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Letter from the Editor...

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Paul F. Zimmerman

The Philosopher in Action: A Tribute to the Honorable Edwin Meese III

*By William J. Haun**

In December 2011, former U.S. Attorney General Edwin Meese celebrated his 80th birthday. While his accomplishments are hardly unknown to the Federalist Society, Mr. Meese's work in the Reagan Administration provides more than merely a list of accolades relegated to history. Through several interviews with Mr. Meese's colleagues in the Reagan Administration, and presently at the Heritage Foundation's Center for Legal and Judicial Studies, one finds that his achievements reveal a commitment to the realization of principles that transcend the politics of any period. Rather than simply concern himself with instant political advantage, Mr. Meese embodied Edmund Burke's characterization of a politician: a "philosopher in action," committed to taking rarefied intellectual concepts and transforming mainstream politics by implementing those ideas through government institutions. Interviews with Mr. Meese, Justice Samuel Alito, Judge Douglas Ginsburg, Judge Loren Smith, the Honorable T. Kenneth Cribb, Jr., Todd Gaziano, and Thomas Jipping reveal how the former U.S. Attorney General found a legal profession with little room for conservative analysis, and used the confluence of an inclined boss (Ronald Reagan) and Meese's own personal commitment to conservatism to create a political movement that will outlast them both. Meese's congenial leadership continues to facilitate new avenues of substantive growth for the conservative legal movement, including combating the growth of federal criminal law, and limits on congressional power. For these, and his many other achievements detailed herein, Americans owe him their thanks through analyzing his experiences in public life. This tribute strives to do just that.

Meese recalled being "not particularly interested" when then-Governor-elect Ronald Reagan called him about a job interview in 1966 while serving as a deputy district attorney. As Heritage Foundation scholar Lee Edwards notes, "Ed Meese had never been political—he thought of himself as a disinterested public servant."[1] While it is common for political actors to downplay their inner Machiavelli, Meese's distinction between politician and public servant was different. "Ed was not interested in immediate political payoffs," said T. Kenneth Cribb, Jr., who served as counselor to Meese during his tenure as Attorney General. As Judge Loren Smith of the U.S. Court of Federal Claims, who worked with Meese on President Reagan's 1980 transition team, recalled, "[Ed's] focus was on the future—how Americans would view the Constitution, and how the courts would apply it, well after President Reagan left office." Meese ultimately worked for Reagan because of their shared policy ideas—particularly on legal issues like the death penalty and judicial selection. What Cribb called Meese's "laser-like" loyalty to Reagan kept his focus on long-term impact, rather than achieving political goals.

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Meese's loyalty to Reagan, especially on legal issues, was cemented as the two encountered the depth of political power that progressive legal groups possessed in California. During Reagan's governorship, the California Rural Legal Assistance group thwarted his efforts to reform "MediCal," California's health insurance program. When the administration, in recognition of a discovered 135 instances of misconduct, sought to deny the group state funding, the judiciary ruled the administration's attempts "unfounded"—a reflection of a politicized judiciary.[2] Meese also recalled how Governor Reagan made combating judicial politics a top priority. "Reagan developed a new system of [judicial nominee] evaluation which included assessment of candidates by people knowledgeable about the legal profession in California's fifty-eight counties, as well as the state bar." Nevertheless, having served as a law professor at the University of San Diego, Meese knew full well that few conservative legal academics—outside his colleague Bernard Siegan, or Robert Bork at Yale—existed to craft intellectual responses to the Left's legal efforts. This not only limited the crop of potential judicial nominees, it exacerbated the Left's influence on public policy through the state and, ultimately, federal judiciary. During Reagan's governorship, Meese recalled, they began to develop concerns about the federal judiciary's overreach into democratic decisions: "Many of the decisions of the Supreme Court, particularly about the criminal law," along with "activist lower court decisions," interfered "with the legitimate governmental decisions of the states."

Federal interference into state prerogatives, and the politicization of the state judiciary, inspired Meese (along with many others, as Meese humbly notes) to begin organizing a conservative legal response. One initial response was the Pacific Legal Foundation, where Meese served as a board member. It wouldn't be until Reagan's 1980 presidential election, however, that the conservative movement fully embraced judicial reform. Cribb recalled:

> Law, as a profession, didn't receive a modern conservative analysis until the 1970's. So, the notion that there should be an interest in how lawyers inhibited conservatives' political priorities was relatively new. The generation of Republicans that Reagan and Meese found in 1980 simply didn't grasp the issue. Judicial restraint to them was merely a prudential question, not about the boundaries of the Constitution, or its structural components.

In his position in the Reagan White House, informed by his California experiences, Meese would begin to change this mentality by using conservative political action and conservative legal theory to mutually reinforce their respective developments.

When Meese led Reagan's 1980 presidential transition team, he helped him first reform executive branch decision-making so as to maximize the effect of Reagan's agenda within the bureaucracies. Meese wanted a presidential cabinet focused on the President's agenda, rather than pressure from outside groups. "Cabinet secretaries frequently based decisions on the

influence of constituencies within their department, rather than by considering the President's agenda," Meese said. Using the California governor's office as a model, Meese instituted "cabinet councils" composed of different department heads that met directly with the President more often than the full cabinet. Judge Smith remembered how this began to improve inefficiencies within federal departments as subdivisions of specific departments could finally speak to their counterparts. More profoundly, as Cribb points out, "by increasing Reagan's involvement within the executive branch, [Meese] encouraged bureaucrats to support Reagan's interest in streamlining government." Yet despite Meese's work in the White House, President Reagan knew that Meese's deep interest in law enforcement made the Attorney General post his "life-long dream."[3] That point might not have been intuitive, however. According to Cribb, there was some speculation that Meese was under consideration for a judicial nomination, to which Meese responded, "'Ken, I'm not ready to retire.'" Meese's Attorney General confirmation hearing foreshadowed the contentious judicial confirmations later in his tenure.

