economic standpoint, the CTEA's lengthened copyright terms are virtually perpetual – the difference is indeed trivial.[85] (Although the majority rightly notes that, if it accepted this argument, then earlier copyright extensions may have been unconstitutional too, Justice Stevens's dissent would rescue the Court – temporarily – from this dilemma by noting that the Constitutionality of the earlier Acts is not before the Court.) And the Court's failure to intervene at this late stage – when the economic value of the extended copyright term may be as high as 99.99999% of a perpetual term[86] – may effectively stop it from ever intervening.

From the standpoint of federalism, of course, the only proper focus of the Supreme Court's inquiry is whether, in enacting the CTEA, Congress exceeded the authority that the Constitution grants it. And here the Court's *Eldred* deci-

sion offers cause for both hope and dismay. In recognizing that its own power is limited in areas the Constitution assigns to Congress, on the one hand, the Court respects the federal scheme. In effectively letting the Congress police the limits of its own power under the Copyright Clause, on the other, the Court effectively abandons its duty of judicial review under *Marbury v. Madison* and erodes, at least ever so slightly, the framers' Constitutional scheme of checks and balances.

If, in particular, the Congress should continue its nearly unbroken practice of extending copyright terms again in, say, another fifteen years – just as the earliest Walt Disney cartoons are again about to enter the public domain – then the Supreme Court may find that it has truly authored a Mickey Mouse copyright decision.

* The views expressed in this article are those of the author, and should not be taken as an expression of opinion, if any, of Williams Montgomery & John Ltd., nor of any of its clients or members.

Footnotes

[1] *Eldred v. Ashcroft*, 537 U.S. ___ , 123 S. Ct. 769 (2003), *reh'g denied*, 123 S. Ct. 1505 (2003).

[2] S. Res. 505, 105th Cong. (codified at 17 U.S.C. § 101, *et seq.*).

[3] Weighing in as *amici* on behalf of the government were the Sherwood Anderson Literary Estate Trust; The Sherwood Anderson Foundation; the American Society of Composers, Authors, and Publishers; AmSong, Inc.; the Association of American Publishers, Inc.; Broadcast Music, Inc.; the Motion Picture Association of America, Inc.; the National Music Publishers Association, Inc.; the Recording Industry Association of America, Inc.; and The Songwriters Guild of America.

[4] *See* Brief of *Amicus Curiae* Intel Corporation in Partial Support of Petitioners at 2-3.

[5] 8 Ann., c. 19.

[6] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975); *see* Marci Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 Cardozo Arts & Ent. L. J. 655, 659 (1996).

[7] U. S. Const., art. I, § 8, cl. 8. Contrary to modern usage, the reference to "science" is actually the predicate for the copyright authority; "useful Arts" is the underpinning of the patent laws.

[8] Act of May 31, 1790 § 1, 1 Stat. 124, 124.

[9] Act of Feb. 3, 1831 §1, 4 Stat. 436, 436.

[10] See Pub. L. 87-668 (1962); Pub. L. 89-142 (1965); Pub. L. 90-141 (1967); Pub. L.
90-416 (1968); Pub. L. 91-147 (1969); Pub. L. 91-555 (1970); Pub. L.92-170 (1971); Pub. L.92-566 (1972); Pub. L. 93-573 (1974).

[11] See H.R. Rep. No. 94-1476 at 135 (1976). For works created on or after January 1, 1978 (its effective date), the 1976 revision increased the term of U. S. copyright to the life of individual authors plus 50 years, or in the case of nonidentifiable authors or works made for hire, to the earlier of 75 years from the year of publication or 100 years from the year of creation. For works created before 1978, Congress extended the renewal term from 28 to 47 years, thus allowing 75 years of total protection from the time the copyright was "secured."

[12] The pre-1978 and post-1977 dichotomy of the 1976 Act makes the mechanics slightly complicated, but in essence the CTEA extends copyright terms: (1) for works created in or after 1978, to which an individual or individuals hold the copyright, to the life of the last surviving author plus 70 years, 17 U.S.C. § 302(a); (2) for anonymous works, pseudonymous works, and works made for hire created in or after 1978, to the earlier of 95 years from publication or 120 years from creation 17 U.S.C. § 302(c); (3) for works created before 1978 and still in their first term on January 1, 1978, to an initial term of 28 years plus a renewal term of 67 years, for a maximum of 95 years 17 U.S.C. § 304(a); and (4) for works created before 1978 and already in their renewal term on January 1, 1978, to a fixed term of 95 years. 17 U.S.C. § 304(b). See 17 U.S.C. §§ 302-304, inclusive, especially §§ 304 (a)-(d).

[13] The original plaintiffs were "various individuals and businesses that rely upon speech in the public domain for their creative work and livelihood." *Eldred v. Ashcroft*, No. 01-618, Supreme Court of the United States, Brief for Petitioners at 3. Besides Eldred personally, they included Eldritch Press, which posts public domain literary works on the Internet; a sole proprietorship that reprints books on demand; a choir director in Athens, Georgia; a not-for-profit film preservation group; a commercial film archive; a large-scale commercial paperback book publisher; several small publishers; and Copyright Commons, a not-for-profit coalition in Cambridge, Massachusetts formed to support the public domain. Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG at ?? 2-11 (U.S. Dist. D.C. 1999); *see id.*, 27-55.

[14] Second Amended Complaint, *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C. 1999).

[15] *Eldred v. Reno*, 74 F.Supp. 2d 1 (1999).

[16] Eldred's *amici* included numerous library and other associations, law professors, economists, for-profit and not-for-profit archivists and publishers, several foundations and prominent citizens, the National Writers Union, The Domain Name Rights Coalition, and several historians.

[17] *See generally*, Appellants' Opening Brief, *Eldred v. Reno*, No. 99-5430 (D. C. Cir.), filed May 22, 2000.

[18] *Eldred v. Reno*, 239 F.3d 372 (2001).

[19] *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560 (1985), held that First Amendment protections are already embodied in the Copyright Act's distinction between copyrightable expression on the one hand and uncopyrightable facts and ideas on the other, and by the fair use exception to copyright.

[20] *United Video, Inc. v. FCC*, 890 F.2d 1173 (Fed. Cir. 1989), in the view of Judge Ginsburg, holds that "copyrights are categorically immune from challenges under the First Amendment." *Eldred v. Reno*, 239 F.3d at 375 (2001).

[21] *See United States v. Lopez*, 514 U.S. 549 (1995)

[22] *Eldred v. Reno*, 239 F.3d 372, 382 (2001) (Sentelle, J., dissenting).

[23] *See generally*, Brief for Petitioners, *Eldred v. Ashcroft*, No. 10-168 (S. Ct.), filed May 20, 2002.

[24] Assuming a constant revenue stream at a 7% interest rate, for example, *amici* economists calculated that the CTEA would yield a mere one-third of one percent increase in present-value payments as additional compensation to authors or their heirs. *See* Brief of George E. Akerloff, *et al.*, as *Amici Curiae* in Support of Petitioners at 5-7 and Appendix B; see also, Affidavit of Hal R. Varian, Plaintiff's Response to the Government's Motion for Judgment on the Pleadings and Cross-Motion for Summary Judgment, *Eldred v. Reno*, No. 99-CV-00065 JLG (U.S. Dist. D.C.), July 23, 1999.

[25] 537 U.S. at ___ (majority opinion at 1).

[26] *Id.* at ____ (majority opinion at 2).

[27] *Id.* at ___ (majority opinion at 8).

[28] *Id.*

[29] *Id.* at ___ (majority opinion at 9-13).

[30] *Id.* at ___ (majority opinion at 14).

[31] *Id.* at ___ (majority opinion at 14-15).

[32] *Id.* at ___ (majority opinion at 17).

[33] *Id.* at ___ (majority opinion at 18-19).

[34] *Id.* at ___ (majority opinion at 20-28).

[35] *Id.* at ___ (majority opinion at 19). The closest the majority came to explicating its reasoning on this point was in its criticism of dissenting Justice Breyer's acceptance of economic calculations provided by *amici* economists showing that the extended term the CTEA provides is worth 99.8% of a perpetual copyright, but that the 1976, 1909, and 1831 extensions, the constitutionality of which has been accepted, created copyright terms worth, respectively, 99.4%, 97.7%, and 94.1% of a perpetual copyright. *Id.* at n. 16.

[36] 537 U.S. at ___ (majority opinion at 20).

[37] *Id.* at ___ (majority opinion at 21-22).
[38] *Id.* at ___ (majority opinion at 24-25).
[39] *Sears, Roebuck and Co. v. Stiffel Co.*, 376 U.S. 225 (1964).
[40] *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).
[41] *Id.* at ___ (majority opinion at 25).
[42] *Id.* at ___ (majority opinion at 28-29).
[43] *Id.*
[44] Strictly speaking, small business exemption from performance royalites is unrelated to term extension, but is a free speech accommodation nonetheless.
[45] *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 641 (194).
[46] *Id.* at ___ (majority opinion at 30).
[47] *Id.* at ___ (Stevens dissent at 2).
[48] *Id.* at ___ (Stevens dissent at 1), *citing Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 231 (1964).
[49] *Id.*
[50] *Id.* at ___ (Stevens dissent at 5-6).
[51] *Id.* at ___ (Stevens dissent at 6).
[52] In the text, Justice Stevens cites *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 158 (1948), and *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984). 537 U.S. at ___ (Stevens dissent at 6). In a footnote, he cites *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Id. at n. 4.
[53] *Id.* at ___ (Stevens dissent at 6).
[54] *Id.*
[55] *Id.* at ___ (Stevens dissent at 1).
[56] 537 U.S. at ___ (Stevens dissent at 10-12).
[57] *Id.* at ___ (Stevens dissent at 11).
[58] *Id.* at ___ (Stevens dissent at 14).
[59] The majority in fact acknowledges this point early in its opinion. 537 U.S. at ___ (majority opinion at 11).
[60] *Id.* at ___ (Stevens dissent at 16), citing *Wheaton v. Peters*, 8 Pet., at 661.
[61] *Id.* at ___ (Stevens dissent at 19-20).
[62] *Id.* at ___ (Breyer dissent at 1).
[63] *Id.*
[64] *Id.* at ___ (Breyer dissent at 1-2).
[65] *Id.* at ___ (Breyer dissent at 2-3).
[66] *Id.* at ___ (Breyer dissent at 4-6).
[67] *Id.* at ___ (Breyer dissent at 6-9).
[68] *Id.* at ___ (Breyer dissent at 11).
[69] *Id.* at ___ (Breyer dissent at 14).
[70] *Id.*
[71] *Id.* at ___ (Breyer dissent at 16, emphasis in original).
[72] *Id.* at 17.
[73] *Id.* at ___ (Breyer dissent at 18-19).
[74] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984), which Justice Breyer cites for the proposition that the Copyright Clause is "intended . . . to allow the public access . . . after the limited period of exclusive control."
[75] *Stewart* v. *Abend*, 495 U. S. 207, 228 (1990), which Justice Breyer cites for the proposition that copyright terms are "limited to avoid 'permanently depriv[ing]' the public of 'the fruits of an artist's labors.'"
[76] *Id.* at ___ (Breyer dissent at 20-21).
[77] *Id.* at ___ (Breyer dissent at 21).
[78] *Id.* at ___ (Breyer dissent at 22).
[79] *Id.* at ___ (Breyer dissent at 23).
[80] *Id.* at ___ (Breyer dissent at 23-25).
[81]It is certainly true, as the majority observes, that *Feist v. Publications, Inc. v. Rural Telephone Service Co.,* 499 U.S. 340 (1991), on which Eldred relied for his "originality" argument, "did not touch on the duration of copyright protection," 537 U.S. at ___ (majority opinion at 20), but this observation ducks rather than answers the question: how is a pre-existing copyrighted work still "original" at the time of a retroactive term extension? An answer exists, as Judge (Douglas) Ginsburg showed in the Court of Appeals, but the sophistication of Eldred's argument deserved a more sophisticated response that it received in the Supreme Court.
[82] *Id.* at ___ , n. 13 (Stevens dissent at 19).
[83] *Id.* at ___ (Stevens dissent at 21 and n. 14).
[84] *Id.* at ___ (Stevens dissent at 21).
[85] For a persuasive argument not cited in any of the opinions, see Richard A. Posner, "The law & economics of intellectual property," *Daedalus*, Spring 2002, at 5 *et seq.*
[86] *See* 537 U.S. at ___ (Breyer dissent at Appendix A).

LAWFULLY DEFENDING THE PEACE: THE BUSH DOCTRINE AND THE GLOBAL WAR ON TERRORISM

BY ANDRU E. WALL*

> Whenever peace – conceived as the avoidance of war – has been the primary objective of a power or group of powers, the international system has been at the mercy of the most ruthless member of the international community.
>
> Henry Kissinger, *A World Restored* (1954)

The barbarians are always at the gate. Conflict is a natural consequence of the human condition. When these simple facts are ignored and the absence of conflict becomes a principle policy objective, a dangerous stage is set: the barbarians will recognize that you are willing to sacrifice fundamental principles in order to avoid conflict, and they will exploit that timidity. It is in vogue to argue that the lesson for America to draw from Edward Gibbon's *The History of the Decline and Fall of the Roman Empire* is to avoid imperial overstretch and thus avoid the barbarians; 9/11 exposed the fallacy of that theory in today's globalized world.

When the United States failed to finish the war with Iraq in 1991, withdrew from Somalia after losing the lives of 18 soldiers, responded with impotent force to the attacks on the US embassies in Kenya and Tanzania, failed to respond with force to the attack on the USS Cole, refused to intervene in Rwanda to prevent or end a massacre, and timidly bombed Serbia in 1999 in response to attempted genocide, a powerful message was telegraphed to the barbarians: the Americans are comfortably ensconced in self-absorbed materialism and they lack the will to fight. The Bush Administration came into office with a view towards changing that perception. Its response to 9/11 removed all doubt. The enemies in the global war on terrorism are the terrorists and tyrants who threaten American security and who deprive others of the "non-negotiable demands of human dignity." They will be rooted out, and they will be destroyed.

There has been considerable criticism of the international legal foundation on which the Bush Doctrine and the global war on terrorism stands. Several questions arise. Is the Bush Doctrine consistent with the international laws regulating the use of force? Can terrorist attacks give rise to a right of self-defense within the normative framework of the United Nations Charter? Is so, when is it lawful to use force against terrorist located in other States? And, does the modern *jus ad bellum* permit the pre-emptive use of military force?

Critics of the Bush Doctrine view it as unilateralist, aggressive, and – ironically – idealistic. A key strategy to thwart the Bush Doctrine is to severely constrain it through legalistic and unfounded interpretations of international law. What greater criticism could one launch than to argue that the Bush Doctrine's vision for promoting the rule of law actually violates international law in its implementation? This essay demonstrates that the Bush Doctrine is consistent with existing international law. The United Nations Charter and customary State practice provide an adequate normative framework for addressing the continuing threat of international terrorism. International law recognizes the primacy of the right of self-defense and it does not require that we wait to act until the barbarians breach our gate.

The Bush Doctrine

> My fellow citizens, the dangers to our country and the world will be overcome. We will pass through this time of peril and carry on the work of peace. We will defend our freedom. We will bring freedom to others and we will prevail.
>
> President George W. Bush
> *Presidential Address to the Nation* (March 19, 2003)

The Bush Doctrine began as a framework to address the threats posed by weapons of mass destruction, expanded after 9/11 to cover terrorism, and was crystallized in the National Security Strategy of the United States released in September 2002. It boldly sets forth three strategic missions: to "defend the peace by fighting terrorists and tyrants," to "preserve the peace by building good relations among great powers," and to "extend the peace by encouraging free and open societies on every continent."[1] The first mission, defending the peace, is a direct challenge to terrorists who are now able to inflict levels of "chaos and suffering" that were once the domain of nation-states. Terrorists "penetrate open societies and turn the power of modern technologies against us." It is at this "crossroads of radicalism and technology" that the United States finds its "gravest danger." This danger comes not just from terrorists, but also from those States that sponsor, support and harbor terrorists. It comes from tyrants or terror States that are determined to acquire weapons of mass destruction.

Contrary to the assumptions of many, the Bush Doctrine preceded the horrific attacks of September 11, 2001. While first formally presented in the National Security Strategy in September 2002, the Bush Doctrine began to germinate much earlier. In a speech at the National Defense University on May 1, 2001, President Bush highlighted the threat posed by tyrants in possession of weapons of mass de-

struction. In a world inhabited by tyrants who hate democracy, freedom and individual liberty, President Bush declared, "Cold War deterrence is no longer enough." A new, proactive strategy of "active nonproliferation, counter-proliferation and defenses" would replace deterrence. President Bush closed the speech by stating: "This is the time for vision; a time for a new way of thinking; a time for bold leadership."

The Bush Doctrine's three goals stand in sharp contrast to the three goals contained in President Clinton's final National Security Strategy: "To enhance America's security. To bolster America's economic prosperity. To promote democracy and human rights abroad." As the historian John Lewis Gaddis observes, the "Bush objectives speak of defending, preserving, and extending peace; the Clinton statement seems to simply assume peace."[2] But, then, it is during times of prosperity that man tends to lose his sense of tragedy – his sense of history. 9/11 was the wake-up call that announced that the world is far from arriving at some postmodern paradise.

The Bush Doctrine recognizes the reality of human conflict and declares that the United States will act to defend peace and freedom. Peace is conceived not as the absence of conflict, but rather, in the words of Martin Luther King Jr., as the presence of justice. Thus, peace is not a utopian destination; it is a journey requiring constant vigilance. For this reason, the Bush Doctrine is more proactive than that of its recent predecessors. It rejects the assumption that democratic prosperity necessarily leads to perpetual peace. It embraces the reality that freedom isn't free.

International Law and the Global War on Terrorism

> We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.
>
> President George W. Bush
>
> *Letter Transmitting the National Security Strategy* (2002)

The horrific attacks of September 11, 2001, on the Work Trade Center, the Pentagon, and the hijacked airliner that crashed in Pennsylvania awoke the world to the realization that terrorism is a very present threat to international peace and security. After 9/11 the paradigm for combating terrorism shifted dramatically from law enforcement to armed conflict. Terrorism was previously viewed as a matter to be dealt with by domestic law enforcement authorities. This was evidenced when after the attack on the USS Cole destroyer in Yemen, which caused the death of 17 sailors and injured many more, domestic law enforcement officers were among the first people sent to the scene. It was evidenced in the civilian criminal trials held for the perpetrators of the first World Trade Center bombing. It was also evidenced in the Clinton administration's refusal to capture Usama bin Laden due to a perceived lack of evidence to prosecute him in a US civilian court of law.

The United States and many allies have made the eradication of international terrorism their principal mission. The global war on terrorism is a war of indefinite duration fought "against terrorists of global reach."[3] For policy makers and those interested in international law, several questions come immediately to mind: does international law allow a military response to terrorism? Can terrorist attacks amount to an armed attack within the meaning of Article 51? Can a State be held responsible for terrorist attacks carried out by non-State actors? When does the UN Charter permit a State to use force against terrorists located within the territory of another State?

International Law and the Use of Force

The United Nations Charter is understood to have outlawed war and its provisions have governed the use of force by States since 1945. The Charter makes its idealistic purpose manifestly clear: "to save succeeding generations from the scourge of war … and for these ends … to unite our strength to maintain international peace and security…."[4] The cornerstone of the modern *jus ad bellum* – the law regulating the recourse to force – is Article 2, paragraph 4 of the Charter, which prohibits the use of force by States as a means of resolving interstate disputes. Article 2(4) is the most important norm in international law. It states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Article 2(4) declares that peace is a supreme value; ensured by a fundamentally new world order. The Charter envisions that this new world order would be premised on collective security rather than self-help. Yet such obligations only arise voluntarily (collective self-defense) or when the Security Council acts under Article 42. The Security Council has never ordered States to use military force, thus collective security has in practice been ad hoc and voluntary.

The drafters of the Charter envisioned that the Security Council as the guarantor of collective security would counterbalance the prohibition against the use of force. With a standing military force at its beck and call, the Security Council would quickly respond to threats or breaches of international peace and security. The operational reality is that no State has ever seconded its troops to the Security Council, the Military Staff Committee remains an idealistic pipe dream, and collective security is guaranteed by States – occasionally through regional organizations – acting volitionally in individual or collective self-defense.

In the context of terrorism, it is worth noting that Article 2(4) prohibits only "the threat or use of force against the territorial integrity or political independence of any *state*…." Thus, on its face, the Charter is silently regarding the use of force against non-State actors. However, because terrorists are typically located in States, issues of territorial sovereignty necessarily arise. This essay will examine what factors must be present in order to override the controlling norm of Article 2(4) and permit the pursuit of terrorists located in another State.

Self-Defense in Response to an Armed Attack

While the sovereign right of States to use military force to resolve interstate disputes was outlawed by Article 2(4), their inherent right to use force in individual or collective self-defense was preserved. Article 51 encapsulates this right:

> Nothing in this present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to restore international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

While the Security Council is given the right to act in response to threats to international peace and security, Article 51 limits the right of States to use force unilaterally in self-defense to responses against armed attacks. The plain language of the Article 51 states that the inherent right of self-defense may be exercised "*if* an armed attack occurs." Much debate has centered on those four poorly drafted words.[5] The term "armed attack" was left undefined and it is not clear whether the drafters intended for "if" to be an example or a limitation (if and only if).

The very reason Article 51 was inserted into the text of the UN Charter raises questions as to the intent of the drafters. Article 51 was not in the original drafts because the drafters believed the customary international law right of self-defense was incorporated without alteration into the Charter.[6] The US delegation in San Francisco proposed Article 51 to ensure that the obligations of collective self-defense against armed attacks arising from the Chapultepec Act were incorporated into the Charter.[7] While self-defense was uniformly accepted as a customary right of States, collective self-defense was an emerging right.

With fifty years of interpretative State practice to look to, the original intent of the drafters is of diminishing interest.[8] *Opinio juris sive necessitatis* – the practice of States coupled with a belief that the practice was required or consistent with international law – seems to accept the plain language of Article 51, while simultaneously employing a broad interpretation of armed attack. Since the inception of the UN Charter, States defend their uses of force as legitimate acts of self-defense in response to armed attacks. Since the *Nicaragua* decision in 1986, States have taken care to specifically articulate that their unilateral uses of force are justified under Article 51 – regardless of whether there was an actual armed attack, whether that attack occurred on their territory, or whether the attack was carried out by State or non-State actors.

While the Security Council plays an important role in maintaining international peace and security, it is "clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked."[9] States determine when they been the victim of an armed attack and when they will act unilaterally in self-defense. Only after they act does Article 51 impose the requirement that the State notify the Security Council of its actions. This notification provides the Security Council the opportunity to act under Article 39 and rule on the legitimacy of the acts purportedly taken in self-defense. The Security Council can *ex post facto* determine that the State's actions were not lawful, but there is no requirement to get the Security Council's blessings prospectively. As President Bush made abundantly clear in a nationally televised news conference on March 6, 2003, his "most important job is to protect the security of the American people … [and] if we need to act, we will act, and we really don't need United Nations approval to do so."[10]

Terrorist Attacks as Armed Attacks

Because Article 51 limits the unilateral use of force in self-defense to responses against armed attacks, the question must be asked whether terrorist attacks can constitute an armed attack. The answer is, unequivocally, yes. On September 12, 2001, the United Nations Security Council passed Resolution 1368, which condemned the attacks of the preceding day and recognized the existence of the inherent right of individual and collective self-defense.[11] This recognition of the right of self-defense was a landmark decision by the Security Council. By recognizing the right of individual or collective self-defense, the Security Council implicitly acknowledged that an armed attack had occurred. The importance of this point cannot be underestimated. The Security Council does not need to determine there has been an armed attack in order to exercise its enforcement powers under Chapter VII – it need only determine that there is a threat to the peace or an actual breach of the peace. But an individual State may only take unilateral action under Article 51 in response to an armed attack. So when the Security Council passed Resolution 1368, it was acknowledging for the first time that States may unilaterally use military force against terrorists who have committed an armed attack. The

Security Council reaffirmed this right of individual or collective self-defense in two subsequent resolutions.[12]

Both the North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS) also recognized that the United States had been subjected to an armed attack. NATO determined that the attacks of September 11 were covered under Article 5 of the NATO Treaty, which provides that an armed attack against one NATO country shall be considered an attack against all NATO countries.[13] Likewise, OAS invoked the 1947 Inter-American Treaty of Reciprocal Assistance, also known as the Rio Treaty, which also treats an armed attack against one member State as an attack against all.[14] After making their respective determinations that an armed attack had occurred, both NATO and OAS thereby obligated their members to act in the exercise of collective self-defense with the United States. Australia also invoked the ANZUS treaty and several other countries lent bilateral support to the United States.[15] Any debate over whether a terrorist attack can rise to the level of an armed attack under Article 51 has now been forever laid to rest.

The question remains whether a degree of magnitude is required for an attack to be classified as an armed attack. Not all attacks are armed attacks, yet both logic and pragmatism dictate that the "gap between Article 2(4) ('use of force') and Article 51 ('armed attack') ought to be quite narrow."[16] If the Article 51 magnitude was significantly higher than that of Article 39, as many opponents of military action assert, then State A could carry out low-intensity attacks against State B that ostensibly would not amount to armed attacks and State B would be limited in its response by Article 2(4) to only non-force countermeasures. This argument is without precedent in State practice; to think it ever would be is fallacious.

Because Article 51 fails to define armed attack, the International Court of Justice in the *Nicaragua* case looked to customary international law to define the term but in so doing added little clarity. The ICJ confounded the matter by holding that an armed attack is distinguished from a "mere frontier incident" by its "scale and effects." The ICJ did hold that "acts by armed bands" are armed attacks if they occur on a "significant scale."[17] Because "significant" does not seem to be a very high threshold, the distinction of "*mere* frontier incidents" from "*significant*" attacks appears to focus more on the purpose than the actual scale. Furthermore, there is nothing in Article 51 that references severity.

Professor Michael Schmitt offers this instructive clarification of "mere frontier incidents:" "Border incidents are characterized by a minimal level of violence, tend to be transitory and sporadic in nature, and generally do not represent a policy decision by a State to engage an opponent meaningfully. They are usually either 'unintended' or merely communicative in nature."[18] Attacks by international terrorists can hardly be analogized to mere border incidents. Terrorist attacks, which the Bush Doctrine defines as "premeditated, politically motivated violence perpetrated against innocents," are by their very nature significant. They are political acts of violence intended to spread terror by killing innocent civilians, not mere incidents on the frontier; they will nearly always be armed attacks giving rise to a right of self-defense.

Necessity

Actions in self-defense are limited by the customary principles of necessity, proportionality, and immediacy,[19] which attempt to secure a balance between the right of self-defense on one hand and territorial integrity on the other. The Charter's limitation of the right of self-defense to responses to armed attacks entails an element of necessity and immediacy. If an act of aggression or other use of force falls short of an armed attack, then the victim State is limited in its response to claims for reparations, non-force reprisals or other countermeasures short of an armed response. While States may define armed attacks broadly, nevertheless, the existence of one is a necessary prerequisite for military action in self-defense. The prevailing norm of international relations must remain the prohibition on the use of force; thus, the question of necessity essentially turns on whether peaceful means are available to accomplish what is sought through armed means.

The *Corfu Channel* case, decided by the International Court of Justice in 1949, is instructive as an instance of when necessity did not exist.[20] A British vessel struck a mine while transiting through Albanian territorial waters. The Royal Navy thereafter entered Albanian waters to remove mines. While the ICJ recognized Albania's obligation under international law to prevent the launching of armed attacks from its territory, the court decided that Britain's subsequent violation of Albanian sovereignty was not necessary. The ICJ held that the Royal Navy entered Albanian waters to seize the mines, not as a necessary act of self-defense, but rather to collect evidence that could be used in its case for reparations against Albania. So even when there is an armed attack, if measures short of the use of military force can be expected to eliminate further attacks, then the use of force would not be necessary or lawful.

Scholars often look to the *Caroline* case for the customary international law articulation of necessity: "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[21] This exaggerates the modern applicability of the principles set forth in the *Caroline* case, however, because it took place in an era in which the use of force was considered a sovereign right of States. Any justification of the use of force was for *political* rather than *legal* purposes. Furthermore, in his exchange of letters with Lord Ashburton that has come to be known as the *Caroline* case, US Secretary of State Daniel Webster was arguing a reparations case for his client and, thus, his articulation of

necessity includes some hyperbole. While the *Caroline* case is illustrative, it strains credulity to argue that this is the standard of necessity that has been applied in State practice.

For too many years the United States has attempted to use measures short of the use of military force in response to armed attacks by terrorists and States that sponsor them. The result was 9/11. Perhaps necessity in the global war on terrorism is best illustrated by these words painted on the side of a US Navy ship operating in the Arabian Gulf in March of 2003:

Why We Are Here –

Oct 1983	Marine Barracks Beirut, Lebanon	243
Dec 1988	Pan Am FLT 103 Lockerbie, Scotland	244
Feb 1993	World Trade Center NYC, NY	6
Jun 1996	Khobar Towers Dhahrain, SA	19
Aug 1998	US Embassies Kenya/Tanzania	224
Oct 2000	USS Cole Aden, Yemen	17
Sep 11th 2001	World Trade Center NYC, NY Pentagon Washington, DC United Airlines FLT 93	3,000+

Proportionality

The use of force in self-defense must also be proportionate, but this does not require equality in scale and effect.[22] Indeed operational modalities typically dictate a response of greater magnitude than the initial attack. An otherwise lawful military response to an armed attack may be deemed violative of Article 2(4) if it is disproportionate. For example, Israel's invasion of southern Lebanon in 1982, while initially a legitimate response to ongoing armed attacks, was deemed disproportionate by a majority of States because of its extent and duration.

Apart from the war with Iraq – in which the Security Council in Resolution 678 expanded proportionality to include the restoration of "peace and security in the region" – proportionality has particular relevance in the global war on terrorism. The battle against al-Qaida is similar to traditional wars of self-defense in which a proportionate goal is the complete destruction or capitulation of the enemy's military, whereas armed interventions against other international terrorists and terrorist organizations in the global war on terrorism will be more minor skirmishes of limited duration and intensity. In those latter instances, proportionality will be measured against the initial attack. This does not mean that there must be symmetry between the original armed attack and the use of force in self-defense, but rather that force be limited to what is reasonably necessary to promptly thwart or repel the attack and prohibit its resumption – reasonableness being the key aspect.

Both proportionality and necessity will play a significant role in the global war on terrorism as the interplay between the two influences the choice of means. In Afghanistan and Iraq, armed invasions that toppled the governments were necessary and proportional because of the magnitude of their precipitating armed attacks (9/11 and the 1990 invasion of Kuwait) and the continuing threat posed to the United States and the world by those governments. Necessity and proportionality will typically dictate a less-invasive response. If the armed attack can be halted or pre-empted through the surreptitious insertion of special forces or a surgical cruise missile strike, then such means would strike the proper balance between Article 2(4) and the victim State's right of self-defense.

Immediacy: the Preemptive, Anticipatory or Interceptive Use of Force

Nearly four-hundred years ago, Hugo Grotius articulated that actions in self-defense are permissible "only when danger is immediate and certain, not when it is merely assumed."[23] No doubt this was the impetus behind Webster's requirement that an intervention leave "no moment for deliberation." Add to these two statements the Charter's requirement of an "armed attack", and it quickly becomes apparent why so much confusion surrounds the principle of immediacy today.

The greatest debate surrounding immediacy in the post-Charter era is the question of whether a State may respond in advance of the firing of the first shot – pre-emptive, anticipatory, or interceptive self-defense. There is no question that prior to the UN Charter, customary international law recognized the right to use force in self-defense against imminent threats. What has been debated for nearly sixty years is whether the Article 51's stricture "armed attacks" limited the customary right to respond to imminent threats or whether that right was assumed to continue. Writing in 1958, Professor Bowett argued: "It is not believed that Art. 51 restricts the traditional right of self-defense so as to exclude action taken against an imminent danger but before 'an armed attack occurs.'"[24] During the Cold War with its ominous threat of nuclear holocaust, proponents of anticipatory self-defense argued that a State could not be expected to await the first, possibly incapacitating, blow. In 2003, President Bush stated: "Terrorists and terror States do not reveal these threats [chemical, biological and nuclear terror] with fair notice, in formal declarations – and responding to such enemies only after they have struck first is not self-defense, it is suicide."[25] The commonality, then, is the magnitude of the threat and the likely efficacy of a post-attack response.

The Bush Doctrine's bold invocation of pre-emp-

tion was necessitated in part by the emerging realities of the post-Cold War world and in part by the operational divide between the intent and the practice of the UN Charter. The UN Charter envisioned that the Security Council acting through the Military Staff Committee would fill the gap between Article 39 (threats to the peace) and Article 51 (armed attacks). In the absence of such a crucial implementing mechanism, is it really rational to expect a nation that recognizes an Article 39 threat to wait for the international community to address its security – hoping it acts before an Article 51 attack occurs? Remember that the Security Council passed three Chapter VII resolutions prior to 9/11 (one just six weeks prior to 9/11) demanding that the Taliban comply with international law by extraditing Usama bin Laden and closing the terrorist training camps in its country.