Many Senate Democrats used Meese's confirmation hearing to attack the Reagan Administration on criminal law and civil rights, especially in light of his history in helping shape the conservative legal movement in California. To many liberals, and even some conservatives, Meese was a reminder of the President's close contact to conservative principles, rather than just the Republican Party. One White House aide even described Meese as "more Reagan than Reagan" during the first term.[4] "Ed Meese rode point for the Reagan Revolution," said Cribb. "Reagan was untouchable politically, so the Left's tactics instead were to attack anyone around the president, and Ed Meese, because of how close he was to Reagan and the conservative movement, was the most important target." Thus, senators opposed to President Reagan saw Meese's confirmation as an opportunity to superimpose their criticisms of Reagan's temperament and conservatism onto a close aide.[5] Meese's nomination was held over for more than a year, with Senator Edward Kennedy vociferously attacking the Reagan Administration on civil rights, and Senator Robert Byrd saying that "I don't believe the nominee in this instance meets the standards of this office."[6] To those who actually worked with Meese, the criticisms were unfounded. As Steven Calabresi, who would serve as a special assistant to Meese, said in *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, "[Meese] was unusual in that he was very interested in ideas as well as in action and accomplishing things."[7] Despite such strong attacks, the Judiciary Committee voted him to the full Senate 12-6, and the Senate confirmed him. Meese began his service as Attorney General on March 20, 1985.

"In leading the Department of Justice," Meese recalled, "I believed that this was an opportunity to provide constructive change and improvement in the Nation's justice system as a whole." Meese began with specific goals at his swearing-in ceremony:

> First, the protection of the law abiding from the lawless with due and careful deference to the Constitutional rights of all citizens; secondly, the safeguarding of individual privacy from improper governmental intrusion; third, the vigilant and energetic defense of the civil rights of all Americans; and fourth, the promotion of legal regulatory structures designed to conserve and expand economic freedom.[8]

Many of Meese's initial changes to the Department were internal, reorienting the Department past short-term political priorities toward long-term legal change. He relied upon many of the organizational experiences he developed in the Reagan White House: "[W]e established a strategic planning board, comprised of the Deputy Attorney General, the Associate Attorney General, and all the Assistant Attorneys General. Their mission was to develop ideas that would lead to long-range improvements in the work of the Department of Justice and justice system generally." And Meese preferred being personally involved in the administration of DOJ policies. "To avoid any tensions resulting from new policies in the lower-levels of DOJ," Cribb recalled:

> Ed was very active in Department functions. He loved to start early with 7 a.m. breakfasts with different DOJ constituencies—law enforcement heads, litigators, etc. He reached out them, and tried to show the DEA, the FBI, and other Department entities that he knew their issues first-hand. It seemed to be appreciated.

These structural adjustments complemented the Department's deepened philosophical orientation during the first Reagan term through the creation and evolution of the Office of Legal Policy ("OLP").

Like Meese, whose focus was on judicial issues and law reform, OLP began as the "joint White House-Justice Department Judicial Selection Committee" that ensured "that Reagan judicial nominees were compatible with the philosophical and policy orientation of the President."[9] Meese and Reagan's efforts in this regard, and former Attorney General Bill Smith's ultimate creation of the OLP as a result of the committee, were further than any prior White House's effort to seek philosophical and political vindication from judicial selection.[10] While Meese notes that this increased focus on judicial philosophy and selection was the result of many individuals, Meese's own interest partly came from his background in criminal prosecution.

Meese experienced the 1960s "revolution" in criminal procedure while prosecuting college protestors as a deputy district attorney in California. Cribb recalled that Meese's experience as a prosecutor "developed in Ed a life-long interest in law enforcement not just in lofty terms, but the challenges that come with actual policing."

As Attorney General, he did much to combat what he considered to be this "revolution's" detrimental effects in both constitutional interpretation and on the victims of crime. In the latter context, Meese is most proud of overseeing the installation of victim coordinators in every U.S. Attorney's Office during his tenure, while numerous commissions on victim protection, and deleterious social conduct connected to crime (like pornography), continues to have an impact on Justice Department policy. But it is in constitutional interpretation where Meese's most enduring legacy began to cement itself.

As Justice Samuel Alito (then an Assistant Attorney General to Meese) observed, "In addition to the separation of powers, General Meese ensured that a sound approach to criminal justice would be an instrumental part of explaining originalism." After becoming Attorney General, Meese would argue that "[a] drift back toward the . . . civil libertarianism of the Warren Court [in criminal procedure] would be . . . a threat to the notion of limited but energetic government."[11] His attempt to refute the underlying judicial supremacy within cases like *Miranda v. Arizona* and *Mapp v. Ohio* shaped Meese's—and in turn, the Department's—focus on constitutional law. Meese used the practical effects of judicial activism on criminal prosecutions to re-educate prosecutors. As he recalled, "[w]e also developed a series of seminars on critical legal topics, such as the exclusionary rule, in which top officials in the department, both appointed and career, participated." To Meese, turning the DOJ into an "in-house think tank" as well as a place for law enforcement and judicial vetting, allowed the Department to keep a long-term focus. Proof of Meese's impact in this regard lies in the changed description of the OLP from its 1984-85 report to its 1986-87 report. The 1984-85 report described the office as "the principal policy staff reporting to the Attorney General and Deputy Attorney General . . . ." The latter report, however, calls the OLP "a strategic legal 'think tank' serving as the Attorney General's principal policy development staff . . . OLP's long-term planning responsibilities require its attorneys to anticipate and to help shape the terms of national debate on forthcoming legal policy questions."[12]

"Ed's emphasis on originalism within the Department of Justice brought a nascent development from the legal academy into the real world of legal policy," commented D.C. Circuit Judge Douglas Ginsburg, an Assistant Attorney General in the Meese Justice Department. And as the OLP description demonstrates, the "real world of legal policy" did not simply include the Justice Department's internal policies. While the first Reagan term saw the nomination of some former academics to the federal bench who agreed with originalism, like Ralph Winter, Robert Bork, and Antonin Scalia, Judge Ginsburg observed that "Ed was the first to bring the idea to the broader public." Yet there is a tension between the view of originalism articulated by Alexander Hamilton in *Federalist 78*, where he wrote that the judiciary is the "least dangerous branch"[13] of government, and the Court's modern view, as stated in *Cooper v. Aaron*, that "the federal judiciary is supreme in its exposition of the Constitution."[14] Meese thus concluded that he had "to explain to the legal profession that the scope of the federal judiciary, even if it had benevolent motives, was threatening the separation of powers and individual liberty."

Meese's goals, to "protect that original [Constitutional] design . . . dust off the Federalist Papers . . . and point out also that . . . [f]ederalism is not a quaint canard of the 18th century,"[15] shook up the Justice Department's public affairs. In a 1985 letter from Meese's former chief spokesman, Terry Eastland, to Pat Buchanan, Eastland said:

> Ed Meese and I want to reorganize Public Affairs, which is now mainly a press office. Speechwriting will be under me, as will a "public liaison" effort designed to reach out to academics and laymen. I will be the department's communications strategist, mapping plans for doing battle in the war of ideas. Mr. Meese wants to emphasize federalism and separation of powers. I intend to design public initiatives in these areas, as well as in some others, including judicial restraint, victims' rights, religious freedom, and "Baby Doe."[16]

Meese himself would lead the charge by taking his case to the country. In a series of speeches, Meese would pose a controversial distinction between the Constitution and constitutional law, and ignite a public debate over originalism that would refine it intellectually.

In a 1986 speech to Tulane University, Meese famously contended that, regardless of how the Supreme Court interprets constitutional provisions, the only "supreme law" is the meaning each provision possesses at the time of its ratification.[17] Meese allowed that the Court's decisions were binding on the parties to the action and the executive branch for enforcement purposes. "But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forever more."[18]

Meese's argument, in his words, "brought to public attention that fact which had been largely ignored up until that time both in the legal profession and in the law schools." But the reactions to his speech suggested that many prominent members of the profession did more than ignore Meese's view, they despised it. University of Chicago law professor Geoffrey Stone remarked that the "disturbing implications" of Meese's view could "create a situation of enormous chaos."[19] The then-president of the American Bar Association, Eugene Thomas, disputed Meese's argument: "Supreme Court rulings are the law of the land . . . . Public officials and private citizens alike are not free simply to disregard that legal holding."[20] Yet despite misgivings from these professors and practitioners, history was on Meese's side. If the Supreme Court's holdings, "henceforth and forever more," bound the president, then President Andrew Jackson was remiss in vetoing the Bank of the United States on constitutional grounds despite the Supreme Court affirming such grounds in *McCulloch v. Maryland.*[21] President Lincoln was also thus wrong to undermine the Supreme Court's 1857 decision *Dred Scott v. Sanford*, affirming a right to own slaves.[22] The rationale Lincoln cites for his efforts tracks what Meese would argue over a century later: if every branch of government outsourced any and all constitutional questions to the Supreme Court, henceforth and forever more, "the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."[23] For Meese, he thinks the resurgence of the Federalist Papers has helped, for now, cement this view's legitimacy in both legal academic and professional life. The view certainly impacted policy development and judicial selection within the Justice Department.[24]

As Judge Ginsburg notes, "Ed's public addresses informed the public about developments at the Justice Department, where he appointed people who shared his views on original meaning and would shape the department's policies accordingly." Many

of Meese's appointments allowed him to begin mentoring a new generation of conservative lawyers. Cribb recalled:

> Our need to get credible people advocating originalism led Ed to say to me, "Ken, bring me people with gray hair." But there was no one with gray hair that agreed with us—the profession was too wedded to legal realism. So we appointed a lot of bright, young lawyers with outstanding accomplishments to think outside the box.

"Thinking outside the box" led to a publication called *Guidelines for Constitutional Litigation* that instructed prosecutors how to incorporate originalist arguments into government briefs, and panel discussions at the Justice Department about originalist thought. Such efforts were pursued out of not just commitment to principle, but out of necessity to originalism's survival and legitimacy. Outside of Robert Bork's 1971 law review article, *Neutral Principles and Some First Amendment Problems,*[25] and Raoul Berger's 1978 book *Government By Judiciary*, few sources existed that developed originalism as an interpretive method. The discussions Meese organized at the Justice Department on such topics had the effect of refining originalism now that it was in public use. For example, when Meese initially defined originalism publicly in 1985, he characterized it as a "jurisprudence of original intent."[26] This view had its origins in the view of Joseph Story, who said "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."[27] Yet Meese's public addresses provided the opportunity for further debate on his words, and refined this conception of originalism into one of "original public meaning" through talks at Federalist Society events. Meese himself would confirm this later in 1985 when he spoke to the Society.[28]

Meese's interest in both interacting with and mentoring young lawyers facilitated opportunities for grooming potential future members of the judiciary. "General Meese was very supportive of my work in [the Office of Legal Counsel]," recalled Justice Alito. "He was instrumental in my candidacy to become U.S. Attorney." Similarly, Judge Ginsburg said, "My stint as Assistant Attorney General for Antitrust was surely instrumental in Ed's recommending that the President nominate me for the D.C. Circuit." Meese's commitment to mentoring in this regard was another manifestation of his primary interest in judicial selection. "Despite the importance of other issues," Cribb said, "[judicial selection] was the ball game. Ed took the issue directly into his office, and wanted younger, accomplished attorneys that could be readied for nomination."

The focus on young attorneys for judicial selection was fitting, considering how novel Meese's emphasis on it was. The first recorded instance of expanded White House interest in judicial selection came from a young Richard Nixon aid, Charles Houston, who summarized the concept to President Nixon:

> Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office . . . .In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made. . . . The President [should] establish precise guidelines as to the type of man he wishes to appoint—his professional competence, his political disposition, his understanding of the judicial function—and establish a White House review procedure to assure that each prospective nominee recommended by the Attorney General meets the guidelines.[29]

Yet despite the fact that the concept originated in the Nixon years, it would not be until the Reagan years that the concept manifested into reality.[30] "The problem with the Nixon approach," Cribb said, "was that it was still slogan-focused. If originalism was going to be taken seriously as an idea, and not just a political tool, then we needed principals to apply and not just slogans. So, we used scholarship written in the 1970's on the role of a judge, and Ed made developing those ideas at Justice a priority."

Meese remembered, "[P]rimarily, we were looking for long-term constitutional fidelity in our judicial selection." This was not, as critics would suggest, a simple litmus test that rewarded political supporters. As Cribb recalled, "[W]e would not, and could not, simply green-light result-oriented conservatives. We wanted individuals who would interpret the law with the Constitution's structural limits in mind—even if that led to conclusions we didn't like as a policy matter." This turned away some candidates who failed to live up to the department's review process. "Simply asking 'do you believe in judicial restraint?' or other such slogans was unenlightening," recalled Meese. "We would not ask how individuals would rule on a particular case, but we tried to probe constitutional principles carefully." Echoing his disinterest in pure politics, Meese is careful not to characterize judicial selection as a partisan affair. "The 'evolving constitution' approach of activist judges is not simply a political threat, it evades self-government." To Judge Ginsburg, Meese's philosophical commitment to originalism transformed judicial selection: "There's little political reward in most judicial nominations because, in our constitutional system, a judge has to be independent of politics, but Ed was committed to persuading politicians of the value of rigorous judicial selection."