It is absurd to argue that States "must await a first, perhaps decisive, military strike before using force to protect themselves," yet is equally absurd to relax Article 51's requirement of an "armed attack" to the point that States may unilaterally use military force anytime they feel "potentially threatened."[26] Recognizing these competing concerns, the State Department Legal Advisor clarified the Bush Administration's position:

> The United States, or any other nation, should not use force to pre-empt every emerging threat or as a pretext for aggression. We are fully aware of the delicacy of this situation we have gotten into. After the exhaustion of peaceful remedies, and after careful consideration of the consequences, in the face of overwhelming evidence of an imminent threat, though, a nation may take pre-emptive action to defend its nationals from catastrophic harm.[27]

Where does this place pre-emption on the spectrum of pre-first-shot actions in self-defense? Does pre-emptive self-defense mean something different than anticipatory self-defense, the term generally favored since 1945? To many, pre-emptive self-defense sounds suspiciously like preventative war – something clearly not consistent with a textual or contextual reading of Article 51. To Professor Dinstein, both anticipatory and pre-emptive self-defense appear to be subjective responses in advance of an armed attack (attempted mind-reading) and, thus, inconsistent with a literal reading of Article 51. He attempts to resolve the competing interests by recognizing that "an armed attack may precede the firing of the first shot" and offering the term "interceptive" as the correct articulation of the modern right.[28] Interceptive does signal that it is in response to an attack actually in motion, yet it is no less subjective than pre-emptive or anticipatory.

Etymological concerns aside, what matters most is how States – in the context of the Bush Doctrine, the United States – act in practice and the legal justifications they put forth in defense of their actions. In this respect, pre-emption is not different from anticipatory and interceptive in that its legality will be evaluated after the fact and State practice has been to justify self-defense actions generally under Article 51, making no distinction between actual or anticipatory.

The key challenge for policy-makers and lawyers alike is divining the precise moment when the armed attack began. To Sir Humphrey Waldock, that moment is when "there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted…."[29] Israel's launching of the Six Day War in 1967 is perhaps the clearest example of lawful interceptive, anticipatory or pre-emptive self-defense. With overwhelming evidence that Egypt was about to launch an attack on Israel (belligerent statements, the massing of troops on the border with Israel, the expulsion of the UN Emergency Force from the Gaza Strip and the Sinai Peninsula, and the closing of the Strait of Tiran to name but a few indications), the international community accepted the legality of Israel's actions. The Security Council, however, condemned the Israeli attack of the Iraqi nuclear reactor in 1981. There, the direct threat to Israel of a nuclear reactor under construction did not rise to the level of immediacy required by Article 51.[30] Yet, as US Secretary of State Colin Powell recently remarked, Israel "got the devil criticized out of them at the time" but everyone now is quite pleased they did it. Ultimately, history is the judge of whether the proper balance was struck between the State's right of self-defense and the controlling norm of Article 2(4).

Cross-Border Counter-Terrorist Operations

Once it is determined that terrorists have carried (or are carrying) out an armed attack, the right of self-defense is still limited by the fact that the responsible terrorists are likely located in another State. Thus the victim State's right of self-defense confronts the right of territorial sovereignty of the State in which the attackers are located. Although al-Qaida and other international terrorist organizations are non-State actors and, as such, have no rights of sovereignty, they are necessarily located within sovereign States. The United States has the right to attack al-Qaida in self-defense, yet it may not violate the sovereignty of another State without justification. Thus, when US forces enter another State to carry out attacks against al-Qaida, it must be either at the invitation of that State or there must be evidence sufficient to establish State responsibility for sponsoring, supporting, or harboring al-Qaida.

1. Entry by Invitation

If the State in which the terrorists are located grants the victim State permission to enter the country and capture or attack the terrorists, then the legality of the intervention is without dispute. This happened in the fall of 2002 when a Predator-launched Hellfire missile killed Qaed Sinan Harithi and five other men in Yemen. Harithi was the al-Qaida leader believed to be responsible for the attack on the USS Cole in Aden Harbor in 2000. US forces operating in Yemen at the invitation of the Yemeni government tracked Harithi. When

Yemeni troops failed to capture Harithi in a valiant operation that left 18 Yemenis dead, an unmanned Predator aircraft operated by CIA operatives was used to launch the missile attack that killed Harithi.

Anytime military forces operate with consent in the territory of another State, the consenting State has every right to place limits upon the extent and duration of the military operations. The host nation restrictions will be legally binding and will limit the freedom of action of the intervening forces unless the host nation's right of State sovereignty is outweighed by the intervening State's right of self-defense. The restrictions must be so onerous as to amount in practice to sheltering or harboring of the terrorists.

2. State Responsibility – Unintentional Harboring

Should terrorists carry out an armed attack in State A while operating from State B, then State B has the responsibility under international law to counter the terrorist activity. The International Court of Justice in the *Corfu Channel* case of 1949 ruled that every State has an obligation to not knowingly allow its territory to be used in a manner contrary to the rights of other States.[31] States cannot allow their territory to be used as a staging area for armed attacks against other States.

In his address to a joint session of Congress and the American people on September 20, 2001, President Bush declared: "Every nation, in every region, now has a decision to make. Either you are with us or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime." This echoed a similar statement he made on the evening of September 11, 2001, as well as the specific language of Security Council Resolution 1368, which "stress[ed] that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable."[32]

In the case of unintentional harboring, there is no complicity – the State simply does not have the ability to counter the terrorists or the terrorist threat. The terrorists may be operating from territory where the State does not have forces stationed, the State may simply not have the fire-power to counter terrorists that are better armed, or there may not be a functioning State – it may be a failed State with no legitimate, functioning government for the victim State to turn to.

The United States dealt with this very scenario in 1916 during the Mexican revolution. A Mexican opposition leader by the name of Francisco "Pancho" Villa launched a terrorist attack against the United States on the border town of Columbus, New Mexico. Eighteen Americans were killed and much civilian property was destroyed. The attack outraged the United States, and President Woodrow Wilson immediately ordered General John "Black Jack" Pershing to lead a cavalry expedition into Mexico. The Mexican government had no real control over the northern part of Mexico, the operating base for Pancho Villa and his band of nearly 500 outlaws, and was waging its own unsuccessful battle against him. General Pershing led over 700 American troops on an eleven-month mission that penetrated over 800 kilometers inside Mexico in search of Pancho Villa. Three months into the expedition the Mexican government asked the Americans to return to the United States, to which President Wilson replied that the United States could not retreat from its right and duty to prevent further attacks upon American soil.

More recently the United Stated launched cruise missile attacks against al-Qaida targets in Sudan and Afghanistan in 1998 following the bombing of the American embassies in Kenya and Tanzania. While there was some criticism of the choice of the al Shifa pharmaceutical factory as a target, the international community's silence evidenced its acceptance of, or at least acquiescence to, the *jus ad bellum* justification for the attacks.[33] Territorial sovereignty must sometimes yield to the imperative of self-defense.

3. State Responsibility - Ratification of the Terrorist Attack

Article 11 of the International Law Commission's Articles on State Responsibility states: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of the State under international law if and to the extent that the State acknowledges and adopts the conduct as its own."[34] When terrorist attacks are carried out by non-State actors operating from or in another State and the host State refuses to stop the attacks or act against a continuing threat, the victim State may use cross-border force in self-defense. The terrorist action is not considered to be State-sponsored, but through either complicity or ratification the terrorist actions are imputed to a State.

The takeover of the United States Embassy in Tehran, Iran in 1979 is illustrative. Although the Iranian government did not plan or execute the attack, the International Court of Justice found Iran responsible for the takeover of the embassy by Iranian students.[35] Iran had a clear obligation under international law to arrest the students after they seized the embassy. The ICJ determined that while the student's actions may not have been initially State-sponsored, the attack could be imputed to Iran because Iran failed to take necessary action in response. In other words, Iranian inaction against the takeover of the Embassy amounted to ratification of the student's actions and complicity in the armed attack. So while the United States would not have been authorized under international law to attack Iran on the day after the Embassy was seized, at some point thereafter it became lawful – once it could be said that Iran had the opportunity to act but failed to do so.

While the full extent to which al-Qaida and the Taliban government of Afghanistan were intertwined may never be known, the Taliban was complicit by ratification in the attacks carried out by al-Qaida on September 11, 2001. In the three years preceding 9/11, the Security Council passed no less than six resolutions demanding that the Taliban take action against

the terrorists and terrorist training camps in Afghanistan; three of those resolutions were passed under Chapter VII and specifically demanded that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations" and "turn over Usama bin Laden to appropriate authorities in a country where he has been indicted."[36]

The Taliban blatantly refused to comply with the Security Council's demands. On October 7, 2001, President Bush presented the Taliban with his own demands:

> Deliver to the United States authorities all leaders of al-Qaida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.

A little over two weeks later, President Bush announced that the Taliban had failed to meet his demands, and "now the Taliban will pay the price."[37] The Taliban, as the *de facto* government of Afghanistan, had the responsibility to stop the use of its territory for the planning, organizing, and staging of terrorist attacks against other countries. When it failed to act, its right of territorial sovereignty gave way to the right of the United States to use military force in self-defense "to prevent and deter further attacks on the United States."[38]

4. State Responsibility - *De Facto* State Acts

The simplest case for State responsibility is when there is a terrorist attack and the evidence reveals that the terrorists were *de facto* organs of another State. This is the case of State-sponsored terrorism. The terrorists may not be State actors or forces, but a State can assist or encourage the terrorists to a degree that the terrorists become *de facto* organs of the State. Article 8 of the Articles on State Responsibility state that the "conduct of a person or group shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[39]

The example here is the 1986 bombing of the La Belle discotheque in Germany, which American servicemen were known to frequent. The attack killed two American servicemen and a Turkish woman, and wounded 63 American servicemen and 167 other individuals. President Reagan stated that the United States had "incontrovertible" evidence that Libya had supported the attack. By giving material support to the terrorists that carried out the attack, Libya had engaged in armed aggression against the United States just as if it had used its own military forces.[40] The United States responded to the attack and the continuing threat (there was evidence that this was one in a series of attacks) by bombing various Libyan military and intelligence targets that were believed to be assisting the terrorists.

The United States was criticized for bombing Libya by many in the international community who argued that there was not sufficient evidence linking Libya to the disco bombing and that terrorist attacks on American citizens located in a third State could not amount to an armed attack within the meaning of Article 51. Subsequent evidence, including a statement allegedly made by Colonel Gadaffi to a German newspaper, corroborates Libyan involvement in the attack. Most importantly, Security Council Resolution 1368 confirms that terrorist attacks can amount to an armed attack.

The questions of whether and when a State can be held responsible for the actions of terrorists has been addressed by two separate international tribunals – the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY). In the *Nicaragua* case, the ICJ held that armed attacks carried out by "armed bands, groups, irregulars or mercenaries" may be imputed to a State only if the State exercised "effective control" over their actions.[41] The ICJ held that effective control exists where a State participates in the planning, direction, support, or execution of the armed attack.

More recently the ICTY ruled that a State may be held responsible for attacks carried out by non-State actors, but it set a much lower threshold than the ICJ's effective control test.[42] The ICTY rejected the "effective control" test, which it held to be too high of a barrier for proving State responsibility. The ICTY held that the control required by international law exists when a State simply has a role in the organizing, coordinating, or planning of the terrorist activity. The State must exercise control over the non-State actors, but the degree of control may "vary according to the factual circumstances of each case."[43] The ICTY also noted: "judicial and State practice … has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised."[44] The two courts applied different thresholds for when terrorist actions may be imputed to a State, but the crucial point is that both courts recognized the simple fact that a State may be held responsible for the actions of terrorists. Terrorists may be considered *de facto* organs of a State.

The Use of Force Against Tyrants and Terror States

When the National Security Strategy spoke of the use of military force against tyrants, it referred to those tyrants that use terror as a means of pursuing national policy. The Taliban government was the first terror State to be targeted and Iraq was the second. Several subsequent statements by President Bush expanded on this point. In a nationally televised press conference on March 2, 3003, President Bush stated unequivocally: "Iraq is part of the war on terror."[45] Following the

Atlantic Summit in the Azores on March 16, 2003, President Bush declared that the "first war of the 21st century … is the war against terrorism and weapons of mass destruction in the hands of dictators."[46] In his speech to the American people on March 17, 2003, President Bush emphasized which tyrants would be targeted by the United States when he linked "[t]errorists and terror states." The recourse to force against terror States will need to be justified under Article 51, with most instances focusing on necessity and immediacy – the existence of an armed attack and continuing threat. The use of force against Iraq is no different.

The war with Iraq began on August 2, 1990 when Iraq invaded Kuwait.[47] Later that same day the Security Council declared the Iraqi action a breach of the peace, thus removing any debate over who was the aggressor.[48] The Security Council explicitly recognized the right of Kuwait and its coalition partners to use force in collective self-defense.[49] In an ultimately futile attempt to secure Iraq's voluntary withdrawal from Kuwait, the Security Council passed eleven resolutions in the fall of 1990 that collectively denounced Iraq's invasion, declared it a breach of the peace, demanded Iraq's immediate, unconditional withdrawal from Kuwait, recognized the right of individual or collective self-defense, imposed an arms embargo and economic sanctions, and recognized Iraq's obligation to pay reparations.[50]

As the United States massed a coalition military force on the border of Iraq and Kuwait, it aggressively pursued a Security Council resolution authorizing the use of military force against Iraq. Yet the United States and the coalition never believed such authorization was a legally required prerequisite to military action. United Nations support for the exercise of the right of collective self-defense was important for *political*, not legal, reasons. In the book he co-wrote with George H.W. Bush, *A World Transformed*, Brent Scowcroft unequivocally states that the United States sought United Nations support as "an added cloak of political cover. Never did we think that without its blessing we could not or would not intervene."[51] And so it was while standing on the solid legal foundation of the right of collective self-defense that the coalition, led by intense lobbying by the United States, sought and received the additional political cloak of Security Council authorization.

The Security Council explicitly authorized the use of military force by the coalition against Iraq in Resolution 678 on November 27, 1990. Resolution 678 authorized "all necessary means" to eject Iraq from Kuwait and "to uphold and implement … all subsequent relevant resolutions and to restore international peace and security to the area." The Security Council recognized the right of those "States co-operating with the Government of Kuwait" to use force in collective self-defense, although that right was limited in that it could not be exercised until after January 15, 1991. The Iraqi intransigence continued, and so on the evening of January 16, 1991 a 28-nation, US-led coalition commenced Operation Desert Storm. After six weeks of intense bombing, which was followed by an astonishingly successful 100-hour ground campaign that liberated Kuwait, Operation Desert Storm was unilaterally halted.

On March 3, 1991 General H. Norman Schwarzkopf, the commander of coalition forces, and Lieutenant General Sultan Hashim Ahmad al-Jabburi, the deputy chief of staff of the Iraqi ministry of defense, met at the Safwan airfield in Iraq and negotiated a cease-fire agreement. The cease-fire agreement established a demarcation line and addressed the issue of repatriation of Kuwaitis and prisoners of war held in Iraq. Ahmad al-Jabburi also extracted a concession from Schwarzkopf that allowed Iraq to fly military helicopters in the cease-fire zone.[52]

The cease-fire agreement reached by Schwartzkopf and Ahmad al-Jabburi on March 3, 1991 was put into writing by the United States, vetted by the Security Council, and codified in Resolution 687 on April 3, 1991. It was the longest resolution and most detailed cease-fire agreement ever and its activation was conditioned upon Iraq's unconditional acceptance. Iraq formally accepted the terms of the cease-fire in a letter delivered to the Security Council on April 6, 1991, which denounced the "iniquitous resolution," but ultimately declared that Iraq had "no choice but to accept."

The notion that the war with Iraq ended with the acceptance of the cease-fire agreement is a myth as unsupported by international law as it is by the facts. The state of war that commenced between Iraq and Kuwait on August 2, 1990 and between Iraq and the coalition on January 16, 1991 continued. Coalition combat and reconnaissance aircraft flew over 250,000 sorties over Iraq between April 1991 and March 2003 in enforcement of the cease-fire agreement and no-fly zones. Those aircraft were fired upon by Iraqi forces thousands of times and returned fire thousands of times – dropping bombs, firing missiles, and launching hundreds of cruise missiles into Iraq. According to news reports, coalition aircraft dropped 606 munitions on 391 selected targets in 2002 alone.[53] This may be low-intensity conflict, but only a lawyer could argue it was not an ongoing armed conflict.

To argue that the US-led coalition needed Security Council authorization before resuming offensive combat operations against Iraq in 2003 is to argue that the right of self-defense was either supplanted by the Security Council's authorization in Resolution 678 or extinguished upon acceptance of the cease-fire agreement. Both arguments are illogical, without basis in State practice, and contrary to an international public policy that should encourage utilization of the Security Council – not punish resort to it. How can it be seriously contended that a State, by prospectively gaining Security Council approval of its actions in self-defense, thereby cedes this right to the Security Council? Did the US-led coalition believe it was waiving its right of collective self-defense by entering into the cease-fire agreement with Iraq on March 7, 1991, or by adding the blessings of the Security Council to that agreement on March 25, 1991? By unilaterally implementing a temporary cessation of offensive hostilities in an attempt to save Iraqi

lives, how could the coalition lose its right of collective self-defense and be forever (absent another armed attack) precluded from using force without the explicit authorization of the Security Council? Such arguments expose the absurd idealism of those who believe that all recourse to force is evil.

Article 2(4) is the controlling norm of international relations, yet States agreed to this restriction of their sovereignty on the condition that their inherent right of individual or collective self-defense continued. If the exception recognized in Article 51 were extinguished and the norm set forth in Article 2(4) again became controlling upon acceptance of a cease-fire agreement, then the law would create a perverse disincentive to enter into such agreements. The State prevailing in a conflict would be disinclined to agree to a cease-fire at any time prior to unconditional surrender. Such a law would leave no room for magnanimous efforts to limit the horrors of war through potentially life-saving reprieves.

In addition, the Security Council's 1990 authorization to use force against Iraq never lapsed upon implementation of the cease-fire agreement. The Security Council knew precisely what it was doing when Resolution 678 authorized those "States cooperating with the Government of Kuwait … to use all necessary means to uphold and implement Resolution 660 (1990) *and all* subsequent relevant resolutions *and* to restore international peace and security in the area." The Security Council reaffirmed this authorization in Resolutions 687 and again in 1994 when it recalled "in particular paragraph 2 of resolution 678" (the use of force authorization).[54]

The United States considered Iraq to be in continuing material breach of the cease-fire agreement just weeks after the cease-fire agreement was reached. The Security Council found that Iraq was in material breach of the cease-fire agreement on numerous occasions, yet in the fall of 2002 some still debated this point.[55] By declaring Iraq to be in continuing material breach of Resolution 687 and others in Resolution 1441, the Security Council permanently foreclosed debate on the issue.[56]

Given Iraq's consistent and continuing material violations of the 1991 cease-fire agreement, the United States properly notified the world on March 17, 2003 that it considered the cease-fire agreement to be denounced by Iraq. Just as a right of self-defense may be exercised unilaterally without resort to the Security Council, so too may any party to a cease-fire agreement – even one endorsed by the Security Council – determine that the cease-fire has been materially breached and announce that it is resuming hostilities with the breaching party. As a final opportunity to avoid the resumption of offensive hostilities, the United States gave Saddam Hussein and his sons 48-hours to leave Iraq. Hussein failed to seize this final reprieve. After resuming offensive hostilities against Iraq, the United States and United Kingdom sent letters to the Security Council in accordance with Article 51 that set forth the legal case for the use of force against Iraq.[57]

When the use of force is lawfully employed in response to a violation of a cease-fire agreement, proportionality must be measured against the original aggression. Under the UN Charter and the numerous Security Council resolutions related to the Iraqi invasion of Kuwait, permissible objectives include the restoration of international peace and security.[58] Given Saddam Hussein's pattern of aggression, his absolute disregard for international law and the dictates of the Security Council, his material violations of the cease-fire agreement, and evident desire to develop and deploy chemical, biological, and nuclear weapons, the removal of Saddam Hussein from power was an eminently reasonable, i.e. proportionate, response.

The Lilliputian Threads of International Law

> America's allies want a multilateral order that will essentially constrain American power. But the empire will not be tied down like Gulliver with a thousand strings.
>
> Michael Ignatieff (2003)[59]

The international order that emerged after 9/11 is very different from the one that liberal internationalists envisioned emerging from the Cold War. They believed that if the world would simply follow the European model and voluntarily cede State sovereignty to an increasing array of multilateral institutions, then a global Kantian paradise would emerge. Yet the European's demilitarized paradise was a mirage. As Robert Kagan explained in his brilliant essay *Of Paradise and Power*, it thrived only because it was protected by American military might. Even the quintessentially European use of military force – the belated 1999 "humanitarian intervention" over Kosovo – was possible only because the US military aircraft flew over 90% of the missions.

In his insightful and challenging polemic, The Shield of Achilles, Phillip Bobbit reminds us that "[l]aw and strategy are mutually affecting."[60] The State that ignores law is doomed to permanent war; the State that ignores strategy will fail to protect its values and risks seeing its constitutional order destroyed altogether. Rather than waste time searching for a non-existent magic serum that will cure the world of the illness of war, Bobbitt advises us to recognize that war is a natural consequence of the human condition and, therefore, we should take steps to shape future conflicts and prevent them from becoming cataclysmic. The choice is not between a world without conflict or global anarchy, it is much more subtle and foreboding.

> The epochal war we are about to enter will either be a series of low-intensity, information-guided wars linked by a commitment to re-enforcing world order, or a gradually increasing anarchy that leads to intervention at a much costlier level or even a cataclysm of global proportions preceded by a period of relative if deceptive peace. It is ours to choose.[61]

The Bush Doctrine boldly chooses to act rather than wait for the cataclysmic to occur. Its decisions on the recourse to force are far from a rejection of the international rule of law. Rather, these decisions reflect a fundamental understanding of the reality of international relations in the twenty-first century and a hopeful optimism that free and open societies can be built on every continent. Just as they bemoaned the divisions that racked the Security Council during the Cold War (forgetting, apparently, that having values necessarily means you will have disagreements with those who do not share your values), so too will many continue to criticize the United States and the decisions it makes in the global war on terrorism. They will attempt to tie down the United States with overly legalistic interpretations of international law. In so doing, they risk making international law a farce.

Until man is perfected and we achieve universal law and peace, States will remain the primary guarantors of international peace and security. Only States will hold the power to change the constitutional order of our world. The idealists, with their belief that globalization equals universalism, assume a world order that simply does not exist. They assume a world without barbarians – a world in which peace is assumed and undefended. America, like Gary Cooper in the western classic High Noon, reluctantly assumes the role of the world's marshal – standing up to evil and defending the peace.

* Andru E. Wall is a professor of international law at the United States Naval War College and is a lieutenant in the US Navy Judge Advocate General's Corps. The views presented herein are those of the author and do not necessarily represent the views of the U.S. government.

Footnotes

[1] National Security Strategy of the United States ii (Sept. 2002)

[2] John Lewis Gaddis, *A Grand Strategy*, Foreign Policy 50, 51 (Nov./Dec. 2002).

[3] National Security Strategy of the United States 5 (Sept. 2002)

[4] United Nations Charter, *Preamble* (1945)

[5] Yoram Dinstein, War, Aggression and Self-Defence 223-4 (3d ed. 2001); *see* Hans Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations*, 42 Am. J. Int'l L. 783, 792 (1948); *see generally* Thomas Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 Wash. J.L. & Pol'y 51 (2001). Nicholas Rostow, *The International Use of Force after the Cold War*, 32 Harv. Int'l L.J. 411, 420 (1991).

[6] D. W. Bowett, Self-Defense in International Law 182 (1958) citing *Report of the Rapporteur of Committee I to Commission I*, 6 United Nations Conference on International Organization 459 (June 13, 1945).

[7] The Act of Chapultepec was adopted on March 3, 1945 by the Inter-American Conference on War and Peace. It was the precursor to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) of September 2, 1947, 21 U.N.T.S. 77 (1947), which entered into force on December 3, 1948.

[8] Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969); Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* 1971 I.C.J. Rep. 16, 22.

[9] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Merits, I.C.J. Reports 1986, ¶ 103 [hereinafter *Nicaragua*].

[10] Press Release, Office of the Press Secretary, The White House, President George Bush Discusses Iraq in National Press Conference (Mar. 6, 2003).

[11] S.C. Res. 1368, pmbl. (Sep. 12, 2001): "*The Security Council*, *Reaffirming* the principles and purposes of the Charter of the United nations, *Determined* to combat by all means threats to international peace and security caused by terrorist acts, *Recognizing* the inherent right of individual or collective self-defense in accordance with the Charter…" (emphasis in the original).

[12] S.C. Res. 1373 (Sep. 28, 2001); S.C. Res. 1386 (Dec. 20, 2001).

[13] North Atlantic Treaty Organization, Press Release No. 124, Statement by the North Atlantic Council (Sept. 12, 2001) (visited February 5, 2003) <http://www.nato.int/docu/pr/2001/p01-124e.htm>. Article 5 of the North Atlantic Treaty states:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an armed attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, Aug. 24, 1959; 34 U.N.T.S. 243.

[14] Terrorist Threat to the Americas, Resolution 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation In Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001). The Inter-American Treaty of Reciprocal Assistance provides in pertinent part:

> The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 21 U.N.T.S. 77.

[15] Article VI of the ANZUS Treaty provides: "Each party recognizes that an armed attack in the Pacific Area on any of the parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes." Security Treaty Between Australia, New Zealand, and the United States, Sep. 1, 1951, art. VI, 131 U.N.T.S. 83, 86.

[16] Dinstein, *supra* note 6, at 174.

[17] *Nicaragua*, *supra* note 10, at ¶ 176. In his scathing dissent, Judge Schwebel declares that this entire line of reasoning is both wrong and unnecessary given the arguments before the Court:

> The Court appears to reason this way. Efforts by State A (however insidious, sustained, substantial and effective), to overthrow the government of State B, give rise to no right of self-defence by State B, and hence, to no right of State C to join State B in measures of collective self-defence. State B, the victim State, is entitled to take counter-measures against State A of a dimension the Court does not specify. But State C is not thereby justified in taking counter-measures against State A which involve the use of force.

Dissenting Opinion, *id*, at 349 ¶ 175.

[18] Michael N. Schmitt, Counter-Terrorism and the Use of Force in International Law 18 (Marshall Center Papers, No. 5) (George C. Marshall European Center for Security Studies).

[19] *Nicaragua*, *supra* note 16, at ¶¶ 176, 237, 249; Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 ¶ 141. The UN Charter incorporated these pre-existing customary international law principles. Rights and obligations accorded to States under customary international law continue unless they are explicitly waived under the Charter.

[20] *Corfu Channel case*, Judgment, 1949 I.C.J. Reports 4, 34-35 (Apr. 9, 1949).

[21] Letter from Mr. Webster to Mr. Fox (April 24, 1841), *reprinted in* 29 Brit. & Foreign St. Papers 1129, 1138 (1857), *quoted in* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l. L. 82, 85-6 (1938).

[22] Dinstein, *supra* note 6 at 198.

[23] Hugo Grotius, 2 De Jure Belli ac Pacis Libri 173 (Carnegie Endowment trans. 1925)(1625).

[24] Bowett, *supra* note 7, at 191.

[25] Press Release, Office of the Press Secretary, The White House, Remarks by the President in Address to the Nation (Mar. 17, 2003).

[26] Thomas Franck, Recourse to Force: State Action Against Threats and Armed Attacks 98 (2002).

[27] William Howard Taft, IV, Speech to Foreign Policy Association Event, Pre-emptive Force: When can it be used? (Jan. 13, 2003), transcript available at http://www.fpa.org/topics_info2414/topics_info_show.htm?doc_id=142893.

[28] Dinstein, *supra* note 6, at 172. In his book, Professor Dinstein comments only on anticipatory self-defense. He discussed the concept of pre-emption in conversations with the present author in 2003. Notes on file with the author.

[29] Humphry Waldock, The *Regulation of the Use of Force by Individual States in International Law*, 81 Recul Des Cours 451, 498 (1952).

[30] The attack could have been justified on other grounds. See Dinstein, *supra* note 6, at 45.

[31] Corfu Channel Case (Merits), 1949 I.C.J. Rep. 4, 22. See also John Basset Moore's dissenting opinion in the Lotus case, in which he wrote "it is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people …." S.S. Lotus (Fr. V. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).

[32] S.C.Res. 1368 (Sept. 12, 2001).

[33] Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 Yale J. Int'l L. 559, 575 (1999).

[34] James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002).

[35] United States Diplomatic and Consular Staff in Tehran (Iran v. USA), 1980 I.C.J. 3.

[36] S.C. Res. 1333 (Dec. 19, 2000); *see also* S.C. Res 1363 (Jul 30, 2001), S.C. Res 1267 (Oct. 15, 1999), S.C. Res. 1214 (Dec. 8, 1998), S.C. Res. 1193 (Aug. 28, 1998), S.C. Res. 1189 (Aug. 13, 1998).

[37] Press Release, The White House, Presidential Address to the Nation (Oct. 7, 2001).

[38] Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

[39] Articles on State Responsibility, *supra* note 33.

[40] In an address at the National Defense University on January 15, 1986, Secretary of State George Schultz stated:

> There is substantial legal authority for the view that a State which supports terrorist or subversive attacks against another State, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for such attacks. Such conduct can amount to an ongoing armed aggression against the other State under international law.

Reprinted in Department of State Bulletin 15 (March, 1986).

[41] *Nicaragua*, *supra* note 10, at ¶ 14. Nicaragua sued the United States contending that the United State had carried out armed attacks against Nicaragua through US government employees, through paid agents, and through US support of the Contras. The United States countered that its actions were in collective self-defense with El Salvador, because Nicaragua had been assisting and directing guerillas in carrying out attacks against the El Salvadoran government. The United States and El Salvador requested that El Salvador be added as a party, the ICJ refused, and so the United States withdrew its consent to the jurisdiction of the ICJ. The ICJ subsequently held that the United States had committed armed attacks against Nicaragua through its employees and agents, but rejected US responsibility for the actions of the Contras because the United States did not have "effective control" over the Contras. The political motives behind the decision thus became apparent: had the ICJ found the United States responsible for the actions of the Contras, it would have also been forced to acknowledge that Nicaragua was responsible for the actions of the Salvadoran guerillas, thereby validating the United States' position that it was acting in collective self-defense.

[42] Prosecutor v. Tadic (Judgment), ICTY Case IT-94-1 (1999), 38 I.L.M. 1518, ¶ 99 et seq. While some have argued that *Nicaragua* dealt with State responsibility while the Tadic case addressed individual criminal responsibility, the ICTY held that the issue was the same:

> [T]he question is that of establishing the criteria for legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international.

If the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska did not have links with the Federal Republic of Yugoslavia, then the armed conflict in Bosnia was not an international armed conflict giving rise to individual criminal responsibility for grave breaches of the Geneva Conventions.

[43] *Id.* at ¶ 117.

[44] *Id.* at ¶ 124.

[45] Press Release, Office of the Press Secretary, The White House, President George Bush Discusses Iraq in National Press Conference (Mar. 6, 2003).

[46] Press Release, Office of the Press Secretary, The White House, President Bush: Monday "Moment of Truth" for World on Iraq (Mar. 16, 2003).

[47] For a more detailed examination of the legal basis for the use of force against Iraq, see Paul Schott Stevens, Andru E. Wall, and Ata Dinlenc, The *Just Demands of Peace and Security: International Law and the Case Against Iraq*, The Federalist Society (monograph, Sep. 2002) and Andru E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 Israel Yearbook on Human Rights 165 (2002).

[48] S.C. Res. 660 (Aug. 2, 1990).

[49] S.C. Res. 661 (Aug. 6, 1990).

[50] S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 661 (Aug. 6, 1990); S.C. Res. 662 (Aug. 9, 1990); S.C. Res. 664 (Aug. 18, 1990); S.C. Res. 665 (Aug. 25, 1990); S.C. Res. 666 (Sep. 13, 1990); S.C. Res. 667 (Sep. 16, 1990); S.C. Res. 669 (Sep. 24, 1990); S.C. Res. 670 (Sep. 25, 1990); S.C. Res. 674 (Oct. 29, 1990); and S.C. Res. 677 (Nov. 28, 1990).

[51] George Bush and Brent Scowcroft, A World Transformed 416 (Knopf, 1998). Then-US Secretary of State James Baker echoed this position in his memoir, where he wrote that the United States would have been legally justified to act unilaterally in collective self-defense under Article 51. James Baker, The Politics of Diplomacy 278 (1995).

[52] See H. Norman Schwarzkopf, It Doesn't Take A Hero 485-90 (Bantam, 1992).

[53] *Critics Decry 2002 Air Attacks on Iraq that Predated Key U.S, U.N. Votes*, Inside The Pentagon, p.1 (Jul. 24, 2003).

[54] S.C. Res. 949 (Oct. 15, 1994).

[55] S.C. Res. 707 (Aug. 15, 1991); Statement of the President of the Security Council, U.N. Doc. S/23609 (Feb. 19, 1992); Statement of the President of the Security Council, U.N. Doc. S/23663 (Feb. 28, 1992); Statement of the President of the Security Council, U.N. Doc. S/23699 (Mar. 11, 1992); Statement of the President of the Security Council, U.N. Doc. S/24240 (Jul. 6, 1992); Statement of the President of the Security Council, U.N. Doc. S/25081 (Jan. 8, 1993); Statement of the President of the Security Council, U.N. Doc. S/25091 (Jan. 11, 1993); Statement of the President of the Security Council, U.N. Doc. S/25606 (Jun. 18, 1993).