Sometimes, judicial selection did not just lack political reward, it also required refuting the preferences of political allies. In 1984, members of Colorado's congressional delegation wanted the Reagan Administration to nominate federal district court judge Sherman G. Finesilver to the U.S. Court of Appeals for the Tenth Circuit.[31] In another Administration, the support of one's congressional allies, the fact that the judge took some positions that were favorable to the President's party, and the fact that the judge was nominated by a prior President of the same political party (in this case, Richard Nixon), might have been sufficient for a non-Supreme Court judicial post. But the Justice Department closely analyzed his prior judicial opinions, and were troubled by Judge Finesilver's analysis of constitutional rights regarding a law requiring parental consent before a minor has an abortion.[32] Combined with his rationales in other areas of law, DOJ's analysis resulted in Finesilver not receiving a nomination from President Reagan.[33]

The process of judicial selection under Meese entailed more than nominee recruitment. "Our networking with young

conservatives helped bring in allies into staff roles on the Senate Judiciary Committee," Cribb remembered. Meese wanted the Senate to continue the intellectual rigor in judicial selection that the Department emphasized, so he developed relationships between DOJ and Senate staff to relay originalist principles to members (a now-famous example is Meese hiring future United Nations Ambassador John Bolton to serve as Assistant Attorney General for Legislative Affairs). Meese, working with the Federalist Society, helped develop an outside network of supporters to educate the public on these issues. As Meese observed:

> We were fortunate to have the establishment of the Federalist Society at that time, as a source of young, talented conservatives for high level positions within the Department of Justice. We also had a network that supported Ronald Reagan both before and during the 1980 election. It is a combination of these sources that brought to our attention many people who were loyal to the principles of constitutionalism and justice, rather than just a political party.

The relationship was mutual. Justice Alito remembered, "Attorney General Meese's support focused attention on the debate about originalism that the [Federalist] Society helped to foster. And Attorney General Meese's willingness to bring some of the Society's leaders into the Justice Department helped promote originalist arguments within the department." Even after a judicial nominee was selected, the Reagan White House continued to emphasize its interest in smart, predictable judges. "After the department presented a possible nominee to President Reagan," Meese said, "he would call the nominee personally advising them of the news. At every point we wanted to make plain the high expectations we had for what an individual does with life tenure."

Introducing originalism into the public debate inevitably invited a response—one that began shortly after Meese's July 1985 speech to the American Bar Association. Given mere months after Meese was sworn in, this speech was the first public defense of originalism by a sitting Attorney General. It thus became, as Professor Steven Calabresi would say, "part of the originalist creed."[34] The speech introduced the themes Meese was emphasizing in judicial selection and Department policy to the broader public: he called for jurists who would "judge policies in light of principles, rather than remold principles in light of policies."[35] He emphasized "that the Constitution is a limitation on judicial power as well as executive and legislative powers,"[36] and castigated judicial activism in the areas of criminal procedure and religious liberty.[37] While future speeches, such as his speech to Tulane University, would unpack originalism more thoroughly, no other speech sparked a public response from a sitting Supreme Court Justice. When Justice William Brennan took to the podium, he retorted, "It is arrogant to pretend that from our vantage we can gauge accurately the intent of the framers on application of principle to specific, contemporary questions."[38]

Brennan's response was the first, and most prominent, of many. Meese subsequently entered an op-ed duel with the *Washington Post* editorial board over his Tulane speech.[39] Thomas Jipping, Counsel to Senator Orrin Hatch, notes that "Senate Democrats awoke to the threat Meese's arguments posed after Brennan's response. Confirmation hearings became more contentious." As Meese continued to persuade Americans toward originalism, Democrats prompted[40] Harvard Law Professor Laurence Tribe to write *God Save This Honorable Court*, intended for political opponents of originalism to explain why the Supreme Court "should put meaning into the Constitution."[41] Tribe was inspired by a feeling that Meese was disingenuous: "Meese was successful in making it look like he and his disciples were carrying out the intentions of the great founders, where the liberals were making it up as they went along. It was a convenient dichotomy, very misleading, with a powerful public relations effect."[42] When Democrats took control of the U.S. Senate in 1986, they now possessed the political levers to respond to Meese's advances by attacking judicial nominees. Senator Patrick Leahy made clear in the defeat of Professor Bernard Siegan's judicial nomination that "[n]o 'iffy' nominees are going to get through now. The Administration knows it has to send us consensus candidates."[43]

To Meese, "the Left's response . . . put out into the open what had been a clandestine and subversive effort to direct judicial decisions away from the Constitution. This controversy became increasingly public as groups on the left became more organized and more vicious in attacking constitutionally faithful nominees. . . ." All of Meese's associates who were asked, and Meese himself, agree that no one within the Reagan Administration was goading or surprised by the Left's reaction; this was merely an extension of what Meese and Reagan had encountered since they took on judicial politicization in California. Now, it went national. What the Federalist Society later termed "the Great Debate" between originalists and living constitutionalists opened a new front outside the battlefields of law reviews and judicial opinions. D.C. Circuit Judge Robert Bork's nomination to the U.S. Supreme Court would be one of the first prominent casualties.

Despite being unanimously confirmed to the D.C. Circuit during the first Reagan term, the efforts of Professor Tribe in responding to Meese's arguments helped torpedo Bork's Supreme Court nomination in 1987. Bork, as noted above, was one of a handful of scholars critiquing the law from a conservative perspective. The need to enhance originalism's intellectual credibility, Cribb recalled, made Bork—along with his impressive scholarship in antitrust law—"unquestionably qualified" to be a judge. Bork was initially passed up for a Supreme Court position due to Antonin Scalia being younger, but with another opening, Bork became the obvious choice, said Cribb. However, liberals saw a successful Bork nomination as a near-irrevocable rightward shift in the Court. Thus, unprecedented sums of money and political activism were employed to defeat his nomination.[44] Senator Kennedy again took the Senate floor to lambast what "Robert Bork's America" would look like with a parade of horribles, including back-alley abortions and segregated lunch counters.[45] Bork's nomination was defeated 58-42 in the full Senate, and then-Ninth Circuit Judge Anthony Kennedy was ultimately nominated and confirmed for the Supreme Court seat.