[56] "The Security Council … Acting under Chapter VII of the Charter of the United Nations … Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687…." S.C. Res. 1441 (Nov. 8, 2002).

[57] Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 21, 2003).

[58] Resolution 1441 recalled 678 and 687 and stated that 687 "imposed obligations on Iraq as a necessary step for achievement of its stated objective of restoring international peace and security in the area."

[59] Michael Ignatieff, *The American Empire (Get Used To It.)*, New York Times Magazine (Jan. 5, 2003).

[60] Phillip Bobbit, The Shield of Achilles 6 (2002).

[61] *Id.* at 342.

Labor & Employment Law

Nevada v. Hibbs: An Unsound Departure From the States' Rights Trend

*by Amelia W. Koch and Steven F. Griffith, Jr.**

Editor's Note: Another perspective on the Hibbs case is offered by Michael S. Fried at page 51 of this issue.

In 1997, William Hibbs, an employee of Nevada's Department of Human Resources, sought leave to care for his wife while she recovered from an automobile accident and surgery. When Hibbs felt the leave granted by the State did not comport with the Family and Medical Leave Act of 1993 (FMLA), he filed suit. The District Court dismissed the suit on grounds that Nevada was immune from damage suits under the FMLA pursuant to the Eleventh Amendment to the United States Constitution. The Ninth Circuit reversed and the Supreme Court granted a writ of certiorari to resolve a split amongst the circuits on the Eleventh Amendment/FMLA issue.

Following on the heels of the Court's 2000 decision that the Eleventh Amendment immunizes States from damage claims under the Age Discrimination in Employment Act (ADEA) and 2001's ruling that Americans with Disabilities Act (ADA) claims are also barred, the decision in *Hibbs* seemed a foregone conclusion to many observers. However, in a break from a strong States' rights trend, the *Hibbs* majority concluded earlier this summer that the Eleventh Amendment does not shield the States from suit under the FMLA. To understand (and perhaps take issue with) the Court's rationale, let's review some basic principles.

Consistent with the federalism which permeates the Constitution, the Eleventh Amendment grants the States immunity from damage suits in federal court absent their consent to be sued.[1] In tension with that right, Congress has wide authority to regulate interstate commerce under Article I of the Constitution, and a separate power to enforce the guarantees of the Fourteenth Amendment through Section 5 of that Amendment. In balancing these inevitably conflicting provisions, the Supreme Court has found that if Congress seeks to abrogate Eleventh Amendment immunity pursuant to its power to regulate interstate commerce, that attempt will fail.[2] However, Congress may abrogate Eleventh Amendment immunity when its intention to do so is clear and legislation is enacted pursuant to a *valid* exercise of power under Section 5 of the Fourteenth Amendment.[3] Congress usually makes clear its intention to negate States' immunity so the discrimination/immunity conflict typically boils down to the question of whether the legislation constitutes a valid exercise of Congress' powers under the Fourteenth Amendment. It was against this backdrop that the Court decided that States are immune from suit under the ADEA and ADA.

In *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), the Court found Eleventh Amendment immunity was not abrogated by the ADEA. The Court noted that States retain the authority to make age-based classifications without offending the Fourteenth Amendment, if the classification in question has a "rational basis," i.e., is in furtherance of a legitimate State interest. In contrast, race and gender classifications are subject to higher scrutiny under the Fourteenth Amendment. The Court examined whether there was evidence that age classifications by States led to equal protection violations. In analyzing equal protection jurisprudence concerning age claims, the Court concluded that age classifications only very rarely equated to equal protection violations. The Court ruled that with the ADEA, Congress effectively elevated the standard for analyzing age discrimination claims against the States to a heightened scrutiny not supported by the Fourteenth Amendment. The Court thus concluded that the ADEA is broader than the Fourteenth Amendment, not "congruent" and "proportional" to any equal protection violations identified, and therefore not a valid exercise of Fourteenth Amendment power. Basically, in the absence of any legislative record indicating a pattern of age discrimination in employment by the States which equated to an equal protection violation, and would thus require implementation of the ADEA, Congress' attempt to abrogate States immunity was not a valid exercise of its power under the Fourteenth Amendment.

In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court was presented with the question of whether States are immune from suit under the ADA. Following *Kimel*, the Court concluded that States are not required by the Fourteenth Amendment to make special accommodations for the disabled as long as their actions toward that group are rational and serve a legitimate State interest. Further, the Court examined whether a historic pattern of disability discrimination by the States existed. The Court noted there was little evidence that disability discrimination extended beyond the private sector, and what existed was insufficient to permit Congress to abrogate States immunity for a statute as strict in application as the ADA. As in *Kimel*, the Court found that to uphold application of the ADA to the States would effectively allow Congress to heighten the standard of review for discrimination against the disabled under the Fourteenth Amendment from "rational basis" to a higher level. The Court also found that congruence and proportionality were lacking primarily because the ADA's requirements far exceed what is constitutionally required.

So, just to review the bidding, after *Kimel* and *Garrett* the road map for examining Eleventh Amendment immunity was this:

- ascertain whether Congress intended to abrogate States' Eleventh Amendment immunity;
- identify the Constitutional right at issue;
- examine the equal protection jurisprudence concerning that right;
- note the level of review for that right and what it takes to show a violation;
- determine whether Congress found a history and pattern of that Constitutional violation by the State(s); and
- determine if the legislation in question was "congruent with" and "proportional to" the injury to be prevented or remedied.

Given *Kimel* and *Garrett*, recent pronouncements in a strong States' rights trend, many expected Mr. Hibbs' FMLA claim to be barred by the Eleventh Amendment.

In *Hibbs*, the Court quickly concluded that Congress intended to abrogate State immunity with enactment of the FMLA. The question then became whether or not Congress acted within its Constitutional authority. Based on precedent, the Court noted that Congress would be within its authority if it enacted the FMLA pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. That is, Congress must have identified an equal protection violation by the States, and then determined whether the FMLA's means for preventing injury were "congruent with" and "proportional to" the injury to be prevented.

Relying on the language of the FMLA, the Court found that the Act was intended to protect against and prevent gender discrimination in the workplace. That classification removes us from the "rational basis" environment of *Kimel* and *Garrett*, and transports us to the land of heightened scrutiny inhabited by classifications based upon gender. Heightened scrutiny means important governmental objectives must be established as the aim of any suspect classifications, and those classifications must be substantially related to achievement of those objectives. It also turns out to mean Congress can more readily act to impose its will on the States.

Addressing whether or not Congress had evidence of a pattern of gender discrimination in employment by the States (on which the dissent rightly took the majority to task) the Court examined the legislative record before Congress, as well as its own precedent. The Court first noted that its own decisions, until recently, often sanctioned restrictions and classifications regarding women while utilizing stereotypes regarding their "maternal functions." Further, the Court found that the evidence before Congress supported the conclusion that an extensive history of gender discrimination in employment existed in both the private and public sectors. Consequently, a legitimate objective – remedying gender discrimination by the States in violation of the equal protection clause – existed for enacting the FMLA. The Court then reviewed whether the twelve week leave guarantee was "congruent and proportional to the targeted violation."

The Court noted that Congress had already attempted to address gender discrimination in employment with the enactment of Title VII and the Pregnancy Discrimination Act, but that those attempts were unsuccessful. Further, the Court reasoned that an across-the-board routine benefit for all eligible employees would ensure that family-care leave could not be construed as an inordinate drain on the workplace caused by female employees alone. The Court also found that the FMLA was narrowly targeted at the one aspect of the employment relationship in which gender-based discrimination remained strongest: family-care leave. Finally, the Court was impressed by the exceptions in the FMLA, which would limit the breadth of its applicability to the States (as well as, of course, to private employers). Therefore, finding evidence of a violation and that the remedy was appropriate, the Court concluded that the FMLA was a valid exercise of Fourteenth Amendment powers which abrogated States' immunity. Thus, suits against the States based upon the FMLA are not barred by the Eleventh Amendment.

In dissent, Justice Kennedy, joined by Justices Scalia and Thomas, focused on the aspect of the majority's opinion which appeared most vulnerable: whether evidence was presented to Congress that the *States* exhibited a pattern or practice of discrimination in employment based upon gender. In particular, Justice Kennedy noted that the FMLA findings of purpose were devoid of any discussion of such evidence, and that all evidence considered by Congress concerned discriminatory practices in the private sector, not the public. Further, to the extent that any such evidence existed, the majority's opinion relied on legislative evidence before Congress regarding a bill other than the FMLA: one of its predecessors which failed to pass seven years earlier.

Finally, Justice Kennedy noted that, in truth, the States appeared to be well ahead of Congress in providing gender-neutral family leave benefits by the time Congress enacted the FMLA. In particular, thirty States, as well as the District of Columbia and Puerto Rico, had adopted some form of such leave, and Justice Kennedy argued that this was evidence that the States were *not* practicing or exhibiting a pattern of discrimination. In fact, regarding the matter before the Court, Justice Kennedy pointed out that Nevada not only provided its employees (on a gender-neutral basis) up to a year of unpaid leave, but also permitted absences of over a year subject to approval and other conditions. The dissent concluded with the observation that even if the evidence existed to support a pattern of discrimination based on gender among the States, the remedy imposed (an across-the-board twelve week grant of leave) was not "congruent and proportional" as a remedy to that problem. Thus, Justice Kennedy would have concluded that Congress did not abro-

gate the States' immunity with the FMLA.

For Justice Kennedy, proof that the FMLA confers an entitlement, and is not remedial, is found in the fact that as long as States give twelve weeks leave as a floor, they can otherwise discriminate between men and women in leave issues. This truth does, in fact, seem to gut the argument that the Act is meant only to "remedy" gender discrimination. Justice Kennedy would have found the FMLA a valid exercise of commerce clause power, thus binding the States and permitting enforcement by the federal government and injunctive relief, but not subjecting the States to money damage suits by citizens.

In a separate dissent, Justice Scalia said that he would have required some evidence that Nevada had exhibited a pattern or practice of gender discrimination in employment. In particular, he noted that "guilt by association" among the States was unsupported in the Constitution, likening it to an individual's right to a determination that a statute is constitutional as applied to him.

The Supreme Court has indicated over the past several years a willingness to limit Congress' ability to impinge upon States' rights. With *Kimel* and *Garrett*, the trend appeared to be towards barring suits against a State absent a clear violation of a right secured by the Fourteenth Amendment supported by evidence of State conduct. However, in *Hibbs*, the Court stepped back from this rule and concluded that the protections afforded by the FMLA were equivalent to those protections already afforded by the Fourteenth Amendment (in itself a big step) without really examining whether those protections were in jeopardy via State action. The Court tried to make this ruling seem of a piece with precedent, but as the dissent points out, *Hibbs* is a huge departure from *Kimel* and *Garrett*.

Like the evidence before Congress on the ADEA and ADA, the evidence of State gender discrimination in employment seemed sparse. In particular, nobody pointed out much of anything regarding actual discrimination in connection with leave plans, except to say there was discrimination in the "administration of leave benefits." To the contrary, the wealth of statutory protections available under State law for the same relief provided by the FMLA (and, in some cases, greater) indicated that the States had taken affirmative steps to offer gender-neutral leave to workers.

Hibbs represents a departure from the high standard requiring actual evidence of a violation to support abrogation of States' immunity under the Eleventh Amendment. The majority noted that the gender classification equals heightened scrutiny, which in turn renders it "easier for Congress to show a pattern of State Constitutional violations." But still ….. one would have hoped more evidence of discrimination would have been required before stripping States of their immunity. As the dissent puts it, the majority decision suggests that unconstitutional conduct can be inferred from State benefits simply falling short of what Congress deems best.

Even more than the "evidence of a violation" problem, the really troubling aspect of the decision is that it makes short work of the "congruence and proportionality" test and skims like a stone on a pond over the notion that the FMLA confers an affirmative benefit rather than merely proscribing particular conduct that discriminates on the basis of gender. The only real problem identified by the majority in connection with leave in the state employment context was discrimination in the administration of leave benefits. It is not at all clear the FMLA will cure that (it probably cannot) and mandated leave certainly seems a remedy out of proportion to arguably uneven application of gender-neutral leave policies.

Of greater concern than the *Hibbs* holding regarding the FMLA and Eleventh Amendment immunity is the state in which the Court's precedent now lies. The door is now ajar for Congress to revisit perceived discrimination by the States in employment (and other areas) and fashion its own menu of remedies and benefits.

* Ms. Koch is a partner in the New Orleans office of Locke Liddell & Sapps, LLP, where she practices in the areas of employment, antitrust, health care law and litigation. Mr. Griffith is a litigation associate in Locke Liddell's New Orleans office.

Footnotes

[1] *Hans v. Louisiana*, 134 U.S. 1 (1890).

[2] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

[3] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

The Breadth of *Hoffman Plastic*

*By Michael T. Taylor**

In *Hoffman Plastic Compounds, Inc.*, v. NLRB, 122 S.Ct. 1275 (2002), the Supreme Court was presented with the following question: Can the National Labor Relations Board award backpay to a worker who has never been legally authorized to work in the United States? The Court held that awarding backpay under these circumstances is not within the Board's remedial discretion.

There have been several proclamations in the legal community regarding the breadth of *Hoffman Plastic*. For instance, shortly after the Court rendered its decision, the General Counsel for the National Labor Relations Board issued a memorandum to provide guidance to the Regions. In GC Memorandum 02-06, the GC stated that the "clear thrust of the [decision] precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstance of their hire." The GC instructed the Regions to seek backpay even if an employer knowingly employed an undocumented worker who was unlawfully discharged. However, the GC also stated that the decision does not apply to work "already performed." Stated another way, the decision does not apply to non-discharge situations. The GC stated that an example is where there has simply been a unilateral change of pay or benefits. The GC instructed the Regions to seek backpay for work "already performed." (These are just a few areas in which the GC provided guidance to the Regions in light of the decision.)

The U.S. Department of Labor also responded to *Hoffman Plastic*, issuing a fact sheet regarding the breadth of the decision. In Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastic* decision on laws enforced by the Wage and Hour Division, the DOL took the position that the decision does not apply to laws that the DOL enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Those laws require the DOL to seek backpay for work "already performed." The DOL stated that it would continue to enforce those laws regardless of whether a worker is documented or undocumented.

The Equal Employment Opportunity Commission provided guidance on the impact of *Hoffman Plastic* as well. In its June 27, 2002, "Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws," the EEOC stated that in light of *Hoffman Plastic*, and the fact that it had previously relied on Board cases in concluding that undocumented workers are entitled to all forms of monetary relief, it was rescinding prior guidance stating that undocumented workers subject to unlawful discrimination are entitled to post-discharge backpay. The EEOC stated that it would still seek other forms of equitable relief for undocumented workers, however.

Because the Board and the courts will eventually have to grapple with these issues, this article analyzes the breadth of *Hoffman Plastic*. The author contends that in terms of the Board's remedial discretion, the decision is a broad rather than a narrow one. That is, the decision applies when an employer knowingly employs an undocumented worker, and the decision also applies to work "already performed." The author also contends that the logic of the decision is applicable to the remedial authority of other federal agencies as well, such as the DOL and the EEOC.

This article starts with a brief description of the facts of *Hoffman Plastic*, followed by narrative of the Board's reasoning for the decision. The article then discusses the breadth of the decision. Finally, this article draws a conclusion and briefly depicts the impact of the decision.

BACKGROUND

In *Hoffman Plastic*, the National Labor Relations Board determined that the employer had discharged employee Jose Castro in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. The Board ordered backpay and other equitable relief. At the compliance hearing, which was held in order to determine the amount of backpay that was due, Castro testified that he had never been legally authorized to work in the United States. The Administrative Law Judge found that based on this testimony, the Board was precluded from awarding backpay to Castro according to *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and by the Immigration Reform and Control Act of 1986 (IRCA), which makes it unlawful for employers knowingly to hire undocumented workers or for workers to use fraudulent documents to establish employment eligibility. The Board reversed the ALJ's decision with respect to the award of backpay, citing its precedent holding that the most effective way to further the immigration policies embodied in IRCA is to provide the NLRA's protections and remedies to undocumented workers in the same manner as to other employees.

The Supreme Court was subsequently presented with the following question: Can the National Labor Relations Board award backpay to an unlawfully discharged worker who has never been legally authorized to work in the United States? In addressing this question, the Court stated that although the Board has broad discretion in selecting and fashioning remedies for violations of the National Labor Relations Act (NLRA), the Court has never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.

As authority for awarding backpay to employees who violate federal law, the Board had first relied on *ABF Freight System, Inc. v. NLR*, 510 U.S. 317 (1994). In *ABF*

Freight, the Court had held that an employee's false testimony at a compliance proceeding did not require the Board to deny reinstatement with backpay. The *Hoffman Plastic* Court determined that the Board's reliance on *ABF Freight* is misplaced for several reasons: (1) that case involved employee misconduct related to internal Board proceedings; (2) that case did not involve a situation where federal statutes or policies administered by other federal agencies were implicated; and (3) that case did not involve employee misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law. The Court concluded that the appropriate line of inquiry here was whether the Board's remedial preferences trench upon federal statutes and policies unrelated to the NLRA.

The Board had taken the position that *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) only applies to undocumented workers who left the United States and cannot claim backpay without lawful reentry. In *Sure-Tan*, the Court had held that the Board was prohibited from effectively rewarding a violation of the Immigration and Nationality Act (INA) by reinstating an unlawfully discharged worker not authorized to reenter the United States. The Court had opined that in order to avoid "a potential conflict with the INA," the Board's reinstatement order had to be conditioned on proof of the workers' legal reentry. The Court determined that with respect to the award of backpay, "employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

The *Hoffman Plastic* Court determined that addressing the merits of the Board's position was unnecessary in the instant matter and that the question presented would be "better analyzed through a wider lens." The Court explained that in 1986, Congress enacted the IRCA, "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." The IRCA "'forcefully' made combating the employment of illegal aliens central to the '[t]he policy of immigration law.'" Under the IRCA, employers are required to verify the identity and eligibility of all new hires by examining specified documents before they begin work. If a worker is unable to present the required documentation, the worker cannot be hired. If the employer unknowingly hires an undocumented worker, or if the worker becomes undocumented while employed, the employer is compelled to discharge the worker on the discovery of such status. Employers who violate the IRCA are punished by civil fines and may be subject to criminal prosecution. The IRCA also makes it a crime for an undocumented worker to subvert the employer verification system by tendering fraudulent documents. Undocumented workers who use or attempt to use such documents are subject to fines and criminal prosecution.

The Court observed that the Board's award of backpay to "an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud" runs counter to the policies underlying IRCA, which the Board has no authority to enforce or administer. Thus, the award is not within the Board's remedial discretion.

The Court disagreed with the Board's position that awarding backpay to the unlawfully discharged employee "reasonably accommodates" the IRCA. The Court explained:

> What matters here . . . is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. Far from 'accommodating' IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.

The Court stated that awarding backpay in a case like this also condones and encourages *future violations* of the IRCA. For instance, noted the Court, "had the INS detained Castro, or had Castro obeyed the law and departed to Mexico, Castro would have lost his right to backpay. Castro thus qualifies for the Board's award only by remaining inside the United States illegally." Similarly, explained the Court, "Castro cannot mitigate damages, a duty our case law requires, without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers."

The Court concluded:

> [A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

The Court noted that the Board had already imposed other significant sanctions against the employer. Those sanctions included orders that the employer cease and desists its violations of the NLRA and that the employer conspicuously post a notice to employees setting forth their rights under the NLRA. The employer would be subject to contempt proceedings should it fail to comply with these orders. The Court also noted that in light of the practical workings of the immigration laws, any perceived deficiency in the NLRA's existing remedial arsenal must be addressed by the congressional action, not the courts.

ANALYSIS

In determining the breadth of *Hoffman Plastic*, the first issue that needs to be addressed is whether the decision is applicable to a situation where an employer knowingly employed an undocumented worker. This author agrees with the General Counsel of the National Labor Relations Board that the decision is applicable to this type of situation.

The GC correctly notes, "[T]he clear thrust of the majority opinion precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstances of their hire." More specifically, Congress has expressly made it illegal for an undocumented worker to be employed in the United States; consequently, awarding backpay under these particular circumstances would simply trivialize federal immigration law, which the Board has no authority to enforce or administer. It would encourage undocumented workers to successfully evade immigration authorities, condone prior violations of immigration laws by undocumented workers, and encourage future violations by undocumented workers.

Now some may take the position that awarding backpay under these circumstances would discourage some employers from recruiting and hiring undocumented workers. Thus, the award would be consistent with federal immigration policy. Theoretically speaking, that may be true. But in practical terms, employers who engage in this type of activity will already be subject to civil and criminal penalties under IRCA. It is highly unlikely that an employer would take the following position: "Well, I am going to be subject to a fine and the possibility of confinement in prison if I hire this undocumented worker, but because I may be subject to additional labor law costs sometime in the future, I am not going to hire them." In short, an additional cost of a labor law violation under these circumstances is not going to actually deter employers from engaging in this type of activity.

The next issue that needs to be addressed is whether the decision is applicable to work "already performed." An example of work already performed is where there has simply been a unilateral change of pay or benefits. This author disagrees with the General Counsel's position on this issue.

The GC focuses on the Court's use of the phrase "work not performed" to support his position that the decision is indeed a narrow one. This author contends that while, to be sure, the Court uses the phrase "work not performed" in the decision, the Court also uses the phrase "for wages that could not lawfully have been earned" immediately thereafter. The GC conveniently ignores this latter phrase used by the Court. And, again, the clear thrust of the decision is that Congress has expressly made it illegal for an undocumented worker to be employed in the United States; consequently, awarding backpay under these particular circumstances would trivialize federal immigration law, which the Board has no authority to enforce or administer. It would still encourage undocumented workers to successfully evade immigration authorities, condone prior violations of immigration laws by undocumented workers, and encourage future violations by undocumented workers.

The only difference here is that because the backpay award would be for work already performed, an undocumented worker would not be required to mitigate damages. As noted by the Court, an "[undocumented worker] cannot mitigate damages, a duty [that] case law requires, without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers." Thus, awarding backpay under these particular circumstances would not encourage future violations of immigration laws in terms of undocumented workers mitigating damages. It would still encourage future violations of immigrations laws, however, in terms of undocumented workers remaining inside the United States illegally in order to maintain the right to backpay. As noted by the Court in the decision, if the INS detains an undocumented worker, or if an undocumented worker obeys the law and leaves the country, an undocumented worker loses his or her right to backpay.

The next question is whether the logic of *Hoffman Plastic* is applicable to other federal agencies as well, such as the Department of Labor and the Equal Employment Opportunity Commission. This author contends that it is. Regardless of whether it is the DOL or the EEOC that is seeking backpay, the clear thrust of *Hoffman Plastic* is that Congress has expressly made it illegal for an undocumented worker to be employed in the United States; consequently, awarding backpay under *any* circumstances would trivialize and frustrate federal immigration law.

Some may contend that as a matter of public policy we need undocumented workers in our workforce. They, the argument goes, are the ones who perform the menial labor that citizens in this country refuse to perform. This author contends that if that is indeed the case, it is a matter of public policy. And Congress addresses matters of public policy, not the courts. Thus, if this is indeed a legitimate concern, Congress could pass legislation expanding our immigration laws so that we will have more lawful immigrants to perform those menial jobs that citizens in this country do not want to perform.

Some may also contend that with respect to employers who fail to pay undocumented workers for work "already performed," basic fairness dictates that employers should not benefit from cheap or free labor. This author agrees. However, this author also believes that undocumented workers should not benefit from violating current federal immigration law; otherwise, current federal immigration law would be meaningless. That said, in order for employers not to benefit from cheap or free labor, this author suggests that Congress should enact legislation that requires employers who fail to

pay undocumented workers for "work already performed" in violation federal law to pay the amount owed to some kind of immigration fund. The money could be used to fight illegal immigration and to help people who have lawfully immigrated to this country. The latter would include helping them becoming citizens of this country. This would be an equitable approach to what this author acknowledges is a very difficult situation.

CONCLUSION

In terms of the National Labor Relations Board's remedial discretion, *Hoffman Plastic* is a broad decision. The decision applies when an employer knowingly employs an undocumented worker, and also applies to work "already performed." The logic of the decision is applicable to the remedial authority of other federal agencies as well, such as the Department of Labor and the Equal Employment Opportunity.

As stated above, this author proposes that to prevent employers from benefiting from cheap or free labor, Congress should enact legislation requiring employers who fail to pay undocumented workers for work "already performed" in violation of federal law to pay the amount owed into a kind of immigration fund. That money could be used to fight illegal immigration and help *legal* immigrants by, among other things, assisting them in becoming U.S. citizens.

Because backpay awards serve as strong deterrents to employers' violations of federal law, *Hoffman Plastic* will have profound impact on the remedial authority of federal agencies. (The decision may even impact state law as well, affecting everything from backpay for wrongful discharge causes of action to backpay for workers' compensation claims.) Unless Congress acts in the near future, there is going to be a tidal wave of cases in which the courts will have to decide the breadth of *Hoffman Plastic*. This article has attempted to aid the courts in their future task.

* Mr. Taylor is an attorney with the National Labor Relations Board in Washington, D.C.

Litigation

The Splintered Opinion in *Green Tree*: A Roadmap Through Arbitration Federalism*

*by Lori Singer Meyer**

In *Green Tree v. Bazzle*,[1] a case decided in June, 2003, the United States Supreme Court faced the question: does the Federal Arbitration Act[2] (FAA) prohibit imposing class proceedings on an arbitration agreement that is silent on the topic of class-wide arbitration? Petitioners wanted the Court to rule that the FAA preempts South Carolina state law allowing a court or arbitrator to impose class proceedings on an arbitration. However, the Court declined to reach a majority decision. Instead, the Court reached a judgment in the case and issued a highly splintered decision: an opinion and a concurrence in the judgment only and two dissents.

Essentially, the opinions provide the justices' respective approaches to arbitration federalism in the face of silence in an arbitration agreement. According to Justice Thomas, the FAA does not apply to state proceedings on arbitration; hence, the Court has nothing to say about the question asked. According to Stevens, federal law does not come into play until one of the parties raises an issue that must be addressed by federal law. Because the question asked in the case is purely one of contract interpretation, which a state court can decide, Stevens would leave the lower court result alone. Stevens believes that simply asking if the FAA has anything to say about a question does not give the Court *carte blanche* to dig for a deeper conceptual framework where the FAA may be implicated. Rehnquist, on the other hand, believes that the general framework of the FAA requires that the parties to an arbitration agreement affirmatively consent to not only the class action, but any litigation management tool. Therefore, it is impermissible for a court or arbitrator to impose on an arbitration proceeding any procedures other than those explicitly mentioned in the terms of the agreement. Finally, Breyer believes that federal law requires submitting the question asked in *Green Tree* to an arbitrator picked by the putative class representative and Green Tree, since the parties agreed to let an arbitrator decide all questions arising from the agreement.

In order to give a sense of the size of the set of litigation management mechanisms that a party might want to be read into an arbitration agreement, at oral argument Justice Breyer raised the perhaps ridiculous example of whether a court or arbitrator could insist that the parties litigate in a coal mine without any oxygen simply because an arbitration agreement does not mention the coal mine.[3] It is hard to believe that silence in an arbitration agreement could be read as authorizing the use of this requirement if requested by one of the parties. But beyond the class action, is it hard to believe that a party would want a protective order issued for trade secrets? An arbitration agreement might not mention such an order and neither does the FAA. The variations on the theme of what a party might want imposed on an arbitration proceeding are endless.

Noticeably absent from petitioner's question asked in *Green Tree* is *who* would be prohibited from imposing class proceedings on an arbitration agreement that is silent about them. Hence, the final result from the justices' different approaches to arbitration federalism is the answer to the question, *who* will be deciding whether the FAA preempts state law when an arbitration agreement says nothing. Would it be an arbitrator or would it be the state court? Green Tree Financial would have preferred never to even get to that question. However, since the Court by and large has decided in *Green Tree* that class proceedings are not *in toto* prohibited in the face of silence under the FAA, but that a court or arbitrator must decide the issue on a case by case basis, the question *who* decides has now become the next important and very practical concern for litigants. For the time being, the lower courts will struggle with this issue.

This essay breaks into four sections; *Green Tree's* History, Certiorari Review, The Preemptive Force of the FAA, and *Who* Decides. It ends with a brief conclusion.

***Green Tree*'s History**

Green Tree originated in the South Carolina state court system. Though there was a dispute over whether the FAA applied to the arbitration clause, the Supreme Court of South Carolina found that it wasn't necessary to resolve that issue because it held as a matter of state law that silence in an arbitration agreement could be interpreted to permit class arbitration. Hence, even if the FAA had preemptive force, the contract would be interpreted as a matter of state law by the arbitrator or the court. The FAA has nothing to say when a contract is interpreted.

In *Green Tree,* Green Tree Financial Corp. entered into lending agreements with respondents Bazzle and Lackey. The lending documents included an arbitration clause that did not mention class arbitration. Each respondent sought relief as the respective representative of a class in the South Carolina state court. The gravamen of the respondents' complaint was that Green Tree had failed to provide a required South Carolina consumer loan notice provision.

The class action has been a tool of particular interest during the past decade to consumer lenders and consumers alike. Judge Richard Posner could not have better described why lenders have adopted arbitration agreements to take their disputes out of the courts where class actions clearly are permissible. In the majority opinion in *In the Matter of Rhone-Poulenc Rorer Incorporated*,[4] the Seventh Circuit issued a mandamus order decertifying a class (the appellate court could not yet rule on the appeal of the certification order). Posner wrote

> [consider]the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them. Consider the situation that would obtain if the class had not been certified. The defendants would be facing 300 suits....Three hundred is not a trivial number of lawsuits. The potential damages in each one are great. But the defendants have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well....These are guesses, of course, but they are at once conservative and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands. All of a sudden they will face thousands of plaintiffs...They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle... Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements."[5]

However, consumers feel it is an abrogation of a right to pursue a class action if they can not pursue class proceedings in the arbitral forum. Hence, there has been a considerable amount of litigation in the lower courts over whether consumers can proceed as a class under an arbitration agreement that does not mention class proceedings.

In the *Bazzle* case, the trial court certified a class action and then ordered the dispute resolved by arbitration. In *Lackey*, Green Tree sought to compel arbitration; then, when the case went to arbitration, the arbitrator (the same arbitrator as in the Bazzle case) decided the arbitration should proceed as a class proceeding.

In both the *Bazzle* and *Lackey* cases, the arbitrator awarded the class damages and attorneys' fees. The class damages in *Bazzle* were approximately 11 million dollars and the damages in *Lackey* were approximately nine million dollars. The two classes together consisted of more than 3700 individuals and the total award including attorneys' fees was approximately 27 million dollars. The trial court confirmed the awards and Green Tree appealed both cases, claiming, among other things, that class arbitration was legally impermissible under the FAA. The Supreme Court of South Carolina withdrew the cases from the lower appellate court, assumed jurisdiction, and consolidated the proceedings. In its decision, the Supreme Court concluded that the arbitration agreement was silent on the issue of class proceedings. It further concluded that

> ...whether section 4 of the FAA applies in state court is debatable. Section 4 provides, '[a] party aggrieved by the alleged failure ... of another to arbitrate under a written agreement for arbitration may petition a *United States district court* ....'
>
> In any case, this Court can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent. First, under general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. 'As a matter of pure contract interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than to permit arbitral class actions.' [6]

Hence, the Supreme Court of South Carolina found the trial court had correctly decided that the arbitrator did not act in manifest disregard of the law when he permitted class arbitration to proceed under the arbitration agreement.

Certiorari Review

Green Tree sought *certiorari* review of the Supreme Court of South Carolina's decision in the United States Supreme Court. Green Tree argued that the Supreme Court of South Carolina's decision violated the FAA, which requires that arbitration agreements be enforced in accordance with their terms, and that silence in an agreement must be read under the FAA as prohibiting class arbitration. In other words, that the FAA preempts state law that would allow an alternative result. The Court granted *certiorari* to resolve a conflict among the state and federal courts on the issue. The Seventh Circuit, Eighth Circuit and Alabama Supreme Court had held that courts have no authority to order class-action arbitration where an arbitration agreement does not expressly provide for it. The California and South Carolina state courts had held that the FAA does not preempt class-wide arbitration if it is permissible under state law.

The Preemptive Force of the FAA

To the author of this essay, it seems obvious that lenders such as Green Tree Financial Corp. will include a "no class arbitration" clause in arbitration agreements from now on. Hence, a majority decision on the question before the Court likely would have been of limited value. However, there are other litigation management tools than the class action that a litigant might want to import into an arbitration that an arbitration agreement does not mention. A broader treatment

of what the FAA prohibits state law from imposing on silence could be quite valuable. This the Court provides.

It is interesting to consider in some depth the four opinions in *Green Tree.*

In his dissent, Justice Thomas writes that he does not believe that the FAA pertains to state proceedings. Hence, he would have left the South Carolina courts to decide as a matter of state law whether class proceedings might be imposed upon the arbitration agreement.

In a concurrence in the judgment, Justice Stevens follows Thomas to some extent. Stevens does not believe federal law has anything to say about the question presented to the Court. If a party had challenged who should decide the question, then Stevens allows that FAA concerns would be invoked. However, since no one has, the lower court ruling should be left undisturbed, even though Stevens believes that in the first instance the contract should have been interpreted by the arbitrator and not the court.