As Cribb related, "Despite all the politics, we simply assumed that because Bork was, truly, overqualified to be a Justice, he would trump the power play. But even Democrats sympathetic to his nomination were threatened with primary battles if they supported him." Ann Lewis, a Democratic political advisor who later worked on now-Secretary of State Hillary Clinton's presidential campaign later stated, "If this were carried out as an internal Senate debate, we would have deep and thoughtful discussions about the Constitution, and then we would lose."[46] An OLP memorandum released after then-Judge Kennedy's nomination to the Supreme Court examined in detail how the failure of the Bork nomination impacted judicial independence. "Instead of examining the judicial philosophy [of Judge Bork and, subsequently, Judge Anthony Kennedy,] . . . some Senators focused upon the nominees' political views" by asserting that the reasoning of a judicial decision and the policy effect achieved are the same.[47] Some would say that the perceived need to caricature originalism and its adherents, rather than respond to it and them, is perhaps the greatest testament to the impact of Meese and his Justice Department in mainstreaming the philosophy. At the conclusion of Meese's term as Attorney General in 1988, conservative grassroots legal groups had rapidly emerged, ready to respond to future confirmation battles.

Since leaving the Justice Department, Meese now uses his position at The Heritage Foundation as Chairman of the Center for Legal and Judicial Studies to apply the lessons from his work in the Reagan Administration. Todd Gaziano, Director of the Legal Center, said that "Ed turned the Center into a proper place for constitutional discourse," coordinating conservative public interest law groups that will now preempt political attacks on judicial nominees whose fidelity to the Constitution stands in the way of activist legal philosophies. "His considerable talent at bringing respected people together also makes our projects more effective." One particular example is *The Heritage Guide to the Constitution*—a clause-by-clause originalist analysis of the U.S. Constitution that Senate Judiciary Committee members have used during confirmation hearings. Another is the Center's work against the growth of federal criminal law (called "overcriminalization"), an issue that, like originalism in the 1980s, many credit Meese with bringing to prominence. Jipping suggested, "[T]he core takeaway from Meese's legacy is that a judicial nomination desiring to have a substantive impact on constitutional interpretation requires more than nominating a candidate for their political loyalty, gender, or race, and then hoping for the best." The Meese strategy of rigorous selection, developing a network of supporters, and explaining the substantive stakes to the public has proven to be a successful path for originalist advancement.

Gaziano sees Meese's personality as key to coordinating originalist efforts to keep confirmation battles focused on ideas. "We don't want anyone to politicize the confirmation process, and so we make more of an effort to stop false attacks on nominees from the outset. The respect Ed incurs makes sure the debate stays on ideas." Judge Ginsburg expressed a sentiment about working with Meese that was shared by everyone interviewed: "Ed has great management skills: he listens carefully, considers all points of view, and thereby gets everyone invested in the decisions he makes."

It is ultimately fitting that Meese returned to, and in many ways shepherds, the conservative legal movement after his time in government, not only because he was instrumental in building it, but because he continues to prove that it is issues, rather than operatives, that shape political change.[48] He first showed this fact in California, working with Reagan to combat judicial politics, and then he expanded upon it later by working with others in the White House to enact similarly-motivated changes. Meese's work provides one of the most successful examples of how the Reagan Revolution sought to change the focus from political priorities to political principles in all of public policy.[49] The continued impact of Meese's work on judicial selection to this day is a function of how ideas have longer staying power than instant political goals. As Meese himself said ultimately:

> I believe it is important that lawyers, as well as public officials generally, think beyond short-term goals or political objectives, and base their decisions and actions on the enduring principles, particularly the Constitution. I believe that this view is particularly important for young conservatives since it is only by constitutional fidelity and acting on principle that people can maintain their personal integrity as well as the highest values of our profession.

"General Meese began the process of refining and developing originalist theory in the public eye," recalled Justice Alito. "This not only improved legal scholarship and public discourse, it continues to have a profound effect on judicial decisions." While that is an impressive legacy, its most indelible part comes from Meese himself. Nearly everyone interviewed for this article shared an admiration for their former (or current) boss that was personal, as well as professional. Cribb summarized the sentiment best: "Ed's heart is as big as the room he's in, and we're all better for having been in a room with him at some point."

Endnotes

1 Lee Edwards, To Preserve and Protect: The Life of Edwin Meese III 12 (2005).

2 Bennett Beach, *One More Narrow Escape*, Time, Nov. 23, 1981.

3 Ronald Reagan, The Reagan Diaries 213-14 (Douglas Brinkley ed., 2007).

4 *See* Nicholas M. Horrock, *More Reagan Than Reagan: Meese Was Loathed By the Left But Loved By the Right,* Chi. Trib., July 6, 1988, *available at* http://articles.chicagotribune.com/1988-07-06/news/8801130015_1_edwin-meese-white-house-disclosures.

5 *See* Roger Simon, *Ed Meese Sets New Standard*, Chi. Trib., Feb. 4, 1985, *available at* http://articles.chicagotribune.com/1985-02-04/news/8501070496_1_ed-meese-edwin-meese-senators.

6 *See* Glen Elsasser, *Meese Clears 1st Hurdle As Panel OKs Nomination*, Chi. Trib., Feb. 6, 1985, *available at* http://articles.chicagotribune.com/1985-02-06/news/8501070883_1_edwin-meese-senate-judiciary-committee-dedication-and-integrity.

7 *See* S.M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment.* Stud. in Am. Pol. Dev., Apr. 2009.

8 The Hon. Edwin Meese, III, Remarks upon Installation as the Seventy-Fifth Attorney General of the United States (Mar. 20, 1985) (on file with author).

9 *See* Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. Rich. L. Rev. 871, 880 (2004).

10 *See* Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan 291-93 (1997); *see also* judicial selection discussion *infra*.

11 The Hon. Edwin Meese, III, Attorney General of the United States, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985).

12 *See* S.M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment.* Stud. in Am. Pol. Dev., *19, Apr. 2009.

13 The Federalist No. 78, at 490 (Alexander Hamilton) (Henry Cabot Lodge ed., 1902).

14 *See* 358 U.S. 1, 18 (1958).

15 The Hon. Edwin Meese, III, Remarks upon Installation as the Seventy-Fifth Attorney General of the United States (Mar. 20, 1985) (on file with author).

16 Letter from Terry Eastland to Pat Buchanan, April 10, 1985, *quoted in* S.M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment.* Stud. in Am. Pol. Dev., *16, Apr. 2009.

17 *See* Edwin Meese, III, Attorney General of the United States, Address at Tulane University: The Law of the Constitution (Oct. 21, 1986).

18 *Id.*

19 *See* Howard Kurtz, *Meese's View on High Court Prompts Varied Responses*, Houston Chron., Oct. 24, 1986, *available at* http://www.chron.com/CDA/archives/archive.mpl/1986_275047/meese-s-view-on-high-court-prompts-varied-response.html .