Unlike Thomas and Stevens, the remaining justices believe that the FAA governs the question asked in *Green Tree*. However, the justices split in their view of exactly what that governance means. Because they split on how to conceptualize the FAA's governance of the question asked in the case, the two camps reach different answers to the question of *who* should decide whether a party is prohibited from imposing class proceedings on an arbitration agreement.

Chief Justice Rehnquist's dissent adopts Green Tree's argument that (1) the cornerstone of the FAA is that parties must consent to be bound by an arbitration agreement; therefore, (2) when an arbitration agreement does not mention class arbitration, a party can not affirmatively consent to class proceedings; therefore, (3) the trial court must act as a gatekeeper protecting the bargain consented to between parties. Hence, Rehnquist reaches the conclusion that as a matter of federal law the trial court is the institution that must decide whether a plaintiff may represent a class (or any litigation device) under an arbitration agreement that does not mention it.

On the other hand, Justice Breyer, who delivers the judgment of the Court, counters Rehnquist's reading of the law. Breyer writes that first and foremost it is the *arbitrator* who must decide the question of whether an arbitration agreement forbids class arbitration. The parties clearly consented to this one arbitrator, and now he should interpret the agreement. Breyer believes that the issue in *Green Tree* is a matter of contract interpretation - to reach this conclusion, Breyer relies on *Howsam v. Dean Witter Reynolds*, *Inc.*[7] where the Court had decided that the arbitrator should determine a certain procedural gateway matter.

Hence, Thomas' reading of federalism would leave the state courts to determine whether any legal mechanism could be imposed on an arbitration proceeding. Stevens would also let state courts decide unless a direct question was asked that implicated the FAA. Rehnquist would submit the question to the state trial court for an initial determination of whether the parties had consented to be bound by a particular procedure that was not mentioned in their arbitration agreement; Breyer would submit the question to the arbitrator picked by the parties as a matter for the arbitrator to decide under all relevant law.

***Who* Decides**

Two of the opinions in *Green Tree*, those authored by Rehnquist and Breyer respectively, accept that the FAA preempts state law governing the question asked and center on *who* would decide what federal law mandates. As a practical matter, litigants will be concerned about who the decision-maker will be of whether a litigation tool such as the class action may be used in an arbitration in the face of silence in the arbitration agreement.

An arbitrator's decision is given considerable deference by the courts, as can be seen in the Supreme Court of South Carolina's ruling that the arbitrator in *Green Tree* did not act in manifest disregard of the law when he permitted class arbitration to proceed. A trial court deciding whether the parties consented to use of a particular management tool in arbitration typically will be reviewed *de novo*. As Green Tree argued at oral argument,

> ...The problem is, why would we make a judgment at the outset of this process that says, we are going to enter into the most informal decision-making process with no right to judicial review and with $27 million dollars at stake.... No one would... It would be madness.[8]

Hence, even though Green Tree's claim that it would pick different arbitrators for each of thousands of arbitrations might raise eyebrows, the fact that Green Tree would not consent to arbitrate its disputes if it arbitrates in a class proceeding makes wholesale sense.

However, as it is likely that "no class arbitration" clauses will be added to Green Tree's arbitration agreements from now on, the class action point is somewhat moot. But, take for example whether there can be arbitration at the bottom of a coal mine without any oxygen. Under Breyer's opinion, it would be up to an arbitrator to interpret the arbitration agreement according to state law to determine if the parties wanted to do that. Would the arbitrator have freedom to order the arbitration to proceed if state law didn't prohibit arbitrating in a coal mine? And if he did, under the FAA and state law, would such an order be read by a reviewing court as a manifest disregard of the law? Or just a bad idea? Or perhaps would a court be able to find silence on a topic in an agreement that a party wants to use to be, say, unconscionable? Or some similar state law defense to a contract? Under *Perry v. Thomas,*[9]

> ...state law, whether of legislative or judicial origin, is applicable...*if* that law arose to govern issues concerning validity, revocability and enforceability generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with th[e] requirement of Section 2 [of the FAA]...[10]

A defense of unconscionability to silence which means in effect a requirement to arbitrate in a coal mine without oxygen does not seem a defense that would be raised solely to an arbitration agreement, but rather to *any* agreement about dispute resolution.

It seems likely that a court would be able to find unconscionable an arbitrator's decision that required in the face of silence in the agreement that the parties must arbitrate and suffocate. But, consider the requirement that protective orders be issued for trade secrets? A court reviewing an arbitration agreement on that would be hard pressed to find that an unconscionable requirement for the parties, even though a court in the first instance may not have found that the parties actually consented to this requirement.

Justice Thomas would let the state courts hash out all these issues for themselves, without having the FAA hanging over their shoulders. In *Green Tree*, Stevens would leave the issue for the state courts since the FAA was not directly implicated in the question asked. Stevens and Breyer, however, believe the arbitrator in the first instance should decide what silence in an arbitration agreement prohibits. Therefore, the courts would be able to review silence in arbitration agreements only for whether an arbitrator acted in manifest disregard of the law or would be able to review the agreement itself as being unconscionable or a like defense to the agreement's enforceability. Rehnquist would mandate that the court in the first instance review whether the parties actually consented to having a particular litigation management tool imposed on the arbitration agreement. This decision would be reviewable *de novo* by a higher court. For Stevens and Breyer's approach, if a trial court found that an agreement was unconscionable or that an arbitrator acted in manifest disregard of the law, the appellate court would also review the court's decision *de novo*. But the appellate court would have no access to review an arbitrator's decision that was not in manifest disregard of the law, say interpreting silence in an agreement to permit an arbitrator issuing protective orders for trade secrets.

Conclusion

In sum, the justices' differing views on arbitration federalism lead, in the final result, to differing answers of *who* should decide whether a litigation tool can be prohibited by the FAA. As a practical matter, litigants will be greatly concerned with whether an arbitrator or a court will be deciding key questions about how a case may be managed because of the reviewability of that decision for error by a higher court. Five justices of the court seem to believe that it is up to the arbitrator to decide whether silence in an arbitration agreement prohibits importing a litigation management tool into an arbitration proceeding; hence, these justices would leave as unassailable by courts litigation devices that it would not seem in manifest disregard of the law for parties to use. Four justices would have a court review an arbitration agreement in the first instance for whether parties consented to the use of a litigation tool. Perhaps this breakdown signals how the justices will rule in an appropriate case in the future.

* Lori Singer Meyer is a graduate of the University of Chicago Law School, former law clerk to Judge Paul Cassell of the District Court of Utah and slated to clerk for Judge Diarmuid O'Scannlain of the Ninth Circuit Court of Appeals in 2004-2005.

Footnotes

* *See* Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 Fla. L. Rev. 175 (2002).

[1] 123 S.Ct. 2402 (2003).

[2] 9 U.S.C. Section 1, *et seq.*

[3] Oral argument transcript at 34-36.

[4] 51 F.3d 1293 (7th Cir. 1995).

[5] *Id.* at 1297-1298.

[6] *Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349, 359-360 (S.C. 2002).

[7] 537 U.S. 79 (2002).

[8] Transcript at 29.

[9] 482 U.S. 483 (1987).

[10] *Id.* at 492, n. 9.

Punitive Damages and the Supreme Court: A Tragedy in Five Acts

*By Michael I. Krauss**

Tort Law and Private Ordering

First, I want to situate Tort law in a way that allows us to understand punitive damages and to imagine the role they should play in tort law. Political legal philosophers conventionally distinguish between aspects of law that regulate *private ordering* and aspects of law that regulate *public ordering*.[1]

Private ordering describes the juridical relations between citizens: so Property Law, Contracts, Torts, and Family Law essentially regulate this ordering. These are the rules we need to self-determine, in a way, to live our lives as free and responsible human beings.

Public Ordering describes the juridical relations between a citizen and the State. Criminal law, administrative law, tax law, and welfare law are all part of public ordering. Public ordering is the *only* kind of legal order in totalitarian societies: there's no such thing as *property*, as we know it – rather, there's just a grant from the state, returnable to the state; there's no *contract* between consenting adults, because that would allow some people to advance more than others; and there's no *tort* law – there's no such thing as a private wrong, only the state can be wronged, and if you do something wrong it's criminal law that takes over.

So tort law is an essential component of freedom, seen this way. It's regulation of non-contractual behavior among humans, wherein citizens make good the harm they have wrongfully caused others. All this takes place without the intervention of prisons and the police, which are components of public ordering.

When property becomes a loan from the state, when all contracts are with the state only (contract law disappearing to be replaced by administrative law), when tort law (horizontal) gives way to criminal law (vertical), then private ordering will have been dissolved, defiled, and only public ordering remains. A monopoly of public ordering is simply incompatible with a society of free and responsible individuals.

Introduction to Tort damages in general, punitive damages in particular

The foundation and best explanation of tort law is *corrective justice*. When a man wrongs someone, he must make that wrong good. He must correct the private injustice.

Without a wrong there is no corrective justice requirement. An efficient businessman who, through acceptable competitive techniques, out-competes his competitor owes that competitor nothing as a matter of corrective justice, even though the competitor has suffered a loss. It is not the causing of a loss, but the *wrongful* causing of a loss that creates the corrective justice requirement of compensation.

Wrongful behavior *without damages* likewise creates no corrective justice requirement. Driving home while drunk is negligent, and exposes others on the road to undue danger. Nonetheless, if a drunk driver makes it home without hitting anyone, he has no tort liability toward anyone. Note that he may have committed a *crime* – but that is a matter for public ordering, with all the protections provided when the power of the state is involved (constitutional protection against self-incrimination, double jeopardy rule, strong presumption of innocence). The drunk who makes it home safe owes compensation to no one, because his conduct, though wrongful, did not harm anyone.

It is the precise *conjunction of wrongfulness and harm caused thereby* that creates the tort obligation. Typically, that tort obligation consists of compensation, of righting the wrong and making good the loss - no more, no less.

Compensation, moreover, has to be full. This is a definitional requirement of corrective justice, and a fundamental proposition of the common law of tort.

Thus a man who negligently burns down a house worth $50,000 is liable in tort to pay $50,000 to make the home-owner whole. If the house and its contents were worth $1 million dollars, then he is liable in tort to pay $1 million to make the home-owner whole. This is not because tort favors the rich, but because tort *equally respects* poor and rich. All must be returned to their former state - that far but no further - when they are wrongfully harmed.

Punitive damages do not fit the scheme of tort law because, by definition, punitive damages are overcompensatory.

Nevertheless, in one superficial and one real form, punitive damages were present at the conception of tort law. Both of these forms can be usefully summarized here:

Superficial - In medieval days criminal and tort trials were held at the same time. For what we today call *intentional torts*, such as battery and trespass, there was at the same time a crime committed and a tort suffered, and both of these were adjudicated in the same judicial proceeding. So, a battery may have caused $10 in harm, payable to the plaintiff, but in the days before police forces and criminal tribunals the plaintiff could also pursue the equivalent of a criminal fine. He was in a sense the private attorney general, prosecuting the criminal case, and the fine went into his coffers.

Today we have our own attorneys general and

county prosecutors, and fines are collected solely in a criminal setting. Those fines are subject to cherished American constitutional protections such as:

- Double jeopardy prohibition of more than one fine for the same offense;
- 5th amendment protection against self-incrimination;
- 8th amendment protection against excessive fines.

A tort trial offers none of those protections (compulsory discovery is self-incrimination, one tort committed against many people leads to many lawsuits, etc.).

So in this superficial form, punitive damages are an anachronism with no place in tort today, having been replaced by public ordering via criminal law with all its apparatus.

Concrete - Punitives were granted as symbolic damages when there was deliberate wrongdoing but *de minimis* damages.

If A slandered B, but B could not prove that she had lost business because of the slander, A might be condemned to pay B $1.

If A deliberately and flagrantly trespassed on B's land, but didn't trample any of B's crops, B could still sue A for nominal, symbolic damages.

The damages in this case were symbolic – they recognized that one party was in the right, had been wronged by the other party, and won the suit.

Suits like this might be filed both to vindicate one's self and one's rights, and because a 'loser-pays rule' (in effect outside America) means that the tortfeasor would have to pay his victim's lawyer's costs. It would not cost much to vindicate one's rights in this way.

Thus punitives classically were either disguised criminal fines (before the state criminal apparatus was organized), or small symbolic sums meant to vindicate inconsequential violations of a plaintiff's rights. Since criminal fines require constitutional protections, all that should logically remain are the small symbolic vindication sums.

The survival of large punitive awards is a product of confusion between private and public ordering. That is why four states' supreme courts (Louisiana, Nebraska, Washington and Massachusetts) have declared that their common law of tort does not permit punitive damages today.[2] A fifth state (New Hampshire) has abolished punitives by statute.[3] Any state in the union could abolish punitive damages if it chose to, without any federal constitutional impediment.

The Supreme Court and Punitive Damages: A Play in Five Parts (so far…)

States vary tremendously in their rules about punitive damages. A handful have no punitives at all. Quite a few other states, like Virginia, allow punitive damages for intentional torts and gross negligence, but have a statutory cap on punitive damages.[4] Other states have other kinds of caps, some of which may be unconstitutional.[5] Finally, many states have no limitation on punitives at all. Yet in all states punitive damages were not really a problem, in that they were mostly symbolic until the great torts explosion of the 1980s.

Up to 1976, the highest punitive damages award in the entire country was $250,000, a sobering observation in light of recent billion-dollar judgments.

Starting in the late 1980s, some enormous punitive awards started coming down the pike, amounts unheard of ever before, and defendants started for the first time claiming that their constitutional rights had been abridged by these awards. After all, these awards held them liable for amounts that did not correspond to the harm they had wrongfully caused; they could be held liable for these penalties over and over again for the same action if multiple persons sued them; they had to produce self-incriminating evidence in the form of discovery; the burden of proof was "preponderance of the evidence," not "beyond a reasonable doubt;" and there seemed to be no limit on the amount that juries could assess as a punitive award. Of course, we can imagine a criminal law in which violations are punishable by a fine the amount of which will be determined by the King, at his total discretion. If such a criminal law might lead us to dump tea in the nearest harbor, these developments are certainly shocking and contrary to the basic nature of tort law.

Losing defendants started taking their suits to the highest constitutional court in the land. Obviously, every time one of these challenges happened, by definition the complaining party was usually a pretty bad guy – not an "attractive client," as lawyers say…

Anyway, our Supreme Court play begins in 1989, with the case of *Browning-Ferris Industries*.[6]

1. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.* (Vermont 1989)

Browning-Ferris Industries (BFI) was a large company that operated a nationwide commercial waste-collection and disposal business. In 1973 BFI entered the Burlington, Vermont area trash-collection market, and in 1976 began to offer roll-off collection services, which had not previously been available in the Burlington area. Until 1980 BFI was the sole provider of such services in the Burlington area. That year respondent Joseph Kelley, who, since 1973, had been BFI's local district manager, went into business for himself, starting Kelco Disposal, Inc. Within a year Kelco obtained nearly 40% of the Burlington roll-off market. During 1982 BFI reacted to this new competition by attempting to drive Kelco out of business, first by offering to buy Kelco Disposal and then, when Kelley refused to sell his company, by cutting BFI's prices by 40% or more on new business for approximately six months. The orders given to the Burlington BFI

office by its regional vice president were clear: one memo read, "Put [Kelco] out of business....if it mean[s] giv[ing] the [service] away, give it away."[7]

Of course in most American jurisdictions, in England, and in economic theory, price competition is not a tort. So-called "predatory pricing" cannot succeed in the long run, as a matter of economic theory, and it didn't work in Burlington, either. BFI kept losing market share, as Kelco matched its prices, and BFI ended up throwing in the towel when Kelco increased its market share to 56%. BFI left the Vermont market. Then to turn the knife in the wound Kelco sued BFI for the tort of unfair competition. A Vermont jury awarded Kelco $51,000 in lost profits from BFI.

Normally this would merely be a legally questionable and economically silly decision, of which there are many. What distinguished it, however, was that Kelco's attorney urged the jury to return an award of punitive damages, asking the jurors to "*deliver a message to Houston* [BFI's headquarters]."[8] Kelco also stressed BFI's world revenues of $1.3 billion in the previous year, noting that this figure broke down to $25 million a week. BFI urged that punitive damages were not appropriate at all (of course, it believed *no* damages, even compensatory, were due), but after a few hours deliberating the Vermont jury socked it to this Texas company that had already left the state — $6 million in punitive damages.[9]

BFI, shell-shocked, appealed this decision to the Vermont Supreme Court, and from there to the United States Supreme Court. At every level BFI claimed that this was an absurd penalty, an excessive fine for the degree of wrongdoing (which it claimed was zero), and that therefore the award was unconstitutionally imposed in violation of its Eighth Amendment right to be free of excessive fines. The Supreme Court, in an 8-1 decision, cavalierly rejected BFI's claim. Because the $6 million went to Mr. Kelley and not to the State of Vermont, it was not a fine, the majority ruled, and since it was not a fine it could not be an *excessive* fine.

Since BFI had not made a timely Fourteenth Amendment claim, the Supreme Court expressly reserved ruling on the due process argument. In fact, Justices Brennan and Marshall hinted strongly that they thought this kind of punitive award *did* violate due process. But these Justices would soon leave the court.

Justice O'Connor's dissent in this case detailed the history of fines, and showed how substantial punitive damages had in fact always been treated as fines.

The plaintiff nevertheless prevailed. Price competition cost BFI $6 million dollars, over and above any loss that it had caused, even though BFI was convicted of no offense and never had notice that its behavior would subject it to any fine.

Subsequent to the BFI decision, several states modified their statutes to provide that a certain percentage of punitive damages (up to 60% in some instances) must henceforth be payable to the state government, not to the plaintiffs.[9.1] This is how Illinois just got a share of a $3 billion punitive award against Philip Morris in a recent class action tobacco fiasco decision from Madison County.

This makes the state an explicit accomplice in the increasing acceleration of punitive awards, and puts the lie to the claim that punitives are not fines.

So, act 1 of our play ends with a crushing defeat for those who, like me, claimed that tort law prohibits large punitive awards, since they cross the line to become public ordering and are therefore excessive fines.

But the BFI case did hold out the hope that punitives might violate due process of Law, because they are not accompanied by the procedural guarantees of public ordering.

This set the stage for act 2:

2. *Pacific Mutual Life Ins. Co. v. Haslip* (Alabama 1991)[10]

Lemmie Ruffin (I am *not* making that up, Lemmie Ruffin was his name,) was an insurance agent. He worked for a lot of insurance companies, including Pacific Mutual Life.

As a Pacific Mutual agent, Lemmie sold "major medical" health insurance policies to a group of female civic employees in Alabama. They paid monthly premiums to Lemmie, and he was to forward these premiums to the company. The employees thought they had health insurance. In reality, Lemmie stopped sending money to Pacific Mutual Life, and kept the money for himself. So the insurance company gave Lemmie warning letters to give to the women (to pay their overdue premiums or have their policies cancelled) – of course Lemmie never transmitted those letters, he just kept deceiving the insurance company and the employees. Finally the women's policies lapsed, and when one got very sick, she found she was not covered anymore. Needless to say, she sued Pacific Mutual Insurance for its "bad faith."

An Alabama jury found bad faith and inadequate supervision of Lemmie by the (out-of-state…) insurance company. The jury held that Pacific Mutual Life had to pay Ms. Haslip $230,000 to cover her hospital bills. But Ms. Haslip was not yet done with Pacific Mutual – she asked for punitive damages. Alabama's punitive damages scheme gave a jury virtually complete discretion: it merely required a jury to make two distinct decisions: (1) whether or not to impose punitive damages against the defendant, and (2) if so, in what amount. It provided no standard for decision (1), and no method of calculation for decision (2). On the threshold question of whether to impose punitive damages, the trial

court instructed the jury as follows: "Imposition of punitive damages is *entirely discretionary* with the jury, that means you don't have to award it unless this jury *feels* that you should do so."[11] There was absolutely no law there.

The jury condemned Pacific Mutual to $1 million in punitives.[12] The company appealed all the way to the US Supreme Court, on the grounds that it was deprived of due process by the standardless discretion invested in the hometown jury, and by the huge amount of punitives when clearly the company had had no malice whatsoever – it was just as defrauded by Lemmie Ruffin as the plaintiff had been.

Pacific Mutual lost its appeal, 7-1. Again only Justice O'Connor dissented. The due process claim that everyone had thought so promising after the BFI case flubbed, as the two Justices who had espoused it had left the court. The vague Alabama jury instruction was deemed precise enough that the jury would have legal guidance about what to do.[13] The punitive award of 4 times compensatory damages was not so exorbitant as to violate due process standards, said the majority.[14] They did say it was "close to the line," however.[15]

Note that, to the average person, Pacific Mutual did nothing terribly wrong. It had no knowledge of the actions of Ruffin, who was not even its legal employee in any traditional sense. Its tort was to trust Lemmie.

Defendants were reeling after this case. Local juries seemed to have unfettered discretion to whack out-of-state corporations for the most minor transgression, though it was felt that the Supreme Court would henceforth at least require some legal standard for the calculation of punitives.

But the darkest hour had not yet been reached. It would come, in 1993. That is act 3.

3. *TXO Production Corp. v. Alliance Resources Corp*. (West Virginia,1993)[16]

BFI and *Haslip* pale before *TXO Production v. Alliance Resources*, out of West Virginia.

TXO and Alliance were engaged in a complex series of negotiations so that TXO could get oil and gas rights to land owned by Alliance. They were bickering back and forth over what royalty rate would be paid to Alliance. During these negotiations, a third party claimed that it owned the rights to Alliance's land by virtue of an obscure deed. TXO expressed concern that any title it might get to the oil and gas rights was vulnerable; because of this it asked for a reduction in its royalty rate to cover itself from possible claims by this third party. After more complex and ambiguous declarations on both sides, TXO claimed that a deal had been reached, but Alliance denied it. TXO sought a declaratory judgment from the West Virginia Circuit Court that it had, through all these negotiations, acquired the resource rights over the land. Alliance defended against this claim, and countersued for what Alliance called "slander of title," (an old English tort that had never once been recognized in West Virginia's entire history), asserting that TXO was falsely diminishing public belief that Alliance had full property rights. At bottom, this suit was little more than an episode in rather hardball contractual dispute about royalty rates.

That is, until the West Virginia courts got through with it. The trial judge rejected TXO's claim that a deal had been reached. The judge let a jury decide whether Alliance's title had been slandered. The jury accepted Alliance's slander of title suit, and condemned TXO to pay $19,000 to Alliance for damages, which represented its lawyer's costs in defending against the declaratory suit by TXO. Alliance had no other losses.[17]

So far, this sounds unexceptional – the case was a close call in a hardball dispute, TXO lost, and the equivalent of a loser-pays rule was in effect. I have not mentioned that Alliance was a local West Virginia company, while TXO was a fully-owned subsidiary of U.S. Steel. That explains, perhaps, why the jury also condemned TXO to *ten million dollars* in punitive damages, or 526 times the compensatory award.[18]

TXO appealed, and had great confidence in the appeal. In *Haslip* the punitives were "only" 4 times punitives and the court said that was "close to the line."[19] Moreover, West Virginia's instructions to the jury on punitives were so totally devoid of standards as to make a mockery of the Supreme Court's command in *Haslip* to guide the jury with some precision. Here was the standard as stated by the West Virginia Supreme Court, when it heard the appeal: we know we are now compelled by the United States Supreme Court to set punitive damages standards if our decision is to pass constitutional scrutiny, so we hereby distinguish between the "really mean" defendant and the "really stupid" defendant.[20] For the really *stupid* defendant, punitives can be 10 times compensatories. For the really *mean* defendant, punitives can be 500 times compensatories. Since this defendant "failed to conduct [itself] as a gentleman", the "really mean" standard applies, and 526 times punitives is close enough to 500, so we uphold the award.[21]

The Supreme Court affirmed the West Virginia Supreme Court, 6-3, saying that its standard passed constitutional scrutiny. Justices White and Souter joined Justice O'Connor in dissent. On the one hand, O'Connor was no longer alone in thinking that there were *some* punitive damage awards that could not pass constitutional muster. On the other hand, this case looked like the mother of all punitive awards, and if six Justices found *it* constitutional, one wondered what could possibly offend due process.

This was the darkest hour. It was three years before dawn broke, in Act 4.

4. *BMW of North America, Inc. v. Gore* (Alabama 1996)[22]

Mr. Gore purchased a new BMW from an authorized Alabama dealer. He loved his car. But when he took it in for service, he was informed by one of the mechanics that a wing of the car had been repainted. It turned out the car had been scratched during boat transport from Germany to the United States. BMW had followed a nationwide policy of repairing predelivery paint chips and scratches to new cars, so long as the cost of repair did not exceed 3% of the car's suggested retail price. If repairs cost over 3% of the value of the car, it was not sent to the dealer, but was removed from new vehicle inventory and given to the sales team to use as a demonstrator, then sold at auction. This particular paint job cost *way* under the 3% limit, and it was also under the Alabama consumer protection limit, as that law had always been understood.[23] So BMW shipped the car to its Alabama dealer, who sold it new.

Gore brought this suit for compensatory and punitive damages against BMW, alleging, *inter alia*, that his car had a lower resale value because of the repainted part; he considered himself a victim of the tort of fraud. Again, local plaintiff, out-of-state defendant. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, the alleged difference in resale value between a "concourse" car and one that had a repainted part. The jury also assessed $4 million in punitive damages, on the grounds that BMW of North America had likely repainted 1000 cars over the years.[24] Alabama appellate courts reduced the punitive award to $2 million, which they decided was not "grossly excessive" under *TXO Production Corp. v. Alliance Resources* because that amount constituted 500 times compensatories.[25]

Finally, a bare majority of the court had had enough. By a 5-4 margin (Stevens, O'Connor, Souter, Breyer, and Kennedy) the court held that a combination of the lack of real wrongdoing by BMW, the lack of notice that any punitive award was possible or even that its marketing was illegal in Alabama, the consideration of non-Alabama touch-ups which were surely not violations of Alabama law, and the huge discrepancy between compensatories and punitives all combined to make this award unconstitutional. The court didn't give any firm boundaries as to what *would* be a maximum limit, but said *this case* was beyond that limit.

Three dissenters, Chief Justice Rehnquist, Justices Thomas and Ginsburg, essentially held that the federal constitution did not place any limits on states in determining punitives. Justice Scalia denied that due process could ever affect damages, in federal or state court.

There were some procedural decisions following *BMW v. Gore*, but substantively the Supremes did not revisit the issue of punitive damages until this year, when they decided act 5, perhaps the most interesting case of them all.

5. *State Farm Insurance v. Campbell* (Utah 2003)[26]

In 1981, Curtis Campbell was driving with his wife in Cache County, Utah. He decided to pass, all at once, *six* vans traveling ahead of him on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction, at a speed in excess of the speed limit. Campbell did not have enough space to pass all six vans. He was headed right toward Ospital. To avoid a head-on collision with Campbell, Ospital swerved onto the shoulder, lost control of his automobile which came back onto the road, and collided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed; in fact, they never even collided with anyone – they got back in their lane safe and sound just in the nick of time thanks to Ospital's fatal decision to leave the road.

In the ensuing tort suits against Campbell by Ospital's estate (Ospital) and Slusher, Campbell insisted he was not at fault since he never collided with anyone and Ospital was speeding. Campbell's insurance company, State Farm Mutual Automobile Insurance Company (State Farm), decided to contest liability and declined offers by Slusher and Ospital to settle the claims for the policy coverage limit of $50,000 (i.e., $25,000 per plaintiff). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests."[27] To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $185,849, way more than the amount of Campbell's coverage.[28]

At first State Farm refused to cover the $135,849 in excess liability, because Campbell had purchased only $50,000 of coverage. State Farm's lawyer told the Campbells, "You may want to put for sale signs on your property to get things moving."[29] Nor was State Farm willing to post the required bond to allow Campbell to appeal the judgment against him. Campbell thus hired his own lawyer to appeal the verdict. While his appeal was pending, in late 1984, Slusher and Ospital contacted him. The three reached an agreement whereby Slusher and Ospital agreed not to execute their judgment against the Campbells' own property. In exchange the Campbells agreed to pursue a bad faith tort suit against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad faith suit. No settlement between Campbell and State Farm could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict Campbell obtained against State Farm.[30]

In 1989, the Utah Supreme Court denied Campbell's appeal. State Farm then decided to pay the entire $185 thousand. So there were no pecuniary damages for the Campbells.

The Campbells nonetheless filed (as they had promised the Slushers and the Ospitals they would) a complaint against State Farm alleging the torts of fraud and intentional infliction of emotional distress. The trial court initially granted State Farm's motion to dismiss that suit because State Farm for lack of damages, but that ruling was reversed on appeal. Now State Farm had to defend itself. In the first phase the jury determined that State Farm's decision not to settle for $50,000 was unreasonable. The second phase of the trial would determine damages. Remember that there were NO pecuniary damages (because State Farm had paid all the excess award).[31] There *was* arguably emotional distress during the short period when the Campbells thought they were going to lose their home. Emotional distress, however, is not usually recoverable unless it was intentionally inflicted, and no one can seriously claim that State Farm is a sadistic company bent on inflicting emotional distress on its clientele. State Farm argued during phase II of the trial that its decision to take the case to trial was, in retrospect, an 'honest mistake,' and that it certainly did not warrant punitive damages. The Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims.[32]

Just before the second phase of the trial the Supreme Court decided *BMW of North America, Inc. v. Gore*. Based on that decision, State Farm moved for the exclusion of evidence of all out-of-state conduct. The trial court denied State Farm's motion. The jury then, amazingly, found $2.6 *million* dollars in emotional distress for the Campbells, who (to repeat) had not lost one cent. Likely the jury knew that $2,340,000 of this amount was going to the Slusher and Ospital families, and it wanted to give $260,000 in emotional distress damages to the Campbells – but this would be totally illegal if done explicitly, because the other two families had settled their suit and had no cause of action against State Farm. In addition the jury awarded $*145 million* in punitives, to punish State Farm for its aggressive practices throughout the country. The trial court reduced the compensatories to $1 million and the punitives to "only" $25 million, under the *TXO* "really mean" standard. The Utah Supreme Court then reinstated the original $145 million award. State Farm appealed to the Supreme Court.[33]

This time the decision was 6-3. Chief Justice Rehnquist abandoned his previous position and joined the majority, leaving Justices Scalia, Thomas, and Ginsburg alone in dissent.

The majority this time tried to provide an indication that certain trial court activity would no longer be tolerated:

- Don't ever again use legal out-of-state behavior to calculate punitive damages. Out-of-state behavior can be invoked to establish a pattern of bad faith or maliciousness, but in that case it has to be the same behavior as the behavior being impugned.[34]
- Don't ever give more than nine times compensatories as punitive damages, the court said, unless there is a "particularly egregious act that has resulted in only a small amount of economic damages."[35]
- Moreover, in cases like this one, where the compensatory damages adjudged by the jury are extremely generous, do not let punitives exceed compensatories.[36]

Joan Claybrook and Ralph Nader have claimed that *Campbell* is a victory for them. Why? Part of this is spin, but I think Claybrook and Nader are happy that the court has gone up from four times compensatories ("close to the line" in *Haslip*) to nine times compensatories. They are also glad that the court felt it could not touch the compensatories themselves. Surely, there is no way on earth that the Campbells, who cavalierly tried to pass six vehicles at once and drove off into the sunset leaving two devastated families in their wake, had $1 million in pain and suffering inflicted on them because *State Farm* aggressively came to their defense. What is to stop the next jury that wants to sock it to an out-of-state corporation from finding $*50 million* in so-called compensatory pain and suffering?

That, I think, is the next battleground – whether the United States Supreme Court can intervene regarding non-pecuniary compensatory damages. Claybrook, Nader, and the plaintiffs' bar have a base of three Justices to work with here – if they can get back the Chief and one more Justice they are home free. It is quite conceivable that they could pick up two more Justices if the next jury decides to call its punitive award "compensatory." That is why I am not sure *Campbell* is the death knell for runaway awards that much of the press believes it is.

Conclusion

I end where I began – by recalling the purpose of tort law, i.e., true compensation for wrongfully inflicted private losses.

As long as state judges allow juries to punish out-of-state corporate defendants to enrich individual local plaintiffs, tort law will be defiled. As long as that happens, in my opinion, the Supreme Court must continue to intervene. Whether it be by striking down punitive damages or by rejecting standardless "pain and suffering" awards, the Court will have to uphold the fact that private ordering is the domain of civil litigation, while public ordering requires a slew of constitutional protections. The 1989 *BFI* decision denying that punitives are fines is what, in my opinion, has prevented the Court from going down this logical and principled path. I do not think *BFI* is about to be reversed, and that is why I am not sanguine about the future of tort law.

* Michael Krauss is a Professor of Law at George Mason University.