20 *Id.*

21 *See* Steven G. Calabresi, *Text v. Precedent in Constitutional Law*, *in* Originalism: A Quarter-Century of Debate 200-03 (Steven G. Calabresi, ed. 2007).

22 *See* Joel Alicea, *Gingrich, Desegregation, and Judicial Supremacy*, Pub. Discourse, Jan. 5, 2012, *available at* http://www.thepublicdiscourse.com/2012/01/4491.

23 *Id.*

24 *See supra* note 19.

25 47 Ind. L. J. 1 (1971).

26 *See* Edwin Meese, III, Attorney General of the United States, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985).

27 1 Joseph Story, Commentaries on the Constitution of the United States 383 (1833).

28 *See* Edwin Meese, III, Attorney General of the United States, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985):

> Where the language of the Constitution is specific, it must be obeyed. Where there is a *demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed*. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

Id. (emphasis added).

29 *See* Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. Rich. L. Rev. 871, 878-79 (2004).

30 *See* Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan 291-93 (1997).

31 *See supra* note 29 at n.103 (and accompanying text).

32 *See supra* note 29 at n.106 (and accompanying text). The decision reasoned that parents were no more than "third parties" in the context of a minor child having an abortion.

33 *Id.*

34 *See* Steven G. Calabresi, *Introduction* to Originalism: A Quarter Century of Debate 2 (Steven G. Calabresi ed., 2007).

35 *See* Edwin Meese, III, Attorney General of the United States, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985).

36 *Id.*

37 *Id.*

38 *See* Lynette Clemetson, *Meese's Influence Looms in Today's Judicial Wars*, N.Y. Times, Aug. 17, 2005, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E0DEED6123EF934A2575BC0A9639C8B63&pagewanted=all.

39 *Compare* Editorial, *Why Give That Speech?*, Wash. Post, Oct. 29, 1986, at A18 (condemning Meese's speech as "an invitation to constitutional chaos and an expression of contempt for the federal judiciary and the rule of law") *with* Edwin Meese III, *The Tulane Speech: What I Meant*, Wash. Post, Nov. 13, 1986, at A21.

40 *See* Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 3 Utah L. Rev. 803, 815 n.64 (2005).

41 *See id.* at 816.

42 *See supra* note 38.

43 *See* Margalit Fox, *Bernard Siegan, 81, Legal Scholar and Reagan Nominee, Dies*, N.Y. Times, Apr. 1, 2006, *available at* http://www.nytimes.com/2006/04/01/us/01siegan.html.

44 *See* Robert H. Bork, The Tempting of America: The Political Seduction of the Law 282-93 (1990).

45 *See* Tobin Harshaw, *Kennedy, Bork, and the Politics of Judicial Destruction*, posted Aug. 28, 2009, *available at* http://opinionator.blogs.nytimes.com/2009/08/28/weekend-opinionator-kennedy-bork-and-the-politics-of-judicial-destruction/.

46 *See* Joe Nocera, *The Ugliness Started with Bork*, N.Y. Times, Oct. 21, 2011, *available at* http://www.nytimes.com/2011/10/22/opinion/nocera-the-ugliness-all-started-with-bork.html.

47 Dep't of Justice Office of Legal Policy, By and with the Advice and Consent of the Senate: The Bork and Kennedy Confirmation Hearings and the Implications of Judicial Independence, Executive Summary (1989).

48 *See* Morris P. Fiorina et al., Culture War? The Myth of a Polarized America 33-50 (2005).

49 *See* L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 Harv. L. Rev. 647, 664-66 (2003) (reviewing Mark Tushnet, The New Constitutional Order (2003)).

Administrative Law & Regulation

(Mis)Applications of Behavioral Economics to Regulation: The Importance of Public Choice Architecture

*By Adam C. Smith**

I. Introduction

Friedrich Hayek once said, "Unfortunately, the popular effect of this scientific advance has been a belief, seemingly shared by many scientists, that the range of our ignorance is steadily diminishing and that we can therefore aim at more comprehensive and deliberate control of all human activities. It is for this reason that those intoxicated by the advance of knowledge so often become the enemies of freedom."[1] This statement encapsulates a broad wariness of government intervention, even—and perhaps especially—intervention based upon scientific findings, into private enterprise. The problem, as Hayek points out, is that such control mechanisms, however scientifically informed, inevitably lead to unwanted consequences, often stifling the very creativity needed to foster the beneficial spontaneous order of the marketplace.

A recent strand of this government intervention has gone under the label of "libertarian paternalism," a concept popularized primarily by economist Richard Thaler and legal scholar Cass Sunstein. Sunstein and Thaler draw upon one of the most recent advances in economic research involving the integration of psychology into economics. This area, widely known as behavioral economics, has forced economists to rethink the limitations of rational choice and how deviating from the more naïve rational choice paradigm might better inform our understanding of human behavior.

No sooner has this research emerged than its practitioners are calling for its use in policy. As Thaler and Sunstein argue, the results of behavioral economics demonstrate that the "anti-paternalism" advocated by most economists belies the lessons offered by the behavioral economics research program.[2] These lessons at the very least call for an "anti-anti-paternalism" that recognizes the benefits of "soft" interventions into market activity. The purpose of such interventions is to correct for the various biases discovered in laboratory research.

The discoveries of behavioral economics are indeed fascinating and may very well produce the most important research results in a generation. Nevertheless, I argue contra Thaler and Sunstein that these results do not support policy intervention into market activities prima facie, soft or otherwise. They in fact reduce the level of competency we can expect from public officials if the biases of behavioral economics are applicable to the policymaker himself. I argue that this misapplication of behavioral economics is a manifestation of a larger problem, that of failing to produce a theory of political economy that incorporates the very arguments being used to prescribe policy. Until these concerns are addressed, anti-paternalism remains a viable position.

II. Anti-Anti-Paternalism

Before tackling the lacuna in the behavioral law and economics literature outlined above, I will first explore the link between research and policy in this emerging field. Cass Sunstein, one of the leading voices of behavioral law and economics and current Administrator of the Office of Information and Regulatory Affairs, outlines three goals of policy-relevant research[3]: positive, normative, and prescriptive. Positive research seeks to better inform our predictions regarding human behavior. It is simply meant to assess how the world appears to be working. Normative research advocates a certain value-laden goal for human endeavors that ostensibly is in the interest of the people affected by these choices. Prescriptive work follows from this advocacy by demonstrating how changes in certain institutional features might better orient our actions toward these normative goals.

Using these three approaches, Sunstein shows how positive research in the field of behavioral law and economics can prescribe better normative policy that will allow people to achieve the goals that they actually want. He bases this claim on a robust set of findings showing how people are biased in their decision-making in a variety of contexts.[4] He argues that if the people making these choices are lacking in their understanding of the broader ramifications of their choice, then behavioral correction through better "choice architecture" could facilitate better decision-making for both the people choosing and those affected by their choice.

It follows then that a dogmatic adherence to anti-paternalism is unwarranted, or at the very least a stance of "anti-anti-paternalism" becomes more credible. If people can be made better off, based upon their own unique set of preferences, then paternalism may be justified. Hence, these findings have challenged the notion of anti-paternalism as a normative argument against government intervention into private modes of choice.

In the same article, Sunstein touches upon the problem of public officials exercising authority under the same biases as their private brethren. He states:

> None of these points makes a firm case for legal paternalism, particularly since bureaucrats may be subject

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> to the same cognitive and motivational distortions as everyone else. But they do suggest that objections to paternalism should be empirical and pragmatic, having to do with the possibility of education and likely failures of government response, rather than a priori in nature.[5]

Hence, the findings themselves do not provide sufficient foundation in advocating legal paternalism. Sunstein does, however, challenge those who would advocate anti-paternalism on *a priori* grounds, stating that the merits of paternalism should be considered an empirical and pragmatic matter.

Later, Sunstein, along with his behavioral law and economics coauthor Richard Thaler, outlined a specific case where what they now term "libertarian paternalism" would be effective in better organizing private decision-making.[6] In their example, a school administrator is considering where to place certain foods in a school cafeteria. They begin the example by pointing out that the administrator has to choose something, as the food will not just sort itself. In addition, the administrator has a preference to have kids eat healthy foods instead of junk foods. Accordingly, as a "nudge," the administrator could place healthier choices in the front of the line, which would make kids more likely to choose them, thereby providing a better outcome through behavioral correction, albeit of the softer variety. Alternatives to this scheme could be random ordering, ordering to maximize some other preference such as maximizing profits, or even doing the opposite by putting desserts first. Yet each of these seem less desirable as random ordering does not seem to benefit anybody and may prevent the coordination of kids during lunch time. Profit maximization may benefit food services but would involve having kids eat more junk food than the administrator prefers. Finally, doing the opposite of the administrator's preference would be just that.

This example fits nicely within Thaler and Sunstein's preferred intervention method of libertarian paternalism: libertarian because it does not impose a choice on the chooser and paternalism because the overall choice architecture is being manipulated through outside authority. This improvement of choice architecture is explored within numerous other settings in Thaler and Sunstein's popular book, *Nudge*.[7] *Nudge* utilizes libertarian paternalism principles to outline cases where nudges could improve choices, thus benefiting the lives of choosers with minimal intervention.

Along with a number of examples, the authors offer a set of responses to common objections to libertarian paternalism.[8] I will briefly summarize these given their importance to my own argument. First is the slippery slope argument, which claims that allowing for intrusive behavior of a softer variety will inevitably give way to intrusive behavior of a harder variety (in other words, when a nudge becomes a shove). They respond that nudges should be judged first on their own merits before invoking the slippery slope argument. They also show how several of their chosen nudges provide a steep slope for those who would attempt to transform soft paternalism into hard paternalism. Finally, they argue that—just like with the cafeteria example— a default position is requisite in many choice contexts. Hence, avoiding libertarian paternalism on the basis of slippery slope concerns may very well give way to an initial default of hard paternalism instead.

The next objection is the idea that public officials will become corrupt and in turn use nudges for private advantage. Their responses are two. First, public officials and private entrepreneurs both may be tempted to gain from private advantage. So any attribution of villainous motives should be applied equally across the two spheres (see Buchanan's dictum below). Second, they argue that their nudges instill greater transparency into choice architecture and hope that such transparency will permeate further into political discourse through publicly reported votes, earmarked legislation items, and contributions from lobbyists.[9]

They briefly respond to the idea that people should be allowed to fail, particularly if they are cognizant of their actions. While they have no objection to this latter behavior, they question whether all choosers are indeed cognizant of making bad choices. If some choices could be improved with outside assistance, then this assistance should be made available to them.

They then discuss the question of whether redistribution through government is ethical and how nudges could conceivably add to these undesirable transfers. While arguing that redistribution itself is not wrong or even undesirable, they confine their advocacy to only those programs where a default has to be defined anyway. Here again they reiterate their claim that certain policies require and are improved through establishment of an effective default position. Those policies that do not require such a position should not utilize nudges.

They next tackle the issue of subliminal advertising and its ethical use as a nudge. While they envision difficult cases where such nudges could be conceivably justified, such as to combat violent crime, excessive drinking, or tax evasion, they ultimately side against this practice, even if subliminal advertising is publicly disclosed in advance, stating that "manipulation of this kind is objectionable precisely because it is invisible and thus impossible to monitor."[10] Hence, they do not advocate nudges of the "invisible" variety.

Finally, they discuss the question of neutrality and whether public officials are in a position to know what is best for those doing the choosing. Here they appeal to expertise. They argue that in the case of decisions in which much is being required from the chooser, such as in choosing a mortgage plan, experts exist who would be better able to choose on behalf of the chooser than the chooser herself. They acknowledge that these experts may be self-interested but conclude that situations where conflicts of interest arise could be spotted *ex ante* and avoided.

III. The Principle of the Extended Present

Thaler and Sunstein offer convincing evidence that choice is indeed often uninformed and particularly vulnerable to the context in which it is made. Nonetheless, I will argue using longstanding public choice scholarship that their advocacy of nudges is premature, given their lack of reference to actual public choice architecture in which policy would be implemented. Most importantly, I will demonstrate that public choice scholarship should be utilized alongside the discoveries

of behavioral law and economics if beneficial policy outcomes are to emerge. As Kenneth E. Boulding explains, previous research has something to offer to current research paradigms through what he termed "the principle of the extended present."[11] As new topics are explored and new knowledge gained, it is paramount that we not relegate old knowledge to the dustbin, particularly when this old knowledge is directly applicable and complementary to new research paradigms. Accordingly, it is often necessary to revisit the wisdom of previous scholars to gain perspective over current debates.