Footnotes

[1] *See generally* Michael Krauss, *Tort Law and Private Ordering*, 35 St. Louis U.L.J. 623 (1991).
[2] *See, e.g.*, *Int'l Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988); *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566 (Neb. 1989); *Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589 (Wash. 1996); *Fleshner v. Technical Communications Corp.*, 575 N.E.2d 1107 (Mass. 1991).
[3] N.H. Rev. Stat. Ann. § 507:16 (1997).
[4] In Virginia's case, the cap is $350,000. Va. Code Ann. § 8.01-38.1 (Michie 2000).
[5] *See, e.g., Reynolds v Porter*, 760 P.2d 816 (Okla. 1988) [Held, state statute eliminating punitive damages and noneconomic damages recovery in medical malpractice cases violates state constitution.]
[6] 492 U.S. 257 (1989).
[7] *Id.* at 260-61.
[8] *Id.* at 261.
[9] Note the combination of individual, local plaintiff, local jurors, and *out-of-state* corporate defendant with few in-state employees. This turns out to be the common denominator of crazy punitive damages – let's bring some money in-state.
[9.1] Patrick White, *The Practical Effects of Split Recovery Statute and Their Validity as a Tool of Modern Day "Tort Reform".* 50 Drake L. Rev. 593 (2002)
[10] 499 U.S. 1 (1991).
[11] *Id.* at 6n.1
[12] *Id.*
[13] *See id.* at 19-20.
[14] *See id.* at 23-24. The punitives were "much in excess of the fine that could be imposed for insurance fraud" under Alabama criminal law. *Id.* at 23.
[15] *Id.*
[16] 509 U.S. 443 (1993).
[17] *See id.* at 451.
[18] This seemed "quite likely" to Justice O'Connor as well. *Id.* at 489 (O'Connor, J., dissenting).
[19] *Haslip*, 499 U.S. at 23.
[20] *TXO*, 509 U.S. at 452n.15.
[21] *See id.* at 473 (O'Connor, J., dissenting).
[22] 517 U.S. 559 (1996).
[23] *Id.* at 562-64. Specifically, the $601.37 cost of repainting was about 1.5% of the car's suggested retail price. *Id.* at 564.
[24] *Id.* at 564-65.
[25] *See id.* at 567.
[26] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).
[27] *Id.* at 1518.
[28] *Id.*
[29] *Id.*
[30] *Id.* By the way, I am not a Utah expert, but sale of a tort claim is illegal in most states. This was a sale of 90% of a tort suit – former adversaries, all Utah residents, were now in league against the out-of-state corporation.
[31] *Id.*
[32] *Id.* at 1518-19.
[33] *Id.* at 1519.
[34] *See id.* at 1522-23. Interestingly, this part of the *Campbell* ruling undoes much of the *Gore* case – BMW's legal painting of cars in other states, which the court had excluded, would possibly be probative now.
[35] *Id.* at 1524 (citation omitted). "Single-digit multipliers are more likely to comport with due process…than awards with ratios in the range of 500 to 1, or, in this case, of 145 to 1." *Id.* (citation omitted).
[36] *See id.*

Restoring the Rule of Law in Class Actions: Congress Considers the Class Action Fairness Act of 2003

*By Brian P. Brooks**

The system of dual sovereignty known as federalism is a fundamental and cherished part of the American constitutional structure. Among other things, a system that respects the sovereignty of the 50 states serves as an engine of innovation, permitting individual states to serve as "laboratories" for social and economic experimentation.[1] But as Justice Brandeis – the author of the "states as social laboratories" concept – himself acknowledged, the sovereign power of the states to experiment with social and economic innovations is a benefit only to the extent that a given state's experiments can be conducted "without risk to the rest of the country."[2]

It has been properly said that federalism requires a respect for the state judicial systems that interpret state laws no less than for the state legislatures that write those laws. But increasingly over the past decade, multistate (and even so-called "nationwide") class actions brought in state courts have raised the question whether state courts are stepping over the bounds of legitimate federalism and into the realm of interstate commerce. The scenario is by now a familiar one: A plaintiff files a purported nationwide class action in state court in one of several "magnet" jurisdictions (among the most notorious are Madison County, Illinois; Jefferson County, Texas; and Orleans Parish, Louisiana), and asks a state court judge to enter an order enjoining the defendant's challenged conduct in all 50 states. Sometimes the plaintiff's attorney argues that the court should simply apply its own state's law to the challenged conduct, regardless of whether that conduct might be perfectly legal, or even required in other states. In other cases, the plaintiffs' lawyer simply asserts that the laws of all 50 states are identical with respect to the conduct. Either way, the state trial court enters an order that effectively regulates the defendant's conduct across the country, regardless of what other states' laws might have to say about it.

Reflecting widespread concern that this kind of state action is not "without risk to the rest of the country," a bipartisan group of House members and Senators have introduced legislation known as the "Class Action Fairness Act of 2003." The legislation's purpose is to address a collection of legal issues that currently permit individual state trial courts to use injunctions and damages awards to influence business activity that has little or no connection to their states. The Senate version of the bill was approved by the Senate Judiciary Committee on a bipartisan vote on April 11, 2003, and awaits action by the full Senate. The House of Representatives overwhelmingly approved its version of the bill on June 12, 2003. Final Senate action is expected this fall.

I. Multistate Class Actions: Defining the Problem

The problem the Class Action Fairness Act was drafted to address – multistate class actions filed in state court – is a problem of relatively recent vintage. A search of all reported state court decisions in the Lexis database reveals that, from the beginning of reported state court decisions in the late nineteenth century through the end of 1989, the phrase "nationwide class" appeared only 28 times. Since January 1, 1990, that phrase has appeared 175 times.[3] But mere statistics do not fully capture the threat both to federalism and to the rule of law that so-called nationwide class actions often represent. On the one hand, nationwide classes are sometimes justified on the ground that the law of a single state (say, the state where the defendant is headquartered) can be conveniently exported to other states, regardless of whether the conduct challenged under the law of the exporting state is considered lawful in the states where most class members reside.[4] Such a justification avoids the problem of managing a case under the substantive law of multiple jurisdictions, but runs headlong into the core federalism concern that no state be permitted to dictate the substantive laws of any other state. On the other hand, proponents of nationwide classes sometimes argue that such sweeping lawsuits can be managed on the basis of general legal principles, without regard to the nuances that differentiate one state's substantive law from another's. Yet this approach – in which, as Judge Richard Posner has evocatively explained, the jury is provided an "Esperanto instruction" that is "in accordance with no actual law of any jurisdiction"[5] – is fairly obviously inconsistent with rule-of-law concerns.

No jurisdictional legislation can fully address such fundamental problems of multistate class actions. Nonetheless, the Class Action Fairness Act seeks to address at least three of the most significant difficulties in the current class-action system: the lack of any formal system for coordinating overlapping class actions being litigated in state courts; the rise of "magnet courts" in which outcomes can be dictated by the political connections between elected judges and plaintiffs' attorneys; and judicial interpretations of the federal jurisdictional statutes that have made it difficult for major class actions to be heard by less-politicized federal judges.

A. Overlapping Class Actions and The Lack Of State Court Coordination Mechanisms

In a typical class action, one or more named plaintiffs seek to represent all similarly situated persons with respect to a particular alleged legal injury. For example, a purchaser of an allegedly defective product might seek to represent a class of all purchasers of that product. But what happens when several different lawsuits are filed in which different named plaintiffs seek to represent the same class of product purchasers? In the federal system, the answer is simple: The rules of the Judicial Panel on Multidistrict Litigation

("MDL Panel") are invoked to transfer all similar actions to a single court for coordinated or consolidated proceedings.[6] There is no state-level equivalent to the MDL Panel, however, and so defendants facing multiple lawsuits purportedly brought on behalf of the same class members have no choice but to fight a multi-front war, with the possibility that a loss on any one front will effectively nullify victories on the other fronts.

The problem of overlapping state-court class actions is by now well documented. The Winter 2002 issue of *Class Action Watch* presented the results of a study of the 50 then-most-recent multidistrict proceedings created by the MDL Panel, and found that, in a significant percentage of matters in which similar federal actions had been consolidated pursuant to the MDL Panel's rules, overlapping state-court class actions were being litigated outside the federal multidistrict process – usually with no coordination at all.[7] Of the 35 multidistrict proceedings for which the status of related state-court actions could be determined, state-court class actions involving the same alleged injury or the same alleged class existed with respect to 19 of them.[8] Among "mature" proceedings that had been pending more than one year, well over half involved overlapping but uncoordinated state-court class actions.[9] While no statistics were presented on this precise topic, the usual reason for such overlapping state-court actions is the very jurisdictional problem that the Class Action Fairness Act seeks to correct: an unsuccessful attempt by the defendant to remove the state-court cases to federal court, where multidistrict coordination would be possible.

B. The Rise of "Magnet Courts"

The dramatic rise in multistate class action filings in the past decade has been heavily concentrated in just a handful of state-court jurisdictions, suggesting a belief by plaintiffs' attorneys that the forum they select is likely to determine the outcome of their lawsuit. The most notorious "magnet" jurisdiction to arise in the past several years is Madison County, a tiny jurisdiction in southern Illinois that has become famous as a jurisdiction where class certification is virtually always granted and where damages awards against out-of-state defendants are nearly boundless.[10] "Magnet courts" share several defining characteristics. *First*, the per capita rate of class action filings exceeds national averages. In 1999, for example, the filing rate of class action lawsuits in Madison County, Illinois was 61.8 per million residents, compared to a filing rate of 7.6 per million in the federal system.[11] (Jefferson County, Texas had a per capita class-action filing rate of 59.5.[12]) *Second*, the connection between the named parties and the forum jurisdiction is much weaker than in the average jurisdiction. For instance, among all class actions filed in Madison County in 1999, *no* defendant was located in Madison County, and in 37 percent of cases even the plaintiffs resided outside the county.[13] *Third*, class actions are disproportionately filed by plaintiffs' attorneys from outside the jurisdiction.[14]

The very notion of the "magnet court" raises questions about the role of courts as neutral arbiters of law and fact, and indeed about the fundamental concept of the judiciary as the "least dangerous branch." This concern is particularly acute in states (like Illinois and Texas) in which trial court judges are highly subject to political pressures. Naturally, judges that must stand for election are likely to be much more responsive to the constituencies that elected them (usually local lawyers who, in small, rural counties, are disproportionately likely to represent local plaintiffs rather than out-of-state defendants) than to outsiders. One of the purposes of the Class Action Fairness Act is to improve the ability of out-of-state defendants facing large lawsuits brought by local plaintiffs to gain access to federal courts, where the judges are relatively insulated from political pressure by the protections of Article III. The bill is not likely, as some have suggested, to change the system from one in which plaintiffs always win to one in which defendants always win. Class actions, after all, are frequently certified in the federal courts. Instead, the Class Action Fairness Act is merely likely to change a situation in which class certification is nearly always granted to one in which class certification is only granted where it is appropriate based on a rigorous analysis of the legal and factual issues involved. In short, one of the bill's central purposes is to make the forum in which class actions are litigated less outcome-determinative than presently is the case.

C. The Federal Courts' Historically Narrow Interpretation Of Diversity Jurisdiction

The federal diversity jurisdiction statute creates federal jurisdiction over actions between citizens of different states in which the amount in controversy exceeds a specified amount (currently $75,000).[15] While nothing in the text of the statute requires it, judicial interpretations of the statute over the past two decades have made it increasingly difficult for major multistate class actions to be heard in federal court. For one thing, federal courts increasingly have held that the diversity jurisdiction statute requires all named plaintiffs to be citizens of different states from all defendants, even in a class action in which no class member other than the named plaintiff has a claim against the non-diverse defendant. The classic situation is this: a named plaintiff sues an automobile manufacturer on behalf of a nationwide class of automobile purchasers. To avoid removal to federal court, the named plaintiff adds as a defendant the local car dealer from which she bought her vehicle – even though only a tiny percentage of class members (if any) bought their vehicles from this in-state defendant. Despite the fact that more than 99 percent of class members have no connection to this non-diverse defendant, courts have held that the claim by one named plaintiff against a local defendant is sufficient to destroy the diversity required for removal to federal court.[16] Thus, cases of nationwide significance become stuck in state court because a handful of plaintiffs (out of potentially millions) assert a claim against an in-state defendant with no

real significance for the underlying issues in the case.

Federal courts also have increasingly taken a narrow view of what it takes to satisfy the amount-in-controversy requirement for access to federal court. Without relying on any particular language in the diversity statute itself, courts now often refuse to accept jurisdiction over class actions if the claims of at least one named plaintiff does not, by itself, exceed $75,000. Thus, even if the ***total*** damages sought by the class is in the billions of dollars; even if the named plaintiff seeks millions of dollars in punitive damages; and even if the relief sought is injunctive relief compliance with which will cost, federal courts often reject class actions on the ground that the amount in controversy is not sufficiently large to justify federal jurisdiction.[17] This non-aggregation principle has had the anomalous effect of barring from federal court nationwide class actions affecting millions of consumers and threatening billions of dollars of liability to major corporations, while accepting jurisdiction over single-plaintiff auto-accident cases involving two parties from different states and damages of just over $75,000.

II. The Class Action Fairness Act's Solution: Expanding Federal Jurisdiction While Respecting Federalism Concerns

The Class Action Fairness Act proposes a modest expansion in federal jurisdiction to permit the most significant multistate class actions to be heard in federal court, while minimizing any federalism concerns that might be raised by permitting an increased number of cases to be removed from state to federal court. To qualify for federal jurisdiction under the Class Action Fairness Act, a class action must satisfy three preliminary criteria: (1) the purported class must include more than 100 class members; (2) the claims asserted by the class must exceed $5 million in the aggregate; and (3) at least one plaintiff must be a citizen of a state different from at least one defendant.

The bill contains a provision expressly drafted to address federalism concerns that might otherwise arise in connection with legislation designed to increase the number of cases that are removed from state to federal court. In particular, the bill provides that any case brought in the defendant's home state, in which at least two-thirds of the purported class members are citizens of that state – in other words, any case in which the particular state court has an especially strong interest in adjudicating the dispute, and in which fairness risks to the defendant are small – may not be removed on diversity grounds. By contrast, cases in which fewer than one-third of the purported class members are citizens of the forum state are automatically removable to federal court if they satisfy the three preliminary criteria described above. Cases falling in the middle – those in which between one-third and two-thirds of purported class members are citizens of the forum state – are subject to a discretionary balancing test on removal, based on statutorily specified factors.

As a practical matter, the Class Action Fairness Act is not expected to dramatically change class action practice in any but the most notorious "magnet court" jurisdictions. A recent study found that, in most states, a majority of state-court class actions would remain in state court even after passage of the bill (generally because those actions were brought against defendants in their home states on behalf of classes consisting predominantly of state residents).[18] According to the study, which was based on class action filings between January 1, 1997 and June 30, 2003 in six states for which trial court decision are readily available, 62.5 percent of class actions filed in Connecticut state courts, 91 percent of class actions filed in Delaware state courts, 58 percent of class actions filed in Maine state courts, 61 percent of class actions filed in Massachusetts state courts, 63 percent of class actions filed in New York state courts, and 62 percent of class actions filed in Rhode Island state courts would have remained in state court even if the Class Action Fairness Act had been in place at the time such actions were filed. By contrast, the study found that, in Madison County, Illinois, nearly 87 percent of class actions filed between 1998 and early 2002 would have been removable had the bill been in place – reflecting the fact that class actions filed in such "magnet courts" are qualitatively different from class actions in other jurisdictions where the forum is not perceived as outcome determinative.

III. Conclusion

The Class Action Fairness Act represents a fine balance between concern for the rule of law and respect for federalism principles. If enacted, the bill is likely to affect only those class actions that common sense dictates should be heard in federal court – class actions involving citizens of many different states, seeking to recover millions of dollars from out-of-state defendants. Other class actions will remain in state court, just as under the present system. While it is never possible to predict the outcome of legislative votes, the fact that the Class Action Fairness Act is supported by a bipartisan coalition of legislators ranging from prominent Democrats (such as Sen. Herb Kohl and Rep. Jim Moran) to well-known Republicans (including Sens. Charles Grassley and Orrin Hatch and Rep. Robert Goodlatte) makes it a promising candidate for passage this fall.

* Brian Brooks is a partner in the Washington, D.C. office of O'Melveny & Myers LLP, and the co-chair of the Federalist Society's subcommittee on class actions. He edits the subcommittee's publication, *Class Action Watch*.

Footnotes

[1] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

[2] *Id.*

[3] Results retrieved on August 4, 2003 by searching for "nationwide class & date bef 1990" and "nationwide class & date aft 1989" in Lexis's STCTS database.

[4] *See, e.g., Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th

906 (2001) (reversing certification of nationwide class in which plaintiff sought to apply California law to claims of mortgage borrowers residing in all 50 states, regardless of relevant mortgage banking laws of states other than California).

[5] *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

[6] *See* 28 U.S.C. § 1407 (establishing multidistrict litigation process).

[7] *Do Federal Class Actions Compete Against State Class Actions In A Race To The Courthouse?*, Class Action Watch (Winter 2002) (available at www.fed-soc.org).

[8] *Id.*

[9] *Id.*

[10] *See* John H. Beisner & Jessica Davidson Miller, *They're Making A Federal Case Out Of It . . . In State Court*, 25 Harv. J.L. 7 Pub. Pol'y 143 (2001); John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 BNA Class Action Litig. R. 58 (Jan 24, 2003).

[11] Beisner & Miller, *They're Making A Federal Case*, 25 Harv. J.L. & Pub. Pol'y at 163.

[12] *Id*.

[13] *Id.* at 164.

[14] *See id.* at 154 (noting that 85 percent of plaintiffs' attorneys listed on class-action filings in Madison County in 1999 listed office addresses outside the county, with many based in New Orleans, Houston, San Francisco, and Washington, D.C.).

[15] 28 U.S.C. § 1332.

[16] *See, e.g., Triggs v. John Crump Toyota, Inc.*, 154 F.2d 1284 (11th Cir. 1998).

[17] *See, e.g., In re Ford Motor Co./Citibank (South Dakota), N.A. Cardholder Rebate Litig.*, 264 F.3d 952 (9th Cir. 2001) (citing cases).

[18] *See The Impact Of S.274 And H.R. 1115 On State Court Class Actions: An Empirical Study* (2003) (on file with author).

Professional Responsibility

After the 1999 Code Amendments: The Future of Ethics

*by Steven C. Krane**

On July 14, 1999, the presiding Justices of the Appellate Division of the New York Supreme Court issued a comprehensive set of amendments to the Disciplinary Rules of the Lawyers' Code of Professional Responsibility. The amendments, which were effective immediately, help clarify and update existing provisions of the Code and eliminate or modify rules that no longer comport with the reasonable and legitimate expectations of clients, lawyers and society in general. Having spent the better part of seven years working toward the adoption of these amendments, I will leave to others more objective than I the task of their description and analysis. With the millennium approaching, however, it would seem appropriate to undertake a more fundamental examination of the way in which the legal profession is regulated and to try to develop a new framework that takes into account the broad and diverse nature of lawyers, clients and the practice of law.

It was initially believed that the American Bar Association was embarking on precisely such a study when it announced in 1997 that a Commission was being formed to undertake the ABA's first comprehensive review in nearly 20 years of the rules governing the professional conduct of lawyers. It appeared that, having produced the Canons of Professional Ethics in 1908, the Model Code of Professional Responsibility in 1969 and the Model Rules of Professional Conduct in 1983, and having amended each of those works from time to time in the intervening years, the ABA was ready to develop a regulatory scheme that would be more reflective of "developments in the legal profession and society . . . ."[1] ABA President Jerome J. Shestack, who created the Commission, expressed his "hope that the committee will not just examine our rules of conduct but help bring us to a higher moral ground. . . . Ethics is not a system to look for loopholes or ways out but a system of right conduct that is part of the calling of a profession that I regard as a noble and learned profession."[2]

Observers were led to believe that the members of the Commission, all of whom are distinguished members of the bar and nationally renowned experts on ethical issues, would take an expansive look at the fundamental nature of the rules governing attorney conduct — if not the fundamental nature of attorney regulation itself — and with the benefit of heightened perspective and an attempt at "futuring" create a framework for attorney conduct that would not only be reflective of the realities of the practice of law today, but that would be sufficiently progressive to provide a workable structure to govern the legal profession well into the next century.

The possibilities were limitless. With the combined imagination and expertise of the members of the Commission, a thorough reexamination of these matters could have led anywhere. However, that was not to be. Early on, it became apparent that the Commission, dubbed "Ethics 2000," did not intend to do more than tinker with the existing platform provided by the Model Rules of Professional Conduct. The expressed attitude of the Commission was "if it ain't broke, don't fix it."[3] As a result, what is emerging from the Commission is not a proposed regulatory scheme for the next century, but merely an updating of the existing set of Model Rules, driven to a great extent by the view that the substance of the American Law Institutes' recently completed Restatement of the Law Governing Lawyers should be imported into the Rules.[4]

The Model Rules have been adopted by more than four-fifths of the disciplinary jurisdictions in the United States in the 16 years since their approval by the ABA House of Delegates. Although they are the direct lineal descendants of the Canons of Professional Ethics and the three-tiered Model Code of Professional Responsibility, their ancestry can be traced back to the mid-1800s. George Sharswood's celebrated Essay on Professional Ethics, published in 1854, is generally viewed as the first serious attempt at synthesizing the axiomatic norms governing the conduct of American lawyers. To Sharswood, the lawyer's paramount duty was to the client. While expressing the view that lawyers also have certain responsibilities to courts, other lawyers and society, Sharswood declared that lawyers are not responsible for the social utility of their client's cause. Prudence, restraint, civility and fairness were Sharswood's watch cries. These principles found their way virtually intact into the Canons of Professional Ethics, developed by a small committee of the ABA elite. Designed in large part for the upper echelons of the already stratified legal profession, the Canons prohibited advertising and all forms of solicitation, thereby impinging on the ability of working-class lawyers with working-class clients to make their presence known or to educate potential clients as to their need for legal services. The Canons permitted contingent fees, however, in a striking divergence from Sharswood, who viewed them as tending to "corrupt and degrade the character of the profession."[5]

Over 50 years passed before efforts began to replace the Canons with a more modern code of conduct. By

the 1960s, it was apparent that the Canons no longer addressed the realities of the practice of law, which not surprisingly had changed dramatically since 1908. What emerged from the American Bar Association was the Model Code of Professional Responsibility, a three-tiered codification of overarching ethical principles ("Canons"), minimum standards of professional conduct ("Disciplinary Rules"), and principles of conduct to which all lawyers, it was hoped, would voluntarily adhere ("Ethical Considerations"). In a political and cultural environment more receptive to the needs of society's underclasses, the new Model Code recognized the legal profession's responsibility to make legal services available to all Americans. Still, the ABA restricted advertising to "reputable" law lists that it deigned to sanction, and otherwise prohibited structures (such as group legal service plans) that would allow lawyers to make good on their promise to provide access to justice for all those in need.

The Model Code was not without its deficiencies. It focused almost exclusively on the professional responsibilities of litigating attorneys, ignoring the many lawyers who are perfectly happy never to see the inside of a courtroom. It barely touched on the obligations of lawyers representing organizational clients, or of those who work in large bureaucratic public and private firms. Instead, the Code continued to proceed from the outdated paradigm of the individual lawyer representing an individual client. While these shortcomings alone may eventually have been sufficient to topple the Model Code from its throne, a cataclysmic event for the legal profession precipitated an early fall. That event was the Watergate scandal, in which lawyers played key roles, and it served as the catalyst for a movement to revisit the standards governing attorney conduct less than a decade after the Model Code emerged from the ABA halls.

The ABA formed a Commission on Evaluation of Professional Standards in 1977. The Commission spent three years studying lawyer ethics and, in 1980, presented a draft of the Model Rules of Professional Conduct. The Commission urged some far-reaching changes to the nature of the attorney-client relationship, including rules requiring lawyers to disclose illegal activities by clients and instituting mandatory pro bono publico service. Many of the Commission's proposals were rejected by the ABA House of Delegates during the three years of study and debate that followed.

The Model Rules of Professional Conduct, in the form in which they were ultimately adopted by the ABA, differed in significant ways from the Model Code of Professional Responsibility. Gone was the three-tiered structure and, most notably, any mention of aspirational standards or "better practice" guidelines. Instead, black-letter rules for the imposition of discipline were supported by official commentary. The Model Rules made an effort to address some of the ethical issues faced by transactional and other non-litigating attorneys, and otherwise tinkered with some of the ethical precepts that had been in the Model Code. Essentially, however, the Model Rules, while a step forward in many respects, did not constitute a fundamental reworking of the profession's ethics rules. Perhaps as a result, and in direct contrast to the almost immediate and unanimous acceptance of the Model Code, states proceeded deliberately in deciding whether to adopt the Model Rules, and a handful of states, such as New York, rejected the Model Rules outright.

The Model Rules of Professional Conduct can perhaps be analogized to a modest house built in the early 1960s. The kitchen and bathroom were updated in the late 1970s, and the garage was converted into an extra room, but otherwise the house has remained unchanged. By the late 1990s, however, it became apparent that the occupants of the house had — along with their neighborhood — changed dramatically. The house no longer meets their needs. Clearly, what is needed is a new house for the occupants to live in. Instead, the ABA is planning only on redecorating.

It has perhaps, then, fallen to the interested bystanders to take the "steps back" that the ABA chose not to take, and to consider what sort of code of conduct lawyers need today, on the threshold of the Third Millennium.

The first step back involves a consideration of whether the legal profession needs a code of ethics at all. As discussed above, the subtext of the early codes of ethics was an effort by the Brahmins of the Bar to squelch undesired competition from less privileged lawyers or, worse yet, competition from those outside the legal profession. While there may be elements of our profession who continue to view these as valid goals of regulation, the courts have taught lawyers over the past three decades that codes of ethics cannot be used for anticompetitive purposes.[6] Today, the principal purpose served by a code of lawyer ethics is to prevent lawyers from running roughshod over the rights of their clients, the justice system, and the public. Rules are needed to ensure, among other things, that when hiring counsel clients make an informed choice, untainted by false or misleading statements, undue influence or duress, that clients are not gouged for unconscionably exorbitant fees, that lawyers do not under the banner of loyalty facilitate their clients' frauds or illegal conduct, and that lawyers maintain the sanctity of information they receive from their clients. We need to do this because we wish to retain our status as a self-regulating profession, relatively free from the intrusive oversight of politicians and lay bureaucrats. Likewise, we rein in the aggressive tendencies of attorneys in order to prop up our profession's public image, which is always fragile and often besmirched. A code accomplishes these purposes by establishing where the floor is, setting minimum standards of conduct below which lawyers may not fall without risk of losing the privilege of practicing law or suffering other forms

of professional discipline.

Plainly, a regulatory scheme is needed to establish the parameters of the often complex relationships among lawyers, between lawyers and their clients, between lawyers and the courts, and between lawyers and the public. However, a code of conduct can and should accomplish more. Much has been said in recent years about the declining "professionalism" of the bar. An inherently vague and amorphous term, professionalism means different things to different people.[7] Perhaps it is as simple as courtesy and civility to other lawyers, or as basic as the axiom that our obligations to our clients must always be placed ahead of our self-interest in income generation, or as lofty as the phrase "officer of the court." No matter what professionalism is, ethics codes can impel lawyers toward a higher plane of conduct by advising them that certain actions or inactions, while not so reprehensible as to warrant professional discipline, are nonetheless not acceptable for members of the bar. Whether couched as "aspirational standards," expressions of the "better practice," or otherwise, this second tier of rules helps send a clear message to lawyers and the public that we take seriously our special role in modern civilization, and that as among ourselves we do not believe that conduct falling just this side of the disciplinary line is good enough.

The legal profession lost something important when the Model Code of Professional Responsibility, with its motivational Ethical Considerations, were supplanted by the sterility of the Model Rules of Professional Conduct. By not even speaking of the existence of a layer of unacceptable conduct above the bare minima, we effectively told lawyers that they could properly and in good conscience practice at the margins of propriety, and thereby denigrated the many statements of bar associations and other leaders of the profession urging "professionalism." We lost the notion that there is a category of non-sanctionable conduct of which we, as a profession, simply disapprove and will not accept among our own.

Perhaps for the next century we need to make greater efforts as a profession to restore our own dignity, at least through the promulgation of some form of aspirational guideposts. We will apparently need to do so without the help of the ABA.

Even as to the minimum standards expressed in the black letter rules, much could be done to ready the attorney conduct code for the future. The Ethics 2000 Commission is interested chiefly in fine-tuning the Model Rules, filling gaps, clarifying ambiguities and so on, and is foregoing the opportunity to engage in a truly comprehensive re-examination of fundamentals of legal ethics. Such an undertaking could lead to the creation of a code of conduct that is truly reflective of where the attorney-client relationship and the legal profession are today and will be in the near future. Much has been said about the future of the practice of law, and many analyses have been made of the possible courses the practice may take. We should be critically re-examining the century-old principles of legal ethics in light of these changes, some of which are already taking place. Why should lawyers be required to adhere to a duty of undivided loyalty, when that is no longer a reasonable or legitimate expectation of clients who themselves balkanize their legal work among dozens of firms? What must be done to permit lawyers to practice effectively by making maximum use of the new technologies that their clients are using, if not developing? Must we continue to shoe-horn our profession and our relationship with clients, the courts and the public into rules that are, to a significant extent, protectionist, self-serving and outdated?

There is every reason for our profession to explore these and other issues that will or are about to confront the legal profession. And, indeed, the Ethics 2000 Commission has taken some progressive steps in this regard, at least with respect to specific issues and trends nowhere addressed in the current version of the Model Rules. The Commission's work plan includes, for example, the implications of multi-disciplinary practice groups and the practice of law over the internet, two trends of fundamental and immediate significance to the legal profession. How and whether these issues are resolved by the Commission, and ultimately by the ABA House of Delegates, remains to be seen, but the profession will surely benefit from the discussion alone.

But the time has come to go further and undertake a reexamination of the basic structure of the Model Rules of Professional Conduct. The Model Rules are premised on the fallacy of the monolithic attorney-client relationship. In an approach at least as old as the 1908 Canons, each rule purports to address an issue for all walks of lawyer, regardless of the nature of their practice or of the clients they represent. While the commentary to each rule often diverges and discusses the application of the basic, black-letter rule in different contexts, the overarching principle in each case remains the same. But lawyers are not all the same. While a core of general practitioners remain, specialization is rapidly increasing. Likewise, lawyers work in a wide variety of practice settings, from government law offices to large law firms to corporate legal staffs to storefront offices to legal assistance organizations. Correspondingly, their clients are very different, with different needs, different expectations, and different relationships with their lawyers.

Does it make sense to treat all of these lawyers, clients and relationships the same? While there is a nucleus of common ethical precepts, such as loyalty, honesty and confidentiality, stemming from the elemental need of a client to trust his or her lawyer, the same cannot be said for their application. Is the relationship between a large firm and the Fortune 500 corporation it serves the same as that between a legal services lawyer and an elderly client suffering from the early stages of Alzheimer's disease? Should prosecuting

attorneys (and perhaps also criminal defense attorneys) be freed from the general restriction on communicating directly with non-party witnesses who are otherwise represented by their own counsel? The absence of ethical guidance for lawyers in various practice areas is apparent from even a cursory review of the literature attempting to fill the gaps left by the monolithic model.[8]

This is not to say that each legal specialty should have its own, entirely separate code of conduct, as some have suggested.[9] Differences among practice areas and types of clients could be addressed through a "hub and spokes" structure, in which core ethical principles would be set forth, followed by subsidiary rules applicable only in particular contexts or practice settings. Rules that have been revealed as unworkable, unnecessary or anachronistic in various contexts could be tightened or relaxed, as necessary, to address the particular needs of the concerned parties.

The best time to prepare for the future is before it arrives. Ethics 2000 provided us with an opportunity to establish a direction for the legal profession before our ability to control our own destiny is supplanted by market forces and other extrinsic factors. It appears, however, that Ethics 2000 will not work any revolutionary changes in the way we look at legal ethics, but will continue the slow, reactive process evolution that has historically brought about subtle changes in standards of attorney conduct. By the time the Commission completes its work (presenting its report at the earliest in the summer of 2000), and the ABA House of Delegates has concluded its debates and approved amended Rules of Professional Conduct (perhaps by 2002 or 2003), it will be time for New York State to begin yet another review of its rules of professional responsibility. Perhaps we will decide to adopt the newly revised Model Rules, or perhaps we will continue to adhere to the framework of the Code. Perhaps by 2010 we will be governed by a multiple-hubbed, many-spoked document that will be vibrant and flexible for years to come. Our future is in our own hands.

* Steven C. Krane is a artner, Proskauer Rose LLP, New York, NY; Chair, New York State Bar Association Committee on Standards of Attorney Conduct (formerly the Special Committee to Review the Code of Professional Responsibility). This article is based in part on an essay by the author that was published in the Spring 1999 issue of the Northern Illinois University Law Review. The views expressed are solely those of the author.

Footnotes

[1] Robert A. Stein, "Updating our Ethics Rules," ABA Journal, August 1998, at 106.

[2] Steven Keeva, "Professionalism Top Shestack Agenda," ABA Journal, October 1997, at 96.

[3] *See, e.g.,* Minutes of Ethics 2000 Commission, October 17-18, 1997, Part VI; Minutes of Ethics 2000 Commission, September 27-28, 1998, Part V ("The Commission agreed unanimously that as an operating principle it would follow a presumptive rule of making no change unless it is substantively necessary.").

[4] *See, e.g.*, Ritchenya A. Shepard, *Law of Lawyering: New ALI Restatement for Attorneys Could Affect Malpractice Liability, ABA Model Ethics Code,* ABA Journal, July 1998, at 30.

[5] George Sharswood, An Essay on Professional Ethics 159 (1854), *reprinted in* 32 A.B.A. Rep. 1 (1907).

[6] *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[7] *See generally* "Professionalism in Practice," ABA Journal, August 1998, at 48; Seth Rosner, "Professionalism and Money," ABA Journal, May 1992, at 69.

[8] *See, e.g.,* Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 Geo. J. Legal Ethics 787 (1998) (introducing symposium issue on structure of attorney regulation); Gwen Thayer Handelman, Gabriel J. Mihc, Douglas M. Selwyn and Rebecca Harrison Steele, *Standards of Lawyer Conduct in Employee Benefits Practice*, 24 J. Pension Planning & Compliance 10 (1998); Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics,* 6 Am. Bankr. Inst. L. Rev. 45 (1998); David Hricik, *The 1998 Mass Tort Symposium: Legal Ethical Issues at the Cutting Edge of Substantive and Procedural Law*, 17 Rev. Litig. 419 (1998); Malini Majumdar, *Ethics in the International Arena: The Need for Clarification*, 8 Geo. J. Legal. Ethics 439 (1995).

[9] *See* Ethics Forum and Debate, *Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices,* 7 Geo. J. Legal Ethics 865 (1994) (remarks of Judge Stanley Sporkin); *see also* Mark H. Aultman, *Commentary, Response to Judge Sporkin, Cracking Codes,* 7 Geo. J. Legal Ethics 735 (1994); Steve France, *Commentary, Response to Judge Sporkin, Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 Geo. J. Legal Ethics 725 (1994).

Religious Liberties

RLUIPA May Not Pass Constitutional Scrutiny

*By John M. Armentano**

The Religious Land Use and Institutionalized Persons Act of 2000[1] (hereafter, "RLUIPA" or the "Act") enacted on September 22, 2000, represents an undisguised attempt by Congress to circumvent two United States Supreme Court decisions — *City of Boerne v. Flores*[2], which struck down the Religious Freedom Restoration Act ("RFRA")[3], and *Employment Div. Dep't of Human Resources of Oregon v. Smith,*[4] which held that the compelling state interest test did not apply in a First Amendment Free Exercise Clause analysis. In 1993, Congress had enacted RFRA in an effort to override *Smith* and resurrect a strict scrutiny test for all government actions that imposed substantial burdens on religious exercise. RFRA was aimed at state and local laws and/or practices, and provided:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
> Government may substantially burden a person's exercise of religion **only** if it demonstrates that application of the burden to the person - -
>
> (1) is in furtherance of a compelling governmental interest; **and**
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[5] (Emphasis added).

In *City of Boerne* in 1997, the United States Supreme Court held that RFRA was unconstitutional, because its restrictions on state and local governments exceeded congressional authority under the Fourteenth Amendment to the United States Constitution, and because "RFRA contradicts vital principals necessary to maintain separation of powers and the federal balance."[6] Thus, the Court held that RFRA was unconstitutional, not only because it was beyond the power of Congress authorized by the Fourteenth Amendment, but also because the statute was "a considerable Congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[7]

Although Congress shifted the articulated justification for RLUIPA from the Fourteenth Amendment, which was the alleged authority for RFRA, to the Commerce Clause, it did not meaningfully change the intended impact on state and local governments. In other words, although RLUIPA is grounded in the Commerce Clause, rather than the Fourteenth Amendment, it is a similar blatant legislative attempt by Congress to overrule the Supreme Court in both *Smith* and *Boerne* by reinstituting the strict scrutiny test in cases addressing the free exercise of religion. In pertinent part, it provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution
>
> (A) Is in furtherance of a compelling governmental interest; **and**
>
> (B) Is the least restrictive means of furthering that compelling governmental interest.[8] (emphasis added).

Thus, by legislative fiat, Congress is intruding into the traditional prerogatives and authority of the states and their local governments to govern land use. The Act requires the localities to follow Congress' instructions by applying the most demanding test known in constitutional law to the exercise of local land use powers by the lowest governmental entities. The Act may well fall for the same reasons that RFRA did, in addition to other well settled constitutional principals set forth in the Commerce Clause and the Tenth Amendment.

A. An Analysis of RLUIPA Under the Commerce Clause

When a federal statute such as RLUIPA is alleged to be beyond the authority granted to Congress by the Commerce Clause and to have violated the principals of federalism contained in the Tenth Amendment, it must first be determined whether the activity that is the subject of the legislation is within one of the three broad categories defined by the Court that may be regulated under the Commerce Clause: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, or persons or things in interstate commerce, or (3) activities having a substantial relation to interstate commerce.[9]

Clearly, the restrictions placed by RLUIPA upon land use regulation do not address (1) the channels of interstate commerce, or (2) instrumentalities of interstate commerce. If

the activity is analyzed under the third category, the analysis proceeds to determine whether the regulated activity "substantially affects" interstate commerce.[10] In this regard, the Court has emphatically stated that it will not approve an overly broad definition of acts affecting commerce. In *United States v. Morrison,*[11] addressing the Violence Against Women Act, the Court held that Congress did not have authority over the subject matter, inasmuch as the statute before it was not regulating an activity that substantially affected interstate commerce. It observed that, because the statute focused on gender-motivated violence wherever it occurred, rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce, it was unconstitutional, because it was beyond the scope of the commerce power.[12]

In addition, in *U.S. v. Lopez*, the same Court declared that the federal Gun Free School Zones Act was unconstitutional because it also exceeded Congress' power under the Commerce Clause. *Lopez* noted that the Commerce Clause is not boundless and that the law involved was a criminal law which did not involve interstate commerce or any other economic enterprise. It seems that the local, non-economic nature of the regulation was pivotal in the finding of unconstitutionality.

In analyzing RLUIPA in the *Lopez* framework, it should fail to establish legislative authority over the subject matter, as defined by the three broad categories stated in *Lopez*. This Act relates to local land use regulation, not to a channel of interstate commerce, and not to an instrumentality of interstate commerce. As such, it cannot be found to "substantially affect" interstate commerce, because, like the overly broad statute in *Morrison*, it focuses on land use regulation wherever it occurs, rather than on land use regulation directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce.[13] Thus, RLUIPA cannot be based upon the Commerce Clause.

B. An Analysis of RLUIPA Under the Tenth Amendment

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The principles of federalism embodied in the Tenth Amendment impose significant limitations on legislation enacted under Commerce Clause powers in order to retain the balance of power between states and the federal government.[14] Serving in the gatekeeper role and limiting the extent of federal power, the Tenth Amendment, a part of the original Bill of Rights, is not an impotent catch-all residuary clause, or a general statement of a truism. It is the barrier built by the founders of our nation between that which is national and that which is local.[15]

If it is first determined under a Commerce Clause analysis that Congress has legislative authority over the subject matter of the legislation, it still remains to be determined whether the statute violates the principles of federalism contained in the Tenth Amendment by requiring the states to compel or prohibit certain acts.[16] Thus, assuming arguendo that RLUIPA is a proper exercise of the Commerce Power (*i.e.*, that it regulates a channel of interstate commerce, an instrumentality of interstate commerce, a person or thing in interstate commerce, or an activity having a substantial relation to interstate commerce), we proceed to the Tenth Amendment analysis.

In *New York v. United States* and *Printz v. United States*, the Supreme Court held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the core principles of federalism contained in the Tenth Amendment. Under the provisions of the Low Level Radioactive Waste Policy Act that were held to be unconstitutional in *New York*, Congress was found to have "commandeered" the state legislative process by requiring the states to either accept ownership of radioactive waste generated within their borders or to regulate it, according to the instructions of Congress by providing for the disposal of all internally generated radioactive waste. This was held to be "inconsistent with the Constitution's division of authority between federal and state governments," in violation of the Tenth Amendment.[17] The Court stated:

> While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, **the Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions.**[18] (emphasis added.)

In *Printz*, the Court invalidated a provision of the Brady Act, which commanded "state and local enforcement officers to conduct background checks on prospective handgun purchasers."[19] The Court, drawing on the Federalist Papers, reaffirmed that the Tenth Amendment "prohibits the exercise of powers not delegated to the United States," by stating:

> The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. Preservation of the States as independent political entities being the price of union, . . . the Framers rejected the concept of a central government that would act upon and through the States, and instead

designed a system in which the State and Federal Governments would exercise concurrent authority over the people - - who were, in Hamilton's words, "the only proper objects of government." . . . "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" - - "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. . . . As Madison expressed it: "**[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.**"[20] (emphasis added.)

In *Morrison*, the Court stated that it has "**always**...rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power."[21] The *Morrison* Court recognized criminal law and family law as areas of "traditional state regulation" and restated a warning that was originally set forth in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[22] :

> [E]ven [our] modern-era precedents which have expanded Congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Loughlin Steel,* the Court warned that the scope of the interstate commerce power "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate **the distinction between what is national and what is local** and create a completely centralized government."[23] (emphasis added.)

C. Land Use Regulation Is A Local Function

The Court has long recognized land use regulation as an area of traditional state regulation, i.e., a police power belonging to state and local governments. In *Lucas v. South Carolina Coastal Council,*[24] it noted that its "takings" jurisprudence has traditionally been guided by the understandings of its citizens regarding the content of, and the state's power over, the "bundle of rights" persons acquire when they obtain title to real property:

> It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power."[25]

The reasoning that the Court expressed in *City Boerne v. Flores*, in striking down RFRA, applies as well to RLUIPA: Congress's discretion is not unlimited, . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. . . . **RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance**.[26] (emphasis added.)

As in *New York*, because the Constitution has never been understood to confer upon Congress the ability to require the states to govern according to Congress' instructions, the Constitution should not be understood to confer upon Congress the ability to require the states to impose or implement land use regulations according to Congress' instructions, as provided in RLUIPA.[27] With regard to RLUIPA, the courts should follow the guidance in *Printz,* and the limitations created by our Founders, which hold that local and municipal authorities form distinct and independent portions of the balance between federal and state powers, and those local and municipal authorities are no more subject to Congress within their respective spheres, than Congress is subject to the local and municipal authorities, within its own sphere.[28]

The regulation of land use is every bit as much an area of traditional state regulation as criminal law or family law was in *Lopez* and *Morrison.*[29] As recognized by the Supreme Court in other cases, an analysis of RLUIPA must recognize that there is a functional relationship between the states' positive responsibility to protect and enhance the well-being of its citizens, their use of the police powers to these ends, and state and local governments' land use controls as a traditional means to achieve these fundamental goals.[30]

Given the Court's special solicitude for "areas of traditional state regulation," expressed in *Morrison* as extending to state police powers generally, and including criminal law, family law and issues of marriage, divorce, and child rearing, coupled with the Court's continuing recognition of the right of states to exercise their police powers, particularly their land use regulatory powers, what is more local than regulation of local land use? Such questions have always been in the local domain. As the Court stated in *Lopez*, to hold otherwise would be to "obliterate the distinction between what it is national and what it is local."[31]

Since the adoption of RLUIPA two cases have been decided at the Federal District Court Level, both holding that

RLUIPA is a constitutional exercise of congressional power. e.g. *Freedom Baptist Church of Delaware County v. Township of Middletown*, [32] and *Cottonwood Christian Center v. Cypress Redevelopment Agency.*[33] Neither of these cases contains a detailed analysis of the Commerce Clause and the Tenth Amendment issues. For example, in *Cottonwood* the Court simply gratuitously observed that plaintiff had not attacked the constitutionality of RLUIPA. Nevertheless, it went on to say in pure dicta with no analysis that, because RLUIPA was based on the spending and commerce clauses, it would appear to have avoided the pitfalls of its predecessor. This is hardly an analysis of the constitutional magnitude required in cases of this type.

With respect to *Freedom Baptist* the Court examined the issues and noted that the Congress had authority to act under the Commerce Clause and that RLUIPA differed critically from RFRA in that the latter had sweeping coverage that ensured Congressional intrusion at every level of government. It seems that when dealing with the regulation of land use at the lowest level of government for the federal government to dictate that the zoning authority must employ a strict scrutiny standard in religious use situations in and of itself is a similar intrusion which violates the Tenth Amendment.

Neither of these cases has reached a circuit court of appeals for decision. In both *Lopez* and *Morrison,* as seen above, the Supreme Court invoked bedrock notions of federalism observing that the Constitution creates a federal government of enumerated powers and even Congress' power under the Commerce Clause was subject to some limits. When analyzing these cases applying RLUIPA in light of *Printz, Morrison* and *Lopez,* it seems clear that notions of federalism indeed come into play and that the Supreme Court may very well hold that RLUIPA is in the same category as gun free zones (the Brady Act), and the Violence Against Women Statute. To permit the federal government to intrude into the town hall debates and to dictate what uses of land are permitted and to what extent they are permitted to regulate at the local level is a total disregard of the comprehensive planning process, which is the sine qua non for a rational, well considered zoning ordinance. After all, what can be more truly local than determining land use in one's neighborhood particularly when the land use is based upon a well considered comprehensive plan for the entire community and all impacts, including environmental impacts, have been considered. To suddenly have the federal government give certain uses greater protection from otherwise legal regulation to which others are subject may not be upheld by the Supreme Court, especially in light of the clear admonition in *Jones & Laughlin Steel* and restated in *Morrison*: that the Court should not "obliterate the distinction between what is national and what is local and create a completely centralized government."

* John M. Armentano is a partner with the Long Island law firm of Farrell, Fritz, P.C., represents local governments and developers in zoning, land use, and environmental matters, including litigation. He may be reached at jarmentano@farrellfritz.com.

Footnotes

[1] 42 U.S.C. § 2000cc et seq.
[2] 521 U.S. 507, 117 S. Ct. 2157 (1997).
[3] 42 U.S.C. § 2000bb et seq.
[4] 494 U.S. 872, 110 S. Ct. 1595 (1990), *reh'g. den.,* 496 U.S. 913, 110 S. Ct. 2605 (1990).
[5] 42 U.S.C. § 2000bb-1.
[6] *City of Boerne v. Flores,* 117 S. Ct. at 2172 (emphasis added).
[7] *Id.* at 534 (emphasis added).
[8] 42 U.S.C. § 2000cc(a)(1).
[9] *See United States v. Lopez*, 514 U.S. 549, 558-59, 115 S.Ct. 1624 (1995).
[10] *See Lopez*, 514 U.S. at 559, 115 S.Ct. at 1629-30.
[11] 529 U.S. 598, 120 S. Ct. 1740 (2000).
[12] *See Morrison*, 120 S.Ct. at 1749.
[13] *See Morrison*, 120 S.Ct. at 1749.
[14] *See Printz v. United States*, 521 U.S. 898, 924, 935, 117 S. Ct. 2365, 2379, 2384 (1997); *New York v. United States*, 505 U.S. 144, 155-57, 177, 112 S. Ct. 2408, 2417-18, 2429 (1992).
[15] *The Federalist*, Nos. 15 and 39.
[16] *Printz,* 117 S.Ct. at 2379.
[17] *New York v. United States,* 505 U.S. at 175-78, 112 S. Ct. at 2428-29.
[18] 505 U.S. at 162, 112 S. Ct. at 2421 (citing *Coyle v. Smith*, 221 U.S. 559, 565, 31 S. Ct. 688, 689 (1911)) (emphasis supplied).
[19] 521 U.S. at 902.
[20] 521 U.S. at 919-20, 117 S. Ct. at 2379 (quoting The Federalist Nos. 15 and 39) (citations omitted) (emphasis added).
[21] *Morrison,* 120 S. Ct. at 1754 (quoting *Lopez* 514 U.S. at 584-85, 115 S. Ct. 1624) (emphasis supplied).
[22] 301 U.S. 1, 37, 57 S. Ct. 615 (1937), and was echoed in *Lopez*, 514 U.S. at 556-57, 115 S. Ct. at 1628-29.
[23] *Morrison,* 120 S. Ct. at 1748-49 (quoting *Lopez*, quoting *Jones*) (emphasis added).
[24] 505 U.S. 1003, 1027, 112 S. Ct. 2886, 2899 (1992).
[25] *Id*. (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158 (1922)).
[26] *City of Boerne v. Flores*, 117 S. Ct. at 2172 (citations omitted) (emphasis added).
[27] *See* 505 U.S. at 162, 112 S. Ct. at 2421.
[28] *See Printz*, 117 S. Ct. at 2377.
[29] *See Morrison,* 120 S. Ct. at 1753.
[30] S*ee Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978), *reh'g den.*, 439 U.S. 883, 99 S. Ct. 226 (1978); *Agins v. Tiburon,* 447 U.S. 255, 100 S. Ct. 2138 (1980); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143 (1915).
[31] *See, e.g., Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S. Ct. 1536 (1974), *Berman v. Parker,* 348 U.S. 26, 75 S. Ct. 98 (1954), and *Lucas, supra.*
[32] 204 F. Supp. 2d 857 (E.D.P.A. 2002).
[33] 218 F. Supp. 2d 1203 (C.D. Cal.2002).

> [T]he Court … says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show *an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*." Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced "in the past half century," in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy. In relying, for evidence of an "emerging recognition," upon the American Law Institute's 1955 recommendation not to criminalize "'consensual sexual relations conducted in private,' " *ante*, at 11, the Court ignores the fact that this recommendation was "a point of resistance in most of the states that considered adopting the Model Penal Code."
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> The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," –the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual.," The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review. *Lawrence v. Texas* (Scalia, J., dissenting)

In his dissent to *Lawrence v. Texas* Justice Scalia bemoans not only the decline of constitutional principle in Supreme Court jurisprudence but the apparently inevitable decoupling of morals and law. Those who read the Constitution expansively, if not imaginatively, may disagree with Justice Scalia's view of constitutional decision making. But many of these same critics of his judicial philosophy probably would agree with his suggestion that the words "morals" and "legislation" will likely be seen together less and less frequently in current events, and wish that coupling good riddance. Should they, however? And what should conservatives think of such a development?

In fact, Justice Scalia's prediction of the end of morals legislation may be overly pessimistic – or, perhaps, overly optimistic. The difference does not only depend on whether the orientation of a political conservative on legal issues is traditional – like that of Justice Scalia – or of an "alternative" nature, i.e., libertarian. It depends as well on how one regards the progress of a culture war, discussed (famously, already) elsewhere in his dissent in *Lawrence*. For even a libertarian, distrusting a supposed legislation of morality, will be disappointed if Justice Scalia is right about the future of "morals" as a constitutional basis for legislation while "morality" continues its long reign. To understand why this is so, we must consider Justice Scalia's very specific choice of words.

Nothing could be more mundane than "morality." The fourth edition of the American Heritage Dictionary describes it primarily as "The quality of being in accord with standards of right or good conduct." But of course, the only moral principle of our time is, "Who are you to say?" Yet "morals," used as an adjective by Justice Scalia in the phrase "morals legislation," is something different. The closest dictionaries get to this sense of the word is in definitions such as this one, for the noun "morals" – "Rules or habits of conduct, especially of sexual conduct, with reference to standards of right and wrong: *a person of loose morals; a decline in the public morals.*" It seems that this usage of the word derives from the Latin *mores*, meaning a specific set of customary standards (and quite distinguishable from Roman morality, or the requirements of its pagan religious law). The adjective form, as used by Justice Scalia, is typically found only in two or three phrases: "morals charges" or its variant, "morals crimes", and their necessary opposite, "morals squad." Justice Scalia refers not to what each man considers moral or not, which like all things that includes everything thereby includes nothing, but rather the *mores* of a society as a whole.

The morals adjective is an old fashioned adjective for an old fashioned idea – the idea that public morals, and not merely the distance at which my fist brakes before approaching your face, are the appropriate subject of crime and punishment, or at least of social judgment; and that reasonable men can agree, with some petty variation, regarding the appropriate moral code to be enforced. This is how Justice Scalia means morals – a specific code of behavior, based on a shared moral consensus. It goes without saying that in a world with morals, that an act was "consensual" was a necessary, not a sufficient, criterion for evaluating its moral stature. Yet we seem today to doubt that we can ever again say much more than this.

The obvious error we can make at this juncture is to say, "Of course we cannot legislate and enforce morals today, because we do not share the moral consensus of former times, and pity to our benighted fathers for thinking it was ever consonant with liberty to try." This logical error is premised on the idea that the moral code in question must have been Christianity, or some particular form of it (either narrower – say, Puritanism, or Catholicism – or broader – "Judeo-Christian ethics"). In our multicultural times, when every creed must be reckoned as "peaceful" and when paganism itself is elevated to the status of a bona fide church, how can we make crimes of subjects such as "morals"?

It is true that religion was, until very recent times, the foundation of the conception of public morals. This did not begin with Constantine and his martial melding of Church and state nor even with the divided theocracies of the ancient Hebrews. And yet while we are frequently reminded that the Constitution was written by men with a wide variety of commitment to organized religion, no one seriously doubts that they all would have recognized a positive moral code that all reasonable men could and must acknowledge, and that this code, known as the Natural Law, was largely reflected in religious moral systems that they knew.

This consensual code was not Anglican, certainly not Catholic and arguably not even Christian, but rather Anglo-Saxon – which is not to say that it is not of great use to a Catholic intellect such as that of Justice Stevens. But it is no accident that this moral code is vague, evolutionary and lacks a Roman-style reduction to a central written document. Rather it follows the Anglo-Saxon model of the common law – evolutionary, yes; hewn in stone, not at all; but based on a shared set of "common sense" assumptions so widely shared that appeals to them by the likes of the irreligious Thomas Paine and to similar notions of "self evident" truths made perfect sense to all who encountered them. Today a similar set of shared values, an orthodoxy of sorts, is enunciated by the New York Times for many members of certain liberal elites. Unfortunately, however, this "consensus" encompasses something less than half of those engaged in the conversation.

There was not consensus on each and every detail of this code, and from time to time morals within this code seem to have moved fast enough to belie any concept of evolution for any but the most fundamentalist Stephen Jay Gould. The Anglo-Saxon moral code – morals – did not, however, break under the strain of dissent, and did not become irrelevant by virtue of its fluidity. Indeed, like the common law, it became stronger. Its cuttings were replanted in America; its less democratic tendencies – "gentlemen's agreements" and various arbitrary social restrictions – largely pruned, and too slowly for some. But its roots still bear the flower of a great society enjoying substantial liberty and creativity, and cultural conservatives such as Justice Scalia find its shade pleasing. Perhaps it is those bearing the axe rather than the pruning shears that Justice Thomas meant when he wrote, in his own dissent to *Lawrence*:

> If I were a member of the Texas Legislature, I would vote to repeal [this law]. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.
>
> Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated.
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> * * *

Under our present morals, all of us would say that it was wrong to consider slavery moral or to give women less than the full gamut of human rights. But earlier social or political judgments, however, particularly regarding slavery, were not seriously considered appropriate morals under our Anglo-Saxon rubric. And this is not merely because the Anglo-Saxons in England itself, unencumbered by the Holy Writ of 1789, had little difficulty employing their Anglo-Saxon morals to decide that slavery and the slave trade must end there.

In a recent article in the *The Atlantic*, for example, H.W. Brands samples some of the early 19th-century criticism of the Great Compromise. William Lloyd Garrison considered the Constitution, because of its accommodation to slavery, "a covenant with death and an agreement with Hell," and New York's Senator William Seward said that the law "higher … than the Constitution," namely the natural law of human liberty, required that slavery must ultimately be ended. Lincoln acknowledged the moral pragmatism of the slavery compromise, arguing that it was a short-term loss in return for a long-term gain, and he made good on the promise to collect the moral debt incurred by the Republic at the Founding, with interest accrued.

These moral judgments did not arise from the Bible, which does not obviously condemn the not-so-peculiar social institution of involuntary servitude. It was Scripture's

moral sanction for slavery upon which Southern apologists relied early and often. Did this defense of slavery ever merit serious consideration in Anglo-Saxon morals? Perhaps. But to acknowledge these moral misjudgments does not prove that we must despair of ever judging right, and that to have liberty we must retreat into libertarian-style atomism or the replacement of morals with supply and demand. In fact, we know that the critics of Justice Scalia's philosophy themselves do not believe this at all. They do not, however, speak of morals; they speak always of morality. It is "morality" that requires that animals be treated the same as children and fetuses the same as viruses; that dictators be given the same political deference as the leaders of democracies; that "diversity" is an absolute moral good; that all religions (besides Western ones) are noble by virtue of being religions. This is all moral sensibility and none at all, or, worse, it is morality by majority (or elite) rule – the very conception of the moral decried by Justice Stevens in his majority opinion.

Yet ironically the proponents of this same modern "morality" bristle at the call to morals from Justice Scalia, William Bennett or Robert Bork. These critics comfortably don the mantle of moral superiority in its most stylish genus, the moral superiority of moral nullity, and decry political conservatives as "Bible thumpers" and religious fundamentalists. More or less the same criticism may be found in pockets on the right, the libertarians, whose worship of the market as arbiter of all things, moral and otherwise, is never reckoned an establishment of religion. What all these critics miss is that the morals on which our society was built are not, strictly speaking, Christian morality or Old Testament morality – and for this reason they share their error with those on the religious right who might maintain that "America was founded as a Christian country." America was founded, in fact, as an Anglo-Saxon country, with an Anglo-Saxon sensibility of morality. This sensibility, it has been argued, was only strengthened by the contribution of America's second-largest ethnic stock, the Germans, whose own evangelical traditions exalted earthy, common-man values not so different from those of their English cousins. These traditions make serious reference to the teachings of religion but – unlike other social mentalities such as classical continental Catholicism or radical Islam – insist on individual conscience as the highest attribute, but only when placed within a cognizable (usually traditional) social context.

It is for this reason that among the folk heroes of Anglo-Saxon political culture few can match the great attorney St. Thomas More, and of course not in his role as the Vatican's enforcer of orthodoxy in England but as a martyr to conscience in the face of religious coercion. More's conscience was the product, not of personal navel-gazing or even spiritual self-discovery of the highest order, but of his commitment to morals – already reflected in the Magna Carta – which, at that particularly inauspicious and radical moment, were politically unsustainable in Tudor England. To give Catholicism its due here, More lived and died the teaching of St. Thomas Aquinas that *lex injusta, non est lex.* More's *mores* were Anglo-Saxon in the main – based on personal loyalty, communal commitment (in his case, the community of loyalists to Rome) and an underlying conservatism.

Ironically, this call to morals, whether by abolitionists or martyrs to faith, is what it means, then, to be a cultural conservative in our time. Cultural conservatives do not have a monopoly on this quality. They, and their allies in morals in pulpits and among lay people who cannot call themselves conservative, share with the premise that traditional morality (not this religious code or that one) is valid for a society, not because the majority rules but based on the premise that the good that we have inherited outweighs the bad, and that the burden of departing from traditional morals is on the one who would make such a change. It is to morals such as these which presumably a Catholic such as Justice Scalia can call to mind as a signal and, in fact, secular premise of our Constitution. This Anglo-Saxon code of morals is not the same as modern "morality" because it does not call on guilt or pity or other emotion for its moral force. Nor is it based on those moral wolves in sheep's clothing, egalitarianism or materialism, dialectical or otherwise. It despises relativism, which is its necessary opposite, but does not roll out Biblical chapter and verse to make secular law. It calls, rather, on common sense, which can only have meaning if there is common sensibility.

And for this reason perhaps there is reason to believe that Justice Scalia is, sadly, correct. Morals legislation may in fact have no future in our multi-culture. It is unfortunate that the bargain of the melting pot has become parodied as necessitating the abandonment of individuality or cultural connection in return for full membership in the American Enterprise. These may have been subsidiary effects of acculturation, but in fact they may not have been central to the more fundamental political and moral equation: Join us and join in our common sense, and you may benefit from it in full measure. This commonality of sensibility, relied on by Deists and Protestants in framing their original compact, permitted Catholics and Jews, not hewn of Anglo-Saxon rock, to maintain a uniquely American-style loyalty to a country that made no claim to connection with Divine Right. It separated their religious and their political energies while allowing them to draw on the former to nurture the latter. American common sense, American morals, prevailed (if sustaining the occasional bruise) in political life for centuries against attacks from the personally Divinely inspired, the moral solipsists and the radicals who would have replaced it with the alternative morals of Marxian belief.

Sociologists, historians and political philosophers will argue over how and why this changed. Could the infusion of Catholic and Jewish sensibility undermine Anglo-Saxon moral sensibility? This seems doubtful. More likely, the answer can be found in a reversal of field, understandable and predictable, that allowed political values to affect

religious values for Jews, Protestants and Catholics alike. Thus the American commonplace that the hierarchical leadership of this or that religion is "out of step" with its membership and that the doctors of religion should adjust their teaching accordingly. The supposed flock leads the alleged shepherd in matters spiritual. That Americans have always been free to start their own religions has obviously sped up the un-linking of morals and spiritual teaching; but this appears to be beside the point. Because morals and common sense were historically grounded, not in Biblical command or religious doctrine as such but in validation from religion, it seems more significant that mainstream religion in America has become the girl who can't say no. Variant traditionalist strains such as Opus Dei and some far-right Protestant movements, being reactive, cannot or will not contribute new sustenance to public morals because they (accurately) see the interplay of political morality and religion as inherently corrupting. Therefore they reject the melting pot, the appeal to commonality of sense, and despair of a return to public morals except under the strictest of sectarian guidelines, a political and Constitutional dead end. Needless to say, the recent introduction of religious traditions for which there are no "receptors" in Anglo-Saxon morals only complicates the situation. But it may be argued that if many mainstream religious leaders had not given up the fight for morals, and not just morality, in the public sphere, that the system would still be robust enough to either assimilate the contribution from these new contributors – or to reject them as not only foreign, but lacking in morals, as may be the case.

However good such a religious renewal might be for individuals or for societies, it will not reinvigorate the idea of morals as an appropriate basis for policy making, however. What must first be recovered is the understanding that there can ever be moral consensus, except of the basest kind, without theocracy. Our Anglo-Saxon history – ours regardless of ethnic or cultural heritage – shows that it can be done. The experience of outsiders to that tradition who have successfully appealed to it, such as Gandhi, demonstrates that morals can be shared across cultures.

The challenge of developing moral consensus in a multicultural world is daunting. Rejection of *mores* is taught as a virtue; believers, traditionalists and those who do not adopt the orthodoxy of the intellectual elites are denounced as "mean spirited," "fascist" and "fundamentalist," so that no real conversation seems possible. But if we frame the argument properly – as one seeking genuine moral consensus and a rebirth of morals, without recourse to theocracy – we can approach those who see a power-hungry Pope or a grits-eating Ayatollah behind every assertion of morals in public policy. Perhaps at the same time cultural conservatives, and others who value sincere dialogue in search of meaningful moral consensus, can recapture the "moral" high ground of libertarians and others who have embraced the seeming impossibility of moral consensus and morals in public policy, and made their avoidance a virtue. Our goal must be to coalesce in a consensus on morals attractive enough for a meaningful majority that again enables morals legislation, morals social policy, morals leadership – but, given the world we live in today, which does so without alienating a substantial segment of the population or leaving the other perpetually feeling aggrieved at the injustice of it all.

We must not join in abandonment of our own morals, which include our ancient belief that we are, indeed, responsible for the moral state of our brothers, as well as our American faith in reason, common sense and that, when in doubt, we should choose the liberty of the individual.

* Ronald Coleman is the principal of the Coleman Law Firm, with offices in New York and New Jersey and Vice Chairman for Publications of the Religious Liberties Practice Section. He is a former fellow of Mesivta Yeshiva Rabbi Chaim Berlin in New York. David Marshak is an expert on online computer systems. He is a retired Vice President and Technical Manager from Bank of America and works in computer project management consulting. He is also a UMC Lay Speaker and the former Lay Leader and Lay Member of Annual Conference for the Walnut Avenue UMC in Walnut Creek, CA. He can be reached at www.coleman-firm.com.

Telecommunications

The FCC Makes Historic, and Controversial, Changes to Its Media Ownership Rules

*by R. Edward Price**

Rarely does an action taken by the Federal Communications Commission (FCC) result in groups as diametrically opposed as the National Organization for Women and the National Rifle Association taking the same side against the FCC (or even taking an interest in the matter). But on June 2, 2003, the Commission took just such a step when it adopted an order (*June 2 Order*) containing several long-anticipated changes to its rules governing media ownership.[1] In deciding to lessen certain restrictions on the ownership of TV, radio and other media outlets, the FCC cited the vast changes that have occurred in the media marketplace since the rules were originally formulated. Once they take effect (most likely in September 2003), the new rules are almost certain to result in some new consolidation in the media industry.

But opponents of the decision, including the FCC's two Democratic commissioners, have vowed to fight the implementation of the changes before the FCC itself, the courts, and Congress. At stake, they say, is maintaining diversity of media ownership and thereby preserving access to the airwaves. This view is consistent with the traditional thinking that broadcast stations have a special ability to attract public attention and therefore to influence public opinion, particularly concerning elections. Under this theory, broadcast stations should be subject to greater levels of ownership restrictions than would otherwise be warranted for reasons of competition.

Changing the FCC's media ownership rules is nothing new. As discussed below, consideration of the rules has bounced back and forth between Congress, the FCC, and the courts for several years, and the bouncing is likely to continue with the latest changes. Indeed, Congress may very well take the unusual step of enacting legislation to counter all or part of the FCC's decision. The House did so in July 2003, and the Senate is likely to take up the issue after the August 2003 recess. Moreover, court appeals from the FCC's order are sure to be filed by early October 2003.

This article provides some background on media ownership regulations, a discussion of the most recent rule changes, and a description of the actions being taken in Congress and the courts by opponents to try and stop the implementation of the FCC's new rules.

Media Ownership Regulations: A Brief History

In the decades since radio and television were introduced, the FCC and Congress have, over time, set limits on the number of TV and radio stations in which a single entity could hold an "attributable" ownership interest,[2] as well as the extent to which a broadcast station owner may have an ownership interest in other types of media. Specifically, the FCC or Congress has established limitations on the number of TV and radio stations that could be commonly owned in a single market and nationwide; the percentage of TV households that commonly owned stations could reach; and the cross-ownership of TV stations, radio stations, cable TV systems, and local newspapers. The point of these rules was to guard against concentration of ownership in the media industry and thereby help ensure competition, a diversity of viewpoints and programming outlets, and attention by broadcasters to issues of local importance. But with the advent of multi-channel cable and satellite television systems, as well as the Internet, Congress decided to do away with certain of these ownership limitations in the Telecommunications Act of 1996 (1996 Act)[3] and to require the FCC to review the remaining ownership limits every two years to ensure they continue to be "necessary in the public interest."[4]

During its first biennial review of the rules in 1998, the FCC decided that the remaining ownership limits still served the public interest and that they should not be changed or eliminated.[5] However, this decision was appealed to the U.S. Court of Appeals for the District of Columbia Circuit. In two separate cases, *Fox Television Stations, Inc. v. FCC*[6] and *Sinclair Broadcast Group, Inc. v. FCC*,[7] the court determined that the 1996 Act established "a presumption in favor of repealing or modifying the ownership rules"[8] and remanded the matter back to the FCC either to more fully justify its decision to keep the rules or, if it could not do that, to eliminate the rules.[9] Along with the remand, consideration of all of the FCC's ownership rules was consolidated into the proceeding that led to the *July 2 Order*.

Changes to the FCC's Rules

As a central justification for the modifications to its ownership rules made in the *June 2 Order*, the FCC said the following:

> Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before. A generation ago, only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote locations, and the seeds

> of the Internet were just being planted in a Department of Defense project. Today, hundreds of channels of video programming are available in every market in the country and, via the Internet, Americans can access virtually any information, anywhere, on any topic. . . . Nonetheless, while the march of technology has brought to our homes, schools, and places of employment unprecedented access to information and programming, our broadcast ownership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America's information gatekeepers. . . .[10]

The new ownership rules, and the way the *June 2 Order* altered the prior rules, are summarized as follows:

- National TV ownership limit. This rule, as modified, prohibits a company from owning TV stations that together have a national audience reach exceeding 45%.[11] The *June 2 Order* raised this limit from 35% because it determined that an increase would not substantially affect the negotiating power of networks vis-à-vis their affiliates and because of competition in the television market from cable and direct broadcast satellite systems.[12] In calculating national audience reach, the FCC considers UHF stations to reach only 50% of the households of the markets they serve.[13] The FCC left this "UHF discount" in place in its *June 2 Order*. but will eliminate it for stations owned by the big four networks once the transition to digital TV is complete (no earlier than 2006).
- Local TV ownership limit. This rule limits the number of TV stations that a company may own within a single local market. In markets with five or more commercial and/or non-commercial TV stations, the modified rule allows a company to own two stations, only one of which may be in the top four in ratings.[14] In markets with 18 or more stations, a company may own three stations, only one of which is in the top four. The FCC may grant a waiver of this rule to allow ownership of two top-four stations in markets with eleven or fewer stations where the combined ownership better serves the local community. Prior to the *June 2 Order*, common ownership of two stations in the same market was only allowed where the Grade B signal contours of the stations did not overlap or where at least one of the two stations was not ranked in the top four and, after the merger, there would be at least eight other independently owned stations.
- Local radio ownership limit. This rule limits the number of radio stations that a company can own within a single local market. In markets with 45 or more radio stations (both commercial and non-commercial), eight stations may be commonly owned (but no more than five may be in the same service — i.e., AM or FM). In markets with 30 to 44 stations, up to seven may be commonly owned (with no more than four in the same service). In markets with 15 to 29 stations, six may be commonly owned (with no more than four in the same service). And in markets with 14 or fewer stations, five may be commonly owned (with no more than three in the same service). The FCC left these numerical limits unchanged in the *June 2 Order*. However, the agency decided to include both commercial and non-commercial stations in the formula, whereas the prior rule only included commercial stations (i.e., previously there had to be 45 *commercial* stations in a market in order for a single entity to own eight stations). The FCC also decided to change the definition of local markets to the geographic areas assigned by Arbitron Inc., an industry rating service.[15] Previously, local markets were defined based on stations' signal contour overlaps.
- Cross-media ownership limits. Prior to the *June 2 Order*, the FCC's rules contained separate limitations on the cross-ownership of TV and radio stations and daily newspapers. Those limitations have now been combined into one provision that prohibits any cross-ownership of TV and radio stations and newspapers in local markets with three or fewer TV stations. In markets with four to eight TV stations, there may be a combination of any one of the following: (a) one daily newspaper, one TV station, and up to half the radio station limit for that market (e.g., three radio stations if the limit for the market under the local radio rule is six); or (b) one daily newspaper, up to the radio station limit, and no TV stations; or (c) two TV stations (if permitted by the local TV rule), up to the radio station limit for the market, and no newspapers. In markets with nine or more TV stations, there is no longer any ban on newspaper-broadcast and TV-radio cross-ownership.
- Dual network ownership prohibition. This rule prohibits a merger between any two of the top four national broadcast networks (ABS, CBC, Fox, and NBC). The FCC in its *June 2 Order* decided to leave this rule unchanged.

How the New Rules Will Be Implemented

The new rules — to the extent they remain in place following any action by Congress or the courts (see below) — will take effect thirty days after they are published in the Federal Register (which is expected in August 2003). The FCC has established a "freeze" on all radio and TV transfer of control and assignment applications until the new rules take effect and the agency revises its broadcast application forms to reflect the new ownership rules. The parties to pending assignment or transfer applications may amend those applications by submitting new ownership showings to demon-

strate compliance with the new rules.

It is possible that a limited number of commonly owned clusters of TV and/or radio stations that were permissible under the old rules now violate the new rules. The FCC has grandfathered such clusters under the new rules, but they may be sold by their current owners as a cluster only to small businesses; sales to entities that do not qualify as small businesses will require appropriate divestitures to ensure compliance with the new rules.[16]

One important fact to bear in mind is that the FCC's rule changes have not changed antitrust laws in the United States. A combination of stations that is permitted under the new FCC rules could very well face scrutiny from the Justice Department's Antitrust Division. Indeed, such scrutiny has become increasingly common since the liberalization of the FCC ownership limits that began with the 1996 Act. For example, in addition to reviewing large media mergers under Hart-Scot-Rodino, Antitrust Division Chief Hewitt Pate has said the Division currently has an open investigation of media giant Clear Channel Communications, Inc.[17]

Challenges to the New Rules

It is clear that the new rules will face protracted challenges in reconsideration proceedings before the FCC and in court appeals. The top four networks and other large broadcasting groups may challenge the remaining rules as being insufficiently deregulatory under the 1996 Act. Certain political advocacy groups also plan to challenge the new rules as going too far in the direction of media consolidation and away from the central goals of diversity, competition, and localism. As of this writing, reconsideration petitions and court appeals have not yet been filed but are expected by September 4 and October 6, respectively.[18]

Congress has also taken a keen interest in this matter, with many members on both sides of the aisle calling for a rollback of some or all of the changes. The House of Representatives, by a lopsided vote of 400-21 as part of a spending bill, passed a measure to change the national TV ownership cap back to 35% from 45%. Attempts in the House to rollback other FCC rule changes were defeated, reportedly due in part to veto threats from the White House. The Senate has yet to take up the House measure, but the Senate Commerce Committee has approved two bills that would reinstate the 35% cap as well as the newspaper-broadcast cross-ownership ban. Additionally, 20 Senators, including Senators Byron Dorgan (D-N.D.), Trent Lott (R-Miss.), and Russ Feingold (D-Wis.), have co-sponsored a "congressional veto" to nullify the FCC's entire June 2 decision. The Senate is not expected to vote on any bills pertaining to media ownership until after the August recess.

Despite the possible passage of a roll-back measure in the Senate, the FCC still has powerful allies in the House. House Majority Leader Tom Delay (R-Tex.) and House Energy and Commerce Committee Chairman Billy Tauzin (R-La.) both oppose restoring the cap to 35% and will reportedly try to stop attempts to do so during a House/Senate conference. But if legislation rolling back the FCC's changes does pass both houses, it remains to be seen whether President Bush will expend political capital by using a first-ever veto against a measure — rolling back the national TV ownership cap to 35% — that appears to enjoy fairly broad popular support, as well as support among Democrats and many Republicans in Congress. In the meantime, there are rumors that FCC Chairman Michael K. Powell may resign, in part over the response of Congress to the media ownership rule changes. But many at the FCC have denied those rumors, and Chairman Powell continues to stand by the new rules.[19]

*R. Edward Price practices communications law in the Washington, D.C., office of Vinson & Elkins L.L.P.

Footnotes

[1] *See In re 2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, *Report and Order and Notice of Proposed Rulemaking*, FCC 03-127 (adopted June 2, 2003; released July 2, 2003) (*June 2 Order*).

[2] An "attributable" interest is ownership of five percent or more of a corporation's outstanding voting stock or any active interest in a partnership or limited liability company (LLC). Non-voting shareholders, as well as limited partners and LLC members that are not materially involved in the management of the media activities of a partnership or LLC, are not considered to have an "attributable" interest for purposes of the FCC's rules. *See* 47 C.F.R. § 73.3555 Note 2. The FCC did not make any changes to these attribution standards in the *June 2 Order*.

[3] Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act repealed statutes prohibiting telephone/cable and cable/broadcast cross-ownership and overrode FCC rules limiting cable/network cross-ownership. It also eliminated FCC regulations of national radio ownership, relaxed local radio ownership restrictions, relaxed the rule against ownership of two TV networks, eliminated the cap on the number of TV stations a single entity can own nationwide, and increased from 25% to 35% the cap on TV households that a single broadcaster may reach.

[4] 47 U.S.C. § 161(a). Any rules that the FCC determines are no longer "necessary in the public interest" must be modified or repealed. 47 U.S.C. § 161(b).

[5] *In re 1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, *Biennial Review Report*, 15 FCC Rcd 11058 (2000). At that time, during the Clinton administration, the FCC was comprised of three Democratic and two Republican commissioners. The FCC is now comprised of three Republican and two Democratic commissioners.

[6] 280 F.3d 1027 (D.C. Cir. 2002) (addressing the national TV ownership rule).

[7] 284 F.3d 148 (D.C. Cir. 2002) (addressing the local TV ownership rule).

[8] *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159.

[9] In *Fox* the court also vacated the FCC's rule prohibiting cross-ownership of a TV or radio station with a local cable TV system.

[10] *June 2 Order* ¶¶ 3-4.

[11] "National audience reach" is defined as "the total number of television households in the Nielsen Designated Market Area (DMA) markets in which the relevant stations are located divided by the total national television households as measured by DMA data . . . ." 47 C.F.R. § 73.3555(e)(2)(i). Stations' actual ratings are not relevant to

this calculation.

[12] To put the power of large TV station group owners in some perspective, here are the percentages of TV stations nationwide owned by some of those groups: Viacom owns 2.27% of all TV stations; Fox owns 2.03%; NBC owns 1.69%; and ABC owns 0.581%. *See* Adam Thierer and Clyde Wayne Crews Jr., *Manager's Journal: What Media Monopolies?*, WALL ST. J., July 29, 2003, at B2.

[13] 47 C.F.R. § 73.3555(e)(2)(i). Since UHF stations are generally entitled under the FCC's rules to carriage on local cable systems, many are likely to reach an audience far in excess of 50% of their markets. The "UHF discount" could therefore have the effect of allowing commonly owned groups of stations to reach a national audience in excess of the national TV ownership cap.

[14] Critics have pointed out that, under the modified rule, multiple non-commercial stations that broadcast the same programming are counted individually, rather than as one station. So consolidation may now be permitted in markets that have five or more TV stations, even though two or more of them are non-commercial and broadcast the same programming stream. An example cited in a recent *Wall Street Journal* article is Sioux Falls, S.D., which is considered to have a total of 11 stations, but five of them are non-commercial and broadcast the same public television signal from South Dakota Public Broadcasting. *See* Youchi J. Dreazen, *Shifts for Small TV Markets*, WALL ST. J., July 28, 2003, at B1. FCC staffmembers have said that parties are free to raise this issue before the agency in reconsideration petitions.

[15] The *June 2 Order* contains a Notice of Proposed Rulemaking section where the FCC asks for comment from interested parties concerning how radio markets should be defined in parts of the country that are not part of an Arbitron market. *See June 2 Order* ¶¶ 657-70.

[16] *See June 2 Order* ¶¶ 482-495.

[17] Terry Lane, *DoJ Questioning Clear Channel; FCC Actions Draw Interest of House Judiciary Committee*, COMM. DAILY, July 28, 2003, at 4.

[18] The *June 2 Order* was published in the Federal Register on August 5, 2003. *See* 68 Fed. Reg. 46286 (2003). Reconsideration petitions must be filed with the FCC no later than 30 days after that, *see* 47 C.F.R. §§ 1.4, 1.103, 1.106(f), and petitions for review must be filed with the U.S. Court of Appeals no later than 60 days after that, *see* 28 U.S.C. § 2342(1), 2344.

[19] *See, e.g.*, Michael K. Powell, *New Rules, Old Rhetoric*, N.Y. TIMES, July 28, 2003, at A21.

The FCC's New Media Ownership Rules: What's All the Controversy About?

By Stephen T. Yelverton

On July 2, 2003, the Federal Communications Commission adopted new rules to govern the ownership of broadcast stations. This rulemaking was mandated by the 1996 Telecommunications Act which requires that the FCC review its broadcast ownership rules every two years to determine whether the rules that are currently in force are still necessary "as a result of competition" in the marketplace.

The U.S. Court of Appeals for the D.C. Circuit in *Fox v. FCC*, moreover, questioned the validity of any limits on concentration of broadcast ownership. It directed the FCC to develop a "solid factual record" based upon changes in the media marketplace in order to justify such limits on concentration of ownership.

In response to these directives from Congress and the D.C. Circuit, the FCC initiated a rulemaking that in a period of almost two years considered some 520,000 comments from members of the public. This included "town hall" meetings in various cities around the country that were hosted by FCC Commissioners.

When the new broadcast ownership rules were adopted on June 2nd, a torrent of criticism and controversy erupted. Many liberal and conservative advocacy groups were united in their opposition to the FCC's loosening of restrictions on the concentration of ownership. The House Republicans broke ranks with the GOP-controlled FCC and voted almost unanimously to repeal certain aspects of the FCC's new rules. The Senate is expected to follow suit, even though President Bush has threatened a veto of a Congressional repeal of the FCC rulemaking.

So, what did the FCC do to provoke such controversy? What are in these rules that not only could unite liberals and conservatives, but divide Republicans?

National TV Ownership Limits

The most controversial of the FCC's new rules, and the subject of the Congressional repeal efforts, is the rule as to "National TV Ownership Limits." Previously, no one company could own TV stations reaching any more than 35% of TV households in the U.S. The new limit is 45% of TV households. This share is calculated by adding the number of TV households in each market where a company owns a station, regardless of the station's ratings and includes all potential viewers in the market. The number of TV households reached by a UHF station, however, will still be discounted by 50%, because UHF stations are considered to be qualitatively inferior to VHF stations in the same market.

There were 1,340 commercial TV stations in the U.S. as of March 31, 2003, of which the four major networks owned less than ten percent. Viacom (CBS) owns 39 TV stations; Fox owns 37; NBC owns 29; and ABC owns 10. Under the new media ownership rules, the FCC left intact its "Dual Network Ownership Prohibition," which prohibits a merger of any of the top four national television networks.

By increasing the limit on television station ownership to a 45% share of TV households, the new rules enable Viacom, Fox, NBC, and ABC to acquire ownership of several stations in major markets where they previously owned no stations, but potentially many more stations in other markets. This rule change has no direct effect on their network affiliation agreements with independently owned television stations. The major networks will still be allowed to have affiliation agreements with independently owned stations in any markets in the U.S. and thus to distribute their network programming to 100% of all TV households.

Local TV Multiple Ownership Rules

Less controversial, but potentially diminishing or causing unfair competition, is the loosening on the prohibition of owning more than one television station in the same market. Under the new rules, a company may own two stations in a market with more than five television stations, but only one of these stations can be among the top four in ratings. In markets with eighteen or more stations, a company can own three stations, but only one of these can be among the top four in ratings. In markets with eleven or fewer stations, a waiver process was adopted where two top-four stations seek to merge. In determining the number of stations in the market, both commercial and non-commercial stations are counted.

As noted by one of the FCC Commissioners who dissented from the new ownership rules, counting non-commercial stations in determining market size, especially where these non-commercial stations all broadcast the identical signal (as is the case in many, small rural markets) has anomalous results. Thus, a TV market in a small community with many state-owned non-commercial stations, such as Minot, North Dakota, is considered under the new rules as large a market as Detroit, Michigan, and thus subject to the less restrictive ownership provisions for major markets.

Another concern is that a company with two television stations in a single market (of any size) will be in an inherently better competitive position than its single-station rivals in the same market. This may impel the FCC to utilize its waiver process to allow every company to own at least two

stations in the same market in order to minimize any competitive imbalance resulting from the rule changes. In markets with an odd number of stations, where the FCC grants duopoly waivers to all incumbents, the Commission might feel obliged to allow the single-station owner to merge with an in-market duopoloy to create a "triopoly," which would put that entity in a better competitive posture relative to its duopoly challengers.

The new local TV ownership rule, when considered with the 45% limit on national TV ownership, may encourage the major television networks to acquire a second or third station in markets where they already have an ownership presence. Because the national TV ownership limit counts only TV households covered, acquiring a second or third station in a market where a network is already a station owner has no ramifications in terms of breaching (or complying) with the 45% limit.

Under the new rules, a major national network will have substantial leverage over an independently-owned television station it seeks to acquire if the station is affiliated with the prospective acquirer's network. In this situation, if the independent either rebuffed the purchase overtures or attempted to negotiate a higher sales price, the network could threaten to refuse to renew the network affiliation agreement. Without a network affiliation, the value of the station will decrease significantly. The new rules thus bestow on the networks a unique bargaining advantage when attempting to purchase their own affiliates.

Cross-Media Limits

In its June 2nd rulemaking, the FCC replaced existing restrictions on broadcast-newspaper and radio-television cross-ownership with a more liberal rule. The new rule eliminates the ban on newspaper-broadcast cross-ownerships and television-radio cross-ownerships in markets with nine or more television stations. Under this determination of market size, non-commercial television stations count separately towards the nine station benchmark.

In markets with between four and eight television stations, the following combinations of media outlets may be commonly owned: (a) a daily newspaper, one television station, and up to half the limit on commonly-owned radio stations (discussed below) for that market; or (b) a daily newspaper, up to the limit on commonly-owned radio stations for that market, and no television stations; or (c) two television stations (if permissible under the local TV ownership rules), up to the radio limit for that market, and no daily newspapers.

In markets with three or fewer television stations, no cross-ownership is permitted involving television, radio, and newspapers. However, a company may obtain a waiver from the FCC of that ban if it can show that the television station does not serve the area served by the radio station or newspaper to be cross-owned.

This particular rule may have the most wide-reaching effect on competition in the local markets, yet has generated less controversy than other aspects of the rulemaking. The new rule allows major newspaper and media companies such as Gannett, Hearst, the New York Times, or the Washington Post to acquire a television station and multiple radio stations in markets where they currently publish a daily newspaper, an option prohibited since 1975 under the FCC's former newspaper-broadcast cross-ownership rule.

If the Washington Post were to acquire a television station and multiple radio stations in the Washington, D.C. market, the ensuing economies of scale could afford it a substantial competitive advantage. Other TV stations in the market could respond by acquiring a second station of their own or by seeking to be acquired by a print-broadcast conglomerate, such as the New York Times, that could reap its own scale economies from such a move. Under any scenario, the number of owners decreases.

Whether this rule change will result in a greater or lesser diversity of viewpoints is subject to intense debate. Liberals and many social conservatives believe that the new cross-ownership diversity will constrain viewpoint diversity. Economic conservatives believe that it would either have no effect or actually increase diversity, and that, in any event, the enhanced economic efficiency attending a deregulatory rule change such as this one is itself a desirable goal.

Local Radio Ownership Limits

In a surprise move, the FCC tightened its restrictions on the number of radio stations that may be owned in a market by one company. Previously, a radio market was determined by whether the "city-grade" signal contour of a station overlapped that of another station. For many radio stations, the "city-grade" signal contour only extends 7-10 miles from the transmitter, even though the station's audible and protected signal covers a 30 mile radius from the transmitter and, as a result, can be received throughout a metro area. Thus, it was possible under the old rules to acquire multiple stations in a metro area where the stations' "city-grade" signals did not overlap and, as a result, the FCC's local radio ownership restrictions were inapplicable.

The FCC has now changed the definition of a radio market to that of a geographic metro area as determined by Arbitron market surveys (a private company which compiles data on station listenership in every market). Thus, all stations that can be listened to and that are counted in the Washington, D.C. market survey by Arbitron will be considered by the FCC to be a part of the Washington, D.C. radio market, regardless of whether the station is licensed to a community outside of Washington, D.C.

Limits on radio station ownership by market size are as follows: (a) in markets with 45 or more radio stations, a company may own up to eight stations only five of which

may be in one class, AM or FM; (b) in markets with 30-44 stations, a company may own up to seven stations, no more than four of which may be exclusively AM or FM; (c) in markets with 15-29 stations, a company may own up to six stations, no more than four of which may be AM or FM; and (d) in markets with 14 or fewer stations, a company may own up to five stations, no more than three of which may be AM or FM.

Because the new rule as to market definition may result in existing ownership arrangements exceeding the local ownership limits, the FCC "grandfathered" these combinations. At the same time, however, the Commission prohibited sale of these stations as a unit unless there is compelling public policy justification — *e.g.,* avoiding undue hardship to a small business group owner, promoting entry into broadcasting by minority and female-owned small businesses, *etc*.

These potential exceptions to the ban on assignment or sale of "grandfathered" radio station combinations raises issues of regulatory distortion of the marketplace and competitive imbalance. By allowing existing combinations of stations that exceed the new local limits to be sold intact, the Commission could inflict competitive harm on the other station owners in the market who comply with the new limitation. In response, such an owner may seek to acquire its own "grandfathered" combinations in the same market under the minority or female-owned "small business" exceptions that justified the initial transaction. If the Commission were to authorize such a transaction, the competitive disadvantage to the other compliant owners in the market would be exacerbated. The result might force the FCC to consider waivers of its local ownership rules to allow all the companies operating in the same market to achieve competitive balance by owning a comparable number of stations. This, in effect, could eviscerate the new limits the FCC has adopted on local radio ownership.

Conclusions

Under the 1996 Telecommunications Act, the FCC's rules on broadcast ownership must be reviewed and updated on a periodic basis to assure that they reflect marketplace realities. Although its June 2nd rulemaking achieved much needed reforms, the FCC may have unintentionally encouraged situations or circumstances where the new rules may result in unfair competition or competitive imbalance If not rectified by Congress or ultimately by the courts, the FCC should address these matters when considering petitions for reconsideration of its new rules. Fair competition and competitive balance are consistent with economic efficiency. Localism and diversity, which are the pillars of the Communications Act, can best be achieved where there is real competition.

Book Reviews

No Excuses: Closing the Racial Gap in Learning by Abigail Thernstrom

By Peter Kirsanow

No Excuses – Closing the Racial Gap in Learning is the most important civil rights book in a generation. And one of the most encouraging.

Nearly forty years after passage of the 1964 Civil Rights Act, fifty years since *Brown v. Board of Education*, the most pressing problem on the civil rights front is the yawning racial gap in academic achievement. More than a third of all blacks are solidly middle class. Blacks attend college at the same rates as whites. Virtually all of the "civil rights" legislation that can be passed has been passed. The avenue toward the American Dream is wide open to members of every racial and ethnic group in the country as never before in our history Yet there remains an astonishing disparity in academic achievement between blacks and Hispanics on the one hand and whites and Asians on the other. And despite reams of legislation, billions of tax dollars and scores of educational reforms, the disparity shows signs of actually *widening*.

The Thernstroms, the uncannily insightful authors of the encyclopedic *American in Black and White*, perhaps the definitive work on race and race relations in contemporary America, take an unflinching look at the problem, the reasons therefor and proven and potential remedies.

This is not a book for the merely well-intentioned. This is a book about *results.* Supported by copious data and the kind of rigorous analysis normally reserved for the "hard" sciences, *No Excuses* paints a frustrating, if not infuriating, picture of the misguided policies, entrenched interests and head-in-the-sand political correctness that have aggravated the educational crises involving black and Hispanic students.

But for all of the disconcerting information about the underperformance of black and Hispanic students, this is fundamentally a book of hope. And it's a page turner to boot – a scholarly tome that reads almost like a suspense novel.

Make no mistake. The Thernstroms are not starry-eyed optimists predicting that the next billion-dollar, enlightened reform will be the magic formula that finally propels black and Hispanic students toward academic proficiency. Rather, the book's optimism is precisely a consequence of a sober, detailed analysis of what, at first blush, appears to be an intractable problem but which, upon close inspection, has actually proven to be remediable by application of certain basic principles. Even more so, the optimism is grounded in a studied, adamant belief in the capabilities of all American children.

The analysis in the book transcends ideology. Shibboleths of both the right and the left are exposed, although those of the latter seem to have contributed substantially more to the inertia that is emblematic of the problem.

And the problem is prodigious. Black and Hispanic students are horribly underprepared to tackle school work at every grade level, beginning as early as kindergarten. By twelfth grade, according to the National Assessment of Educational Progress ("NAEP"), the "nation's report card", the average black and Hispanic student is performing at the academic level of the average white or Asian eighth grader. An employer hiring the average black high school graduate is, in effect, hiring a person with the reading and math skills of a middle school graduate.

The gap doesn't end there, but persists through college and graduate school. Black and Hispanic high school graduates entering college with the functional equivalent of an eighth grade education drop out at nearly three times the rate of white or Asian students and tend to cluster in the bottom sixth in academic rankings. For all of the hyperventilation about the need for racial preferences and a "critical mass" of preferred minorities on college campuses, the reality is that there are simply too few academically competitive black and Hispanic students to go around.

Equally distressing is the dearth of black and Hispanic academic superstars, particularly in math and science. Only 0.1% of black students score in the Advanced range on the NAEP science assessments and only 0.2% meet that standard in math. Whites are 34 times more likely to score in the Advanced range in science and 11 times more likely to do so in math. (The Advanced math scores for Asians is 37 times greater than that for blacks.)

The Thernstroms rightly call this a crisis, particularly in an age of technology. They note that the causes for these disparities are numerous, beginning with the residual effects of slavery and Jim Crow. But the real culprits are clearly contemporary and revolve principally around the educational establishment and the attitudes of some of the students themselves.

As *No Excuses* makes clear, the nation's public school systems are notoriously resistant to any kind of change, let alone the kind of reforms necessary to close the

educational achievement gap. Major urban schools, among the worst performing, are monopolistic, bureaucratic behemoths, virtually impervious to legislative sticks or financial carrots. Teachers' union contracts make getting rid of rotten teachers nearly impossible and the credentialing hoops aspiring educators must jump through drive many of the more promising candidates to more lucrative professions. Even the most dedicated and talented school administrators often surrender to being little more than caretakers of the status quo. The result is hundreds of thousands of black and Hispanic students locked in what amount to holding pens defined by pedagogical sclerosis and an aversion to standards while graduating hordes of students who are functionally illiterate.

Yet the problem begins even before these unfortunate students ever set foot in the classroom. As noted earlier, black and Hispanic students enter kindergarten already at a significant educational deficit compared to their white and Asian classmates, which deficit often expands as the students proceed toward graduation. Some of the reasons are well-known factors such as poverty rates, parental educational attainment levels, single parenthood and so forth. But even after controlling for these factors, large gaps between blacks/Hispanics and Asians/whites remain.

The Thernstroms review voluminous literature demonstrating that, as scholars ranging from Orlando Patterson to John McWhorter have noted, one of the primary reasons for the achievement gap is group culture. The authors carefully explain that in this context "culture" can be a loaded term, one that suggests that one is "blaming the victim." It's abundantly clear that this is *not* what the authors are doing; they cite many of the reasons why some families are trapped in counterproductive behaviors. But culture, as they see it, is simply the values, attitudes and skills transferred to a child through the family. It is not an immutable set of group traits passed from one generation to the next; but rather, "skills, habits and styles" that are susceptible to change.

The cultural traits that contribute to academic success, irrespective of race or ethnicity, are no secret: valuing education, organization, discipline, attention to detail. The extent to which students embrace these traits manifests itself in a variety of ways. Some of the measurable examples include hours spent on homework, hours spent watching TV and the number of "hard" or AP courses taken.

Although the Thernstroms lament the large number of hours all American kids spend watching TV, blacks and Hispanics far outpace their white and Asian classmates. At every grade level blacks and Hispanics watch much more TV than anyone else. Nearly 50% of black fourth graders watch 5 hours or more of TV on *a typical school day*, compared to less than 20% of white fourth graders. By twelfth grade, a third of black students still watch 5 hours or more of TV compared to just 5% of whites.

The spectacular academic success of Asian students is in part attributable to long hours of homework. But it's not just the number of hours but the quality of time spent on homework. The data suggest that many poor students may be more likely to "multi-task" when it comes to watching TV and doing homework, rather than concentrating on homework alone.

But perhaps one of the best predictors of academic success is what Laurence Steinberg calls the "trouble threshold," *i.e.*, the lowest grade students can get before they're in trouble with their parents. For black and Hispanic students, that level is below a C-; for whites it's below a B-; and for Asians, it's below an A-. It's logical to assume that a student who believes he will get in trouble for getting a B+ will work harder than one who can skate until he gets a D+ — a grade that, by today's inflated standards, often means only that the student has a pulse.

The good news is that nonproductive cultural traits can be changed for the better. The Thernstroms cite a number of real life examples of remarkably successful schools that are instilling productive traits in their students. This is the most exciting part of the book.

The authors actually visited a number of schools throughout the country to study what works. Most successful schools were charter schools that have control over their own budgets, the teachers they hire and the length of the school days. There were also a few classroom oases within traditional public schools (the amazing Rafe Esquith's class in central L.A. is but one example).

The examples cited by the Thernstroms such as the KIPP (Knowledge is Power Program) Academy in the South Bronx and the North Star Academy in Newark have student bodies that are virtually 100% black and/or Hispanic and that are drawn from neighborhoods of crushing poverty with all the maladies typically associated therewith. Nonetheless, these students are performing at levels that rival even those of the best schools in the most affluent neighborhoods – and far beyond students from their own neighborhoods who attend other public schools. For example, 66% of "Kippsters" score *above* their grade level for math compared to only 9% of the students in the district from which KIPP draws its students.

What's the secret? Boatloads of funding? Skimming the best students from the pool? No, say the authors. The "secret" is the *implementation* of a core set of standards and values. The schools set high standards and demand much from their students and parents. In return, the schools deliver quality teaching and relentless dedication to student success.

The authors stress that while this sounds child-

ishly simple, it's difficult to do even without the constraints described earlier. But the schools, from top to bottom, tolerate no excuses for failure.

The Thernstroms emphasize that the schools don't waste time. North Star operates an extra hour per day and 11 months out of the year. By eliminating fluff and disorganization Amistad Academy in New Haven effectively adds 3 hours of teaching time per day. Saturday programming is common.

Discipline and order dominate every aspect of the school and student behavior. Disciples of James Q. Wilson's "broken window" theory, the slightest infractions are immediately remedied.

Testing is also a key ingredient. Basic math, reading and writing skills are stressed without apology. Competition is not a bad word.

The students react to all of this with a sense of accomplishment and pride and a hunger for learning and success.

Obviously, there are many more elements to their success and the Thernstroms document them exhaustively. (Indeed, this review necessarily covers only a fraction of this ambitious work's reach.) They also assess the various obstacles to reproducing these successes at traditionally public schools (among the more intriguing analyses are the impact of school vouchers and No Child Left Behind).

In the end, however, the health of our society demands that we do all we can to duplicate the accomplishments of KIPP and the others. The Thernstroms make an impressive case that if it can be done there, it can be done elsewhere. No excuses.

Skepticism and Freedom: A Modern Case for Classical Liberalism by Richard A. Epstein

By Robert Levy

Some years ago, I first heard Richard Epstein sermonize on the majesty of a free society. Prepped by an Epstein buff, I was geared up to hear the master "speak in full pages, not just sentences, without notes, ready for publication." Later, I had to edit a transcribed version of an Epstein talk before the Federalist Society. Alas, he, like other mortals, needed polishing. Still, an Epstein lecture is a listener's delight and the written product is a reader's feast.

Now comes the capstone of the Epstein trilogy, *Skepticism and Freedom*, which purports to answer objections to classical liberalism raised by economists, philosophers, and socio-biologists. Regrettably, that places chunks of the book beyond the grasp of many lawyers. But there's plenty of meat left for even the hungriest carnivore.

Volume 1 of the trilogy, *Simple Rules for a Complex World* (1995), established the principles: self-ownership or autonomy, first possession, voluntary exchange, and protection against aggression. Those mandates could be breached only in carefully defined and narrow circumstances - like private emergencies or public necessity - and then only with compensation to aggrieved parties.

Volume 2, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* (1998), embraced a mostly *laissez-faire* government, relying on social norms and customs, delineating private and common property rights in water and telecommunications, and promoting private altruism over public redistributionism. Epstein's foundation was natural law, but defended on consequentialist rather than deontological or self-evident grounds.

In Volume 3, while acknowledging that his intellectual path over the decades has led him to endorse a somewhat enlarged role for the state, Epstein nonetheless reinforces his case for libertarian fundamentals accompanied by a limited set of forced exchanges. His dual goals: first, to defend classical liberalism against skeptics who posit that "no moral judgment about the shape of political institutions is better than any other"; and second, to address the main objection of some psychologists and behavioral economists - that humans are not entirely rational, and the assumption of *homo economicus* is too sweeping to justify the classical liberal exaltation of private ordering.

Epstein begins with this assertion: All important legal propositions rest not on deductive imperatives but on observable regularities of human conduct. He does not advance that thesis as a rejection of natural law. To the contrary, natural law tends to track customary practices. In other words, "things ought to be as they commonly are" - not because of a *necessary* connection between *is* and *ought*, but because things that work are apt to endure. Epstein's aim is to combine custom and reason - to derive coherent principles that are responsive to the practical needs of individuals while, at the same time, addressing the moral concerns of philosophers and the efficiency concerns of economists.

That aim dictates a limited role for government. Epstein defends state provision of public goods, including infrastructure. He suggests that autonomy may be compromised to permit a draft in time of war. The rule of first possession may be modified to protect against exhaustion of the common pool (e.g., endangered species regulation). The principle of voluntary exchange may be altered to accommodate a minimalist form of antitrust law.

In nearly all other areas, cautions Epstein, the state does not know enough about what people want - surely too little to tell them what they ought to have. Knowing that it does not know, government must limit itself to establishing a framework that maximizes individual choice. Yes, Epstein is skeptical about the ability of any individual to know fully the preferences of other individuals. But he is more skeptical about the ability of government to substitute its judgment on such matters. And his skepticism does not extend to the epistemological proposition that we, as a society, are unable to develop rudimentary social and moral truths to shape our legal system.

Hayek would have agreed. Although the regulators cannot commandeer sufficient information to dictate the terms of exchange, the market can convert private knowledge into collective wisdom. Along the way, common law rules evolve - superior to the ill-informed commands of the regulatory state.

By contrast, Holmes would have trusted the legislature, not the market. His skepticism, says Epstein, gets the argument exactly backward. Holmes was wrong when he said in *Lochner* that "[A] Constitution is not intended to embody a particular economic theory." As Epstein observes, "*Our* Constitution … most emphatically [embodies] a theory of limited government and vested individual rights." Because the legislature is not privy to the opportunities and costs of private transactors, it is ill-equipped to override their judgment.

A third, albeit related, view comes from Richard Posner, apostle of law and economics. Posnerians are legal positivists who believe that law and morals are separate. To be sure, legal rules will be influenced by moral concerns, but

the existence of law is one thing, its merit or demerit is another. Epstein, to his credit, rejects that genre of moral relativism with the curt observation that "Nazi law, even if law, can be condemned on independent moral grounds."

For his part, Epstein commends a middle approach. On average, we know enough about human behavior to structure a set of broad but non-intrusive rules that work – i.e., a set that yields better consequences (in a Paretian or at least Kaldor-Hicks sense) than alternative rules. Essentially, Epstein aspires to a legal system that produces real and material benefits for humans in ordinary social contexts. He is not content merely with the law as it exists, or solely with the immutable reason-based truths of the natural law.

Epstein's consequentialism serves as a guide to both the easy cases and the tough cases like private necessity and duty to rescue. Yet he still gives libertarians almost all of what they want. Bear in mind, notes Epstein, that the hard cases usually have an importance inversely proportional to the effort required for their just resolution. The world is better understood by first grasping the easy, but frequent, cases that dominate. Nevertheless, Epstein is willing to tackle the nettlesome issues, and he is not reluctant to take on a few classical liberal shibboleths in the process. Libertarianism, in Epstein's view, is an improvement over the state of nature, but libertarianism can itself be improved.

From Epstein's perspective - less so from mine - one of the hard cases is antitrust. Epstein believes that there is a role for antitrust because the gains to monopolists who raise price or restrict output are smaller than the welfare loss inflicted on the rest of us. Perhaps so, but antitrust laws debase the notion of private property; they are fluid, non-objective, and often retroactive; and they are exploited by rent-seeking businessmen and their allies in the political arena.

Moreover, welfare gains can arise only when the monopolist is correctly identified. Otherwise, the costs of false positives could swallow the benefits of restoring competition. Fair enough, says Epstein, but antitrust could be limited to passive non-enforcement when parties cheat on contracts in restraint of trade. Yet much mischief can be spawned if the state declares one form of voluntary contractual arrangement null and void absent a demonstrated violation of third-party rights.

No doubt, the problem of private monopoly will continue to be a thorn in the side of classical liberals. But there are other challenging questions, less widely discussed, including the psychological and behavioral attacks on the *laissez-faire* model that Epstein examines in the second half of *Skepticism and Freedom*.

First, say the critics, individual preferences are inconsistent and malleable, and thus cannot be the basis for legal rules or social institutions. Epstein responds that concerns about preferences are overblown relative to crucial state goals like preventing force and fraud and supplying public goods. In any event, he adds, private adjustments will be more effective and less risky than public solutions. A public regulator faces all the measurement problems that private parties face, and he lacks the subjective information that each person applies in making his own choices. Besides, legal interventions cost money and open new avenues for abuse, including excesses by government officials in pursuit of personal agendas.

Second, Epstein analyzes the prisoners' dilemma - a variation on the problem of prohibitive transactions costs and imperfect information - where parties reach sub-optimal solutions because they are unable to bargain or share information with one another. P-D situations, warns Epstein, do not always justify a grant of power to politicians, whose own preference structures - as we know from public choice theory - are not beyond reproach. Still, Epstein concedes that a limited system of forced exchanges may occasionally be necessary to stop especially destructive P-D games like over-consumption of public goods. Sometimes, the cure will be worse than the disease. Much will depend on the size of the social loss and the cost of remedying a perceived shortfall.

Finally, Epstein looks at behavioral imperfections - irrational acts and cognitive biases that could yield inefficient outcomes when private transactions are wholly unregulated. For example, private parties tend toward overoptimism when evaluating a business venture; they consider sunk costs although the only relevant costs are those yet to be incurred; and they assign higher value to things owned than to things to be acquired - a so-called endowment effect which, to the extent true, diminishes the power of the Coase theorem on which many legal rules depend. Epstein's answers are straightforward: Markets, but not government, have a feedback mechanism that helps self-correct for those biases. Experienced professional dealers, who dominate many markets, are less prone to such behavior. And no system of legal rules eliminates all biases; the classical liberal order, quite simply, is better than the alternatives.

Actually, those answers tell us that Epstein's professed apostasy from pristine libertarianism is somewhat exaggerated. First, he creates a straw man of the libertarian absolutist, inextricably bound up in deontological rules. Second, he poses his own alternative: presumptions favoring those same rules, but rebuttable under narrowly defined circumstances. In fact, thoughtful libertarian legal scholars insist on no more than rebuttable presumptions. State intrusions on individual liberty are not impermissible, but as an initial matter they are presumptively invalid. The burden, then, is on government to show that there is a compelling reason for the intrusion and the goal, however justifiable,

could not have been attained by less intrusive means.

Like Epstein, even libertarians of the purist strain have to tolerate some ambiguity. Even when there's virtually no dispute about the foundational principles, disagreements will arise over specific questions. To illustrate: Not all libertarians share the same views regarding parental rights (e.g., the Elian Gonzales matter), or capital punishment. We differ on nuisance law (what behavior violates the rights of your neighbor?), endangerment (what safety regulations may the government impose *ex ante* on, say, nuclear power plants?), remedies (what redress is appropriate for various crimes?), and enforcement (what is the proper tradeoff between security and civil liberties?). Those disagreements on concrete issues are important, but not nearly so important as agreement on the underlying principles: limited government, private property, free markets, and the indispensable ingredient of the American experience, personal liberty.

At the extreme, anarchists opt for no government. They claim that markets can solve all the problems of social interaction. But mainstream libertarians categorically reject that notion. Instead, they advocate limited government to establish the rule of law and a social infrastructure - preconditions of markets. Because markets cannot exist without legal rules, markets cannot solve the problems associated with establishing such rules.

Those views are congruent with *Skepticism and Freedom*. In Richard Epstein, we libertarians have found our paladin and he has not deserted us. At least not yet. He may be inclined to grant government slightly more power than some of us like. That just means we have to check periodically to certify that the slope of his consequentialism hasn't become too slippery. The touchstone for libertarian devotees of Epstein is *doveryai no proveryai*, trust but verify. Meanwhile, learn and enjoy.

Legal and Ethical Lessons of NATO's Kosovo Campaign by Andru E. Wall

*By Glenn Sulmasy**

In August of 2001, a group of leading international law scholars gathered at the U.S. Naval War College in Newport, Rhode Island, to meet and discuss the many issues associated with the NATO campaign in Kosovo. Their charge was to discuss, argue, learn and write about the successes and mistakes of the campaign. More broadly, they analyzed the law of armed conflict (LOAC)[1] in the era of modern warfare. *Legal and Ethical Lessons of NATO's Kosovo Campaign* is a compilation of the debates and presentations made by this learned group. As Wall captures in the introduction of his book, the sad irony of the conference is that the scholars in attendance could never have predicted the tragedy of 9/11 was a mere month away. In a brief few hours on that Tuesday morning in September, modern warfare changed again. This conference's issues became critically important to decision-makers around the world. The War on Terror ushered in a whole new array of problems challenging established LOAC principles. It is with that chilling knowledge the book puts forth reasoned debates as to issues ranging from the *jus ad bello* and, most importantly in the current context, the *jus in bello.* Throughout, regardless of which side of the debate the attendees espoused, it is clear lawyers have become an integral part of combat operations. The assembled scholars, including Dr. Nicholas Rostow of the United States mission to the United Nations, Sir Adam Roberts of Oxford, Dr. Leslie Green, and Prof. John Norton Moore, present a thoughtful and insightful discussion on the topic. This compilation by scholars, practitioners and warriors makes for a most enjoyable and learned discussion of the issues. The book is well reasoned and, as I will discuss, a must read for all policy makers.

Overview: Wall, himself a professor of International Law at the Naval War College, brings together former Clinton national security staff members including Military Court of Appeals of the Armed Forces Judge James Baker (former NSC Deputy Legal Advisor and Legal Advisor in the Clinton Administration), Prof. Yoram Dinstein of Israel, the brilliant Prof. Ruth Wedgewood, and various operational commanders to analyze and best learn from both the successes and failures of U. S. participation in the Kosovo effort. He makes clear Kosovo was a unique operation — a coalition of nations, engaging in a humanitarian effort, imposed its will on that of a sovereign entity. Regardless of the international motivations, he states it was "war." Therefore, LOAC did and should have applied to the operations. Beyond the Kosovo conflict, the author emphasizes the law of armed conflict is changing, and the traditional norms of what is, or is not, armed conflict is changing as well. The War on Terrorism involves a sovereign nation (the United States) engaged in combat with non-state actors. These "combatants," who operate in (at the minimum) fifty countries and engage in unconventional and arguably illegal combat tactics, do not fit the traditional paradigm of warfare. Clausewitz himself would be challenged as to how best describe this new unconventional warfare. Approaching the subject from this perspective, the book works very well. It makes one pause and reflect on the diverse issues associated with modern warfare. Collateral damage? Perfidy? Human shields and war crimes? Perhaps the most controversial area is that of "distinction": distinguishing between civilian and military targets, especially when many of these new illegal combatants' uniforms are civilian clothes. The book reveals how the legality of military operations is becoming increasingly complex. I do note, with some concern, the notion of total war is never mentioned in the book. It appears almost ***understood*** (emphasis added) by the scholars assembled that such notions are not even worthy of debate in modern warfare. Apparently traditional war, as I knew it, no longer exists. The intervention of many humanitarian rights groups and non-governmental organizations are making warfare for the modern soldiers and sailors more difficult than ever.[2]

Wall addresses the concerns and knowledge requirements of readers beyond his core audience of international law attorneys. He correctly states the law of armed conflict is no longer simply for the National Command Authority, lawyers at the NSC and the Pentagon. It is now an "obligation" imposed on even the ordinary foot soldier. Thus, these implied obligations require the increased involvement of military lawyers to advise battlefield commanders and their troops of the requirements imposed by what would now be considered customary international law and LOAC.

Organization of the book: The book is organized in a lucid, compelling fashion. Part I includes written remarks of the three keynote addresses during the three day conference, opening remarks of then President of the Naval War College, Vice Admiral Arthur Cebrowski; learned comments of The Honorable Jim Baker, discussing the Clinton Administration involvement with target selections and management of the operational warriors while he served as Legal Advisor to the NSC, and illuminating perspectives from Lieutenant General Short (Ret.), former NATO Air Commander in Operation Allied Force. The rest of the book is logically organized and covers all relevant areas for scholars to debate: Part II is the applicability of the Law of Armed Conflict, Part III is Targeting, Part IV is Collateral Damage, and Part V is Coalition Operations. The book concludes with "the road ahead" and tackles the myriad problems of using military force for humanitarian intervention. An appendix provides the *Final Report of the Prosecutor by the Committee* – a controversial piece interwoven throughout the text (and apparently the conference itself). If for nothing else, this report demonstrates why the U.S. is not, and should not, be a signatory to the International Criminal Court (ICC).

Wall is successful in making the book relevant to both lawyers and decision-makers, as well as to operational warriors. It should, and does, provide interest and appeal across the spectrum. Wall explicitly states there are four major lessons learned from Operation Allied Force:

1) The Law of Armed Conflict applies to any clash of arms between two or more states.
2) Military objectives may be lawfully targeted and they are defined within the temporal context of the given conflict.
3) The principle of "proportionality" prohibits *excessive* (italics added) collateral damage, yet the law does not impose absolute rules regarding implementation of weapons and tactics.
4) Despite the proliferation of treaties on the law of armed conflict, customary international law will continue to define major elements and interpretations of the LOAC.

Recommendations: In general, the book analyzed divergent interpretations of the debate. The liberal perspective, as well as the conservative viewpoint, are offered for the reader to reflect upon. I personally disagree with Wall in his limited definition on what constitutes armed conflict (*See*, para 1 above). His definition is particularly limiting considering the context under which the U.S. and current administration are operating. The War on Terror is not between two nation states. Yet I think we all would agree that LOAC applies to our combat operations as well as those of the al Qaeda. Specifically, the United States is about to try six suspected members of the enemy for violations of LOAC. In his introductory remarks, Wall seems aware of the issue of non-state actors involved in the current War, but he still addresses LOAC as applicable only in the traditional sense (e.g., when there is a "clash of arms between two or more states"). I would suggest a broader definition. While non-state combatants may be considered illegal actors under LOAC, applying "gotcha" law enforcement tactics against these illegals would be the wrong approach. Instead, LOAC should be read expansively to permit war fighting methods against such terrorists.

Besides some formatting disconnects, and specific issues raised herein, this book is a "must read" for policy-makers and decision-makers at all levels of government and academia. The current world situation, rightly or wrongly, demands in-depth knowledge of the law of armed conflict. As the world becomes increasingly internationalized, consensus on what is or is not lawful in combat operations will become critical to successful operations before, during, and after the operations have concluded. United States policy makers must be versed in this area. Our positions can not be weakened by those who would use LOAC as a means to embarrass or humiliate the U. S., or worse yet, individual soldiers, sailors, marines, airmen, and coastguardsmen. This book is useful for bringing the reader up-to-date on LOAC arguments being undertaken in academia and the world community.

* Commander Glenn Sulmasy is currently (as of May 2003) an Associate Professor of international law at the United States Coast Guard Academy, and also serves as an Adjunct Faculty for military law at Roger Williams University School of Law. He is a visiting fellow at the Center for Legal and Judicial Studies at the Heritage Foundation. In fall 2003, he will join the international law faculty at the U.S. Naval War College.

Footnotes

[1] The Law of Armed Conflict (LOAC) is the preferred term for this area of law. It had been known as the Law of War and many today, outside of US governmental and military circles, refer to it as International Humanitarian Law.

[2] Brigadier General Charles Dunlap, USAF, has lectured on the growing use of what is known as "Lawfare." It is the theory that many nations and non-state actors are using the legitimate aims of humanitaritan law and rights groups against conventional combat operations of the West. At a minimum, the use of lawfare can lead to negative public and international opinion of Western nations' legitimate combat objectives. In essence, the group will use lawfare to create the appearance of violations of LOAC when none really occurred. Operation Iraqi Freedom has offered many examples of using LOAC and the law as a means to confuse otherwise lawful targeting and wrongfully embarrass legitimate military efforts.

Narrowing the Nation's Power: *The Supreme Court Sides with the States* by Judge John T. Noonan

*By John Eastman**

Even before opening Judge John T. Noonan, Jr.'s latest book, *Narrowing the Nation's Power: The Supreme Court Sides with the States*,[1] one suspects that something is amiss. The cover photo is a picture of an American flag draped backwards, not the kind of mistake that the author of *The Lustre of Our Country: The American Experience of Religious Freedom*,[2] which meticulously traced the original understanding of the Constitution's religion clauses, should have made. But then, at first blush, there is something backwards about a conservative judge such as John Noonan criticizing the conservative Rehnquist Court's recent federalism decisions, the most successful effort to restore the Constitution's original limits since the New Deal virtually annulled them.

The decisions by the high Court that come under Judge Noonan's scathing attack read like a list of conservative favorites. *Seminole Tribe of Florida v. Florida*[3] and *Alden v. Maine*,[4] in which the Supreme Court crafted a doctrine of state sovereign immunity designed to help limit the reach of the federal government, demonstrate for Noonan a "federalism" that is really a "confusing misnomer" for the "old [secessionist] slogan 'states' rights.'"[5] *United States v. Morrison*,[6] in which the Supreme Court struck down provisions of the Violence Against Women Act as exceeding Congress's power to regulate commerce among the states, "leave[s] women less protected by the law than men," in Noonan's world.[7] *City of Boerne v. Flores*,[8] in which the Court struck down the Religious Freedom Restoration Act as exceeding Congress's power to implement the provisions of the Fourteenth Amendment, amounts to judicial activism, according to Noonan, an example of the Court being "boldly innovative."[9] And the series of cases decided by the Court restricting the reach of the Americans with Disabilities Act leaves the elderly and disabled with inadequate remedies for "unequal treatment," he charges.[10] Noonan even goes so far as to compare the Court's recent federalism decisions to the notorious *Dred Scott v. Sandford*[11] and, apparently for Noonan, the equally notorious *Lochner v. New York*[12] (which, according to Noonan, "had a negative effect on the conditions of employment for over a quarter of a century")[13] and *Carter v. Carter Coal Co.*[14] (which, heaven forbid, "nearly brought the New Deal to an end").[15]

With such an assault on the conservative citadel, one might be tempted simply to write off Judge Noonan as yet another Earl Warren or Harry Blackmun, judges who "evolved" toward a more "enlightened" liberalism (and away from any original understanding of the Constitution) during their tenure on the bench. Indeed, some of Noonan's premises are so contrary to the original understanding of the Constitution that his characterization of the Court as a "hitchhiker of history"[16] seems more apt when applied to his own claims. Noonan treats the Constitution's preamble as a broad grant of power, for example, thus rendering redundant the entire list of Congress's powers in Article I, section 8, and rendering a nullity the fundamental constitutional doctrine of limited, enumerated powers. He mistakenly notes, in criticizing the Court's Free Exercise of Religion decisions in *Employment Division v. Smith*[17] and *City of Boerne*,[18] that when "Congress adopted the Bill of Rights, . . . the free exercise of religion was set out as our first freedom,"[19] apparently overlooking the fact that the First Amendment only became the *first* amendment because the two amendments actually proposed by Congress before it were not ratified.[20] And, in criticizing the Court's decision in *Morrison*, Noonan accuses the Court of ignoring an "appeal to history,"[21] but the history to which Noonan looks is the revolution of 1937, when the Court threw off the supposed shackles of the Constitution's limits on federal power, not the deliberations of 1787, during which those limits were so carefully wrought.

Still, there are two aspects of Judge Noonan's critique of the Court's recent federalism decisions that warrant careful consideration. The more obvious is his criticism of the Court's Eleventh Amendment state sovereign immunity decisions.[22] Couched in a wonderfully humorous exchange between a mythical federal appellate judge, Samuel Simple, and his all-star team of law clerks, Yalewoman, Boaltman, and Harvardman, Noonan decimates the reasoning of the entire line of Eleventh Amendment decisions beginning with *Seminole Tribe*,[23] and its historical building blocks, *Ex Parte Young*[24] and *Hans v. Louisiana*.[25] "It's a logical mess," Noonan's character Yalewoman notes, "and it's really intolerable. How can people have respect for a system that violates the laws of logic in one of the system's most important operations?"[26]

Logical mess indeed. The essence of the Court's modern state sovereign immunity doctrine is that the states entered into the Constitution's more perfect union with their sovereignty intact, a sovereignty that includes the old Hobbesian notion of governmental immunity from suit unless there is an express waiver of that immunity (in contrast to the Lockean view adopted by the founders, which recognized the people as sovereign and the government as mere agent).[27] What this means is that the states cannot be sued even for violating federal law duly enacted pursuant to powers expressly and, in some cases exclusively, granted to the federal government in Article I of the Constitution.[28] This, supposedly, because the Eleventh Amendment to the Constitution so commands.

What the Eleventh Amendment actually provides is

vastly different, of course, particularly when read in light of the specific controversy over the Supreme Court's decision in *Chisholm v. Georgia*[29] that produced it: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[30] On its face, the amendment says nothing about suits against a state by its own citizens, yet that non-textual interpretive gloss was added a century later in the 1890 case of *Hans v. Louisiana*.[31] Additionally, the amendment seems designed simply to counteract the holding in *Chisholm*, and is therefore properly read as merely a statement about the inability of federal courts to entertain state law claims against the states based on the diversity of citizenship, not a pronouncement of state immunity from suits based on federal statutory or constitutional law. The Court has long held to the broader view, however, and as a result was forced in the 1908 case of *Ex Parte Young*[32] to create what it has subsequently termed an "obvious fiction," namely, that suits to enjoin state officers from enforcing unconstitutional state laws do not violate the principle of state sovereign immunity.[33] Such suits, which can only be brought against officers of the state, are permissible, according to the Court, because of the fiction that when acting in defense of unconstitutional state laws they are not really officers of the state.[34]

Quite apart from the utter incoherence of the Court's recent decisions, *Seminole Tribe* and its progeny are also problematic because, being based on a non-textual, extra-constitutional theory of inherent immunity, the *Seminole Tribe* majority has placed at risk the broader project of restoring some semblance of the rule of law to constitutional adjudication—leaving itself open to the otherwise unfair charge that its resort to original understanding is simply driven by the majority's preferred results. By criticizing the sovereign immunity cases on the Court's own originalism terms, Judge Noonan at least suggests an alternative theory; perhaps the Court simply got it wrong.

Which brings us to the second, and much more subtle, critique of the Court's federalism decisions offered by Judge Noonan. By enhancing the power of the States via its sovereign immunity decisions, and as importantly, preventing federal intrusion upon the states' exercise of power in select areas declared off limits by the Court's own interpretation of the Constitution, the Court has, according to Noonan, really "accreted" power to itself.[35]

The sovereign immunity cases provide a good example of the problem. For the founders, the division of the people's sovereign powers between two levels of government was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens.[36] And it was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people's control. The Eleventh Amendment is simply an example of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry. By exempting the States from illegitimate exercises of power by the national government, rather than invalidating the illegitimate exercise of power itself (as it did in *United States v. Lopez*, which overruled the Gun Free School Zones Act as beyond Congress's power to regulate commerce among the states[37]), the Court effectively eliminated the states as the counterbalance to federal power.

Noonan's critique might be extended to the commerce clause cases, as well. *Lopez* was itself a landmark decision, and had it been consistently applied, would have resulted in the invalidation of literally thousands of federal laws and regulations. Instead, the Court has only invalidated two federal statutes as inconsistent with Congress's power under the Commerce Clause—both in areas that were already heavily regulated by state governments.[38] With such a piecemeal application of the Constitution's limits, the doctrine of enumerated powers is transformed from a protection of individual liberty into a turf war between two governments, each fighting for the right to regulate every aspect of our lives, with the Court serving as some grand and final arbiter between the competing claims but not as a defender of individual liberty.

This is a serious contention. Unfortunately, the lesson Judge Noonan draws from it is that the Court should more or less abdicate its responsibility for enforcing the Constitution's limits rather than more broadly and consistently enforce them. The book's conclusion is thus consistent with its cover—the material for a proper flag is there, but somehow it comes out backwards. Sometimes you really can judge a book by its cover.

* John C. Eastman is a professor of law at Chapman University in California and director of the Claremont Institute's Center for Constitutional Jurisprudence. The original version of this book review was published by the Claremont Institute.

Footnotes

[1] John T. Noonan, Jr., Narrowing the Nation's Power: The Supreme Court Sides with the States (2002).
[2] John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom (1998).
[3] 517 U.S. 44 (1996).
[4] 527 U.S. 706 (1999).
[5] Noonan, *supra* note 1, at 2-3.
[6] 529 U.S. 598 (2000).

[7] Noonan, *supra* note 1, at 12.
[8] 521 U.S. 507 (1997).
[9] Noonan, *supra* note 1, at 9.
[10] *Id.* at 12.
[11] 60 U.S. (19 How.) 393 (1857); *see* Noonan, *supra* note 1, at 13.
[12] 198 U.S. 45 (1905).
[13] Noonan, *supra* note 1, at 13.
[14] 298 U.S. 238 (1936).
[15] Noonan, *supra* note 1, at 13.
[16] *Id.* at 11.
[17] 494 U.S. 872 (1990).
[18] 521 U.S. 507 (1997).
[19] Noonan, *supra* note 1, at 16.
[20] The history of these amendments can be found on the website for the U.S. Congress. *See* U.S. House of Representatives, U.S. Congress, Amendments Not Ratified: Proposed Amendments to the Constitution Not Ratified by the States, *at* http://www.house.gov/house/Constitution/Amendnotrat.html.
[21] Noonan, *supra* note 1, at 135.
[22] Noonan, *supra* note 1, at 41-57.
[23] 517 U.S. 44 (1996).
[24] 209 U.S. 123 (1908).
[25] 134 U.S. 1 (1890).
[26] Noonan, *supra* note 1, at 47.
[27] *See generally* Thomas Hobbes, Leviathan (1651); John Locke, Second Treatise of Civil Government (1690).
[28] Noonan's character, Harvardman explains:

> The law today is that each of the fifty states is a sovereign, and a sovereign cannot be sued for damages by an individual, an Indian tribe, or a foreign government unless the sovereign has consented to being sued. . . . It cannot be sued even though Congress in the exercise of the powers conferred by article I has given individuals the right to sue.

Noonan, *supra* note 1, at 42.
[29] 2 U.S. (2 Dall.) 419 (1793).
[30] U.S. Const. amend. XI.
[31] 134 U.S. 1 (1890).
[32] 209 U.S. 123 (1908).
[33] *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 270 (1997).
[34] *See, e.g.*, *id.* at 269-70.
[35] Noonan, *supra* note 1, at 13.
[36] *See, e.g.*, The Federalist No. 46 (James Madison).
[37] 514 U.S. 549 (1995).
[38] *See id*; United States v. Morrison, 529 U.S. 598 (2000) (holding that the Congress exceeded its authority under the Commerce Clause when it enacted the Violence Against Women Act); *see also* Jones v. United States, 529 U.S. 848 (2000) (holding that the federal arson statute may not be applied to buildings not used in interstate commerce).

Beyond the Color Line: New Perspectives on Race and Ethnicity in America edited by Abigail Thernstrom and Stephan Thernstrom

*By Roger Clegg**

Early in his second term, President Clinton announced that America badly needed to have a "dialogue" on race, and created a commission to conduct that dialogue. There is no shortage of discussion of racial issues in the United States, and indeed there is already a federal Commission of Civil Rights that conducts hearings on such matters, and the new commission that President Clinton appointed was ill-equipped to conduct a true dialogue.

Nonetheless, the story has a happy ending. President Clinton's commission disappeared without a trace. Not only that but, before doing so, it spawned the Citizens' Initiative on Race and Ethnicity, an alternative panel formed in April 1998 to counter the Clinton commission. And the CIRE has now produced a remarkable book, *Beyond the Color Line: New Perspectives on Race and Ethnicity in America*.

The title alludes to W.E.B. Du Bois's prophetic and often-quoted line in *The Souls of Black Folk*, first published in 1903: "The problem of the twentieth century is the problem of the color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea." Thus, implicit in the title is the book's leitmotiv, that perhaps, just perhaps, over the past century, and particularly in the last half of that century, America has had some success in transcending the color-line that was so absolute when Du Bois wrote, and that some new perspectives might be useful. There are, of course, those who would disagree, like the people who served on the President's commission. But some propositions are so preposterous, observed Orwell, that only an intellectual could believe them, and into that category surely falls the notion that America has not made enormous progress over the last generation in race relations. Jim Crow is gone, discrimination on the basis of race or national origin in just about every public transaction is illegal, bigotry is socially unacceptable, and the biracial color-line is discredited—indeed, obsolete, in an America that is increasingly multiracial and multiethnic, and among Americans who are themselves, more and more, multiethnic and multiracial.

CIRE did not know what the President's commission would produce, so it had no choice but to cover the whole waterfront, to consider all the various facets of race relations in late twentieth/early twenty-first century America. The editors of the book, Abigail and Stephan Thernstrom, did this, and found the most accomplished scholars to address them.

Thus, for instance, one would certainly want to include something about school desegregation—since the modern era in race relations arguably began in1954 with *Brown v. Board of Education*—and, sure enough, the book has a chapter on the topic by the two most knowledgeable experts on this topic, David Armor and Christine Rossell. One would want to write something about racial preferences in government contracting, since the Supreme Court's more recent civil-rights decisions—in cases like *City of Richmond v. J.A. Croson Co.* and *Adarand Constructors, Inc. v. Pena*—have been in this arena and, voila, there is a chapter on such discrimination by the leading authority, George La Noue. And so on, and so on: You would want to read something on crime by James Q. Wilson, on medical care by Sally Satel, on black churches by John DiIulio, on racial demography by Stephan Thernstrom, on politics by Michael Barone, and you would want to hear as well from Shelby Steele, Thomas Sowell, Abigail Thernstrom, Clint Bolick, Tamar Jacoby, Linda Chavez, and Ward Connerly. Well, it's all here, and more.

Indeed, so successful is the book, so chockablock with the very best names on every topic you can imagine, that your humble reviewer is presented with a problem. One feels like a pitchman in one of those infomercials for the latest kitchen high-tech gizmo: Not only does it do this, but it does that, and this, too, and if you order by midnight tonight, we'll send you this attachment as well, and this in addition, and this, and this. The most straightforward way to make this point and the best way to impress upon the potential reader the scope and value of the book is simply to reproduce its table of contents, and so that is what I'll do.

Part One, "The Big Picture," includes chapters on "The Demography of Racial and Ethnic Groups" by Stephan Thernstrom, "Immigration and Group Relations" by Reed Ueda, "What Americans Think about Race and Ethnicity" by Everett C. Ladd, and "Wrestling with Stigma" by Shelby Steele.

Part Two, "Private Lives and Public Policies," has in it chapters on "Residential Segregation Trends" by William A.V. Clark, "African American Marriage Patterns" by Douglas Bersharov and Andrew West, "Crime" by James Q. Wilson, "Health and Medical Care" by Sally Satel, and "Supporting Black Churches" by John J. DiIulio, Jr.

Part Three, "Economics," has chapters on "Discrimination, Economics, and Culture" by Thomas Sowell, "Half Full or Half Empty? The Changing Economic Status of African Americans, 1967–1996" by Finis Welch, and "Discrimination in Public Contracting" by George R. La Noue.

Part Four, "Education," has in it chapters on "Desegregation and Resegregation in the Public Schools" by David J. Armor and Christine H. Rossell, "The Racial Gap in Academic Achievement" by Abigail Thernstrom, "Schools

That Work for Minority Students" by Clint Bolick, and "Preferential Admissions in Higher Education" by Martin Trow.

Part Five, "Law," has two chapters, "Racial and Ethnic Classifications in American Law" by Eugene Volokh and "Illusions of Antidiscrimination Law" by Nelson Lund.

Part Six, "Politics," has chapters on "Race, Ethnicity, and Politics in American History" by Michael Barone, "The Politics of Racial Preferences" by David Brady, and "From Protest to Politics: Still an Issue for Black Leadership" by Tamar Jacoby.

Part Seven, "One Nation, Indivisible," includes chapters on "The New Politics of Hispanic Assimilation" by Linda Chavez, "In Defense of Indian Rights" by William J. Lawrence, "The Battle for Color-Blind Public Policy" by C. Robert Zelnick, and "One Nation, Indivisible" by Ward Connerly.

Much of the material in the book will be familiar to those who work in this area, but not all of it, and in any event it is very useful to have so much collected and to have it updated and so well organized. One famous review—not of this anthology—witheringly observed, "What is good in this book is not new, and what is new is not good." But here, with this embarrassment of riches, the opposite is true: What's new is good, and what's not new is worth reading again. *Repetitio est mater studiorum*. Thank you, President Clinton.

* Roger Clegg is general counsel of the Center for Equal Opportunity and is chairman of the Federalist Society's civil rights practice group.