In his Nobel address, James M. Buchanan wrote, "The relevant difference between markets and politics does not lie in the kinds of values/interest that persons pursue, but in the conditions under which they pursue their various interests."[12] In other words, the persons who populate the public sphere are much like their private brethren in that they are susceptible to the same values, biases, and incentives in how they choose. It is instead the context in which they act that largely determines the divergence in outcomes. Indeed the Public Choice program, which Buchanan helped shepherd, has sought to put decision-making within the public sphere on the same footing as decision-making within the private sphere. Once the same assumptions regarding preferences are maintained across both spheres, the challenge then becomes determining what institutional and environmental features determine choice in the operative setting.

As I noted above, both Thaler and Sunstein have echoed Buchanan's dictum in their analysis. It is true that we should not judge humans working in the public sphere any harsher than in the private sphere. To assume that public officials are inherently corrupt and will botch any attempt at producing a useful nudge would be just as cavalier as stating that market participants are inherently greedy and will botch any attempt at beneficial exchange. As Thaler and Sunstein so aptly articulate, it is the choice architecture before the person that is most responsible for poor choices, not some inherent deficiency in people. They point out that though people are cognitively limited, they are generally honest and careful in making their choices. But the context within which decisions are made can be difficult to navigate and may lead to undesirable outcomes not only for the person making the decision but society at large.

Thaler and Sunstein are clearly right in that choice does not occur in a vacuum. This insight must be applied, however, consistently across public and private spheres. In other words, there should be a public choice architecture to accompany the private choice architecture they present, at least if these theories are to be applied at the policy level. To operate effectively, Buchanan's dictum not only applies to how we model the decision-maker but how we model the choice architecture in which he decides. This does not mean that we should assume that the same choice architecture exists across both contexts. Nothing could be less likely. Instead, it means that to competently advocate policy, we must examine both contexts for what they are. As Buchanan has written elsewhere, we must examine "politics without romance."[13]

Fortunately, such analysis of public choice architecture need not be built from scratch. A robust literature already exists in the field of Public Choice, particularly within the influential Bloomington School.[14] The Bloomington School has provided detailed analysis of public choice architecture using a combination of theory and empirics. Going under the label of institutional analysis, this movement has made significant progress in exposing just how choice operates within public contexts.

Elinor Ostrom, Nobel Prize winner and intellectual leader of the Bloomington School, devised an agenda for the study of institutions in practice. Her short list of institutions[15] represents the basic context we must identify in understanding the production of policy. These components are:

(1) *Position rules* that specify a set of positions and how many participants hold each position.

(2) *Boundary rules* that specify how participants are chosen to hold these positions and how participants leave these positions.

(3) *Scope rules* that specify the set of outcomes that may be affected and the external inducements and/or costs assigned to each of these outcomes.

(4) *Authority rules* that specify the set of actions assigned to a position at a particular node.

(5) *Aggregation rules* that specify the decision function to be used at a particular node to map actions into intermediate or final outcomes.

(6) *Information rules* that authorize channels of communication among participants in positions and specify the language and form in which communication will take place.

(7) *Payoff rules* that prescribe how benefits and costs are to be distributed to participants in positions.

While certainly not exhaustive, this list provides a useful template of what is needed to understand how choice operates in public contexts. Again, as Thaler and Sunstein point out, understanding the choice architecture (i.e. institutions) by which decisions are rendered is crucial in determining the likelihood of beneficial outcomes.

Yet behavioral theorists are quick to assume away these difficulties. Thomas A. Lambert buttresses this claim in response to another behavioral theorist. He states,

> Professor Slovic[16] advocates a governmental fix *without first asking* whether the government is institutionally capable of correcting individuals' affect-induced tendency to overestimate a risk of terrorism. This is a crucial oversight since the answer to the question is probably no. As an initial matter, there is no reason to believe that bureaucrats are any less susceptible to cognitive quirks than the citizens they seek to protect. More fundamentally, a democratically accountable agency faces *institutional* constraints that would render it incapable of correcting affect-induced overestimation of terrorism risks.[17]

Thaler and Sunstein's responses to potential objections reflect a similar aloofness regarding the actual institutions by which public decisions are rendered. For example, as I presented above, they argue that the body politic will be sufficiently informed to ward off any potential conflicting interest between policymakers (or nudgemakers) and those who would be affected by these nudges. This assessment that the sufficient level of information exists to counter any attempts at confiscating gains for private use through public nudges is unsubstantiated by the authors. With no accompanying analysis of the relevant institutional safeguards against such behavior, it is unclear where Thaler and Sunstein find their support for such an assertion. In addition, Thaler and Sunstein are naively optimistic in their hope that greater transparency will mute corrupt decision-making or that undesirable redistribution will be restrained by the limits of Thaler and Sunstein's own guidelines for proper nudgemaking. It is extraordinarily difficult to fortify policy so that special interests cannot creep in. To suggest otherwise is hubris.

Turning to the commonly-used argument of the necessity of a default position, the authors are right, of course, that in many cases a default must be chosen. After all, Ronald H. Coase made this point in reference to the establishment of property rights when transaction costs prohibit private adjudication.[18] In cases like this, the proper default should be a good one, perhaps informed by insights from behavioral economics. It should equally be informed, though, by the insights of Public Choice. What does it matter if the proper behavioral considerations are taken into account at the formative level if the actual administrator simply chooses to ignore them or worse uses them to gain an undesirable end?[19]

IV. The Importance of Public Choice Architecture

Incorporating public choice architecture into prescriptive discussion is important, for these institutions will inevitably determine the effectiveness of behavioral economic policy (or any other policy for that matter). Edward L. Glaeser has taken preliminary steps in doing so by modeling the choice architecture across two corresponding contexts, one public and one private.[20] He starts from a position of behavioral symmetry across the two contexts and then introduces certain institutional parameters to estimate the capacity for bias in decision-making. He outlines three cases where the capacity for error is endogenous to the private or public context. He finds in each case that the public context is likely to generate more errors, not fewer, than the private context. As he maintains, "the flaws in human cognition should make us more, not less, wary about trusting government decisionmaking. The debate over paternalism must weight private and public errors."

Indeed, once we incorporate institutional mechanisms by which choice is effected, it no longer becomes clear that behavioral economic policy directly follows from its relevant research findings, even when we start from the same cognitive assumptions. Knowledge of the basic institutions of political decision-making is needed to understand the interaction between policy recommendation and political action. At a minimum, those who advocate policy based upon laboratory research should be able to show how their policy recommendations will operate effectively through the various rules Ostrom presents.

This lack of discussion of choice architecture in the public sphere constitutes the central dilemma of behavioral economic policy. Drury D. Stevenson provides a thought experiment that encapsulates this lesson nicely.[21] He posits the idea that a vaccination for cocaine addiction—which is in fact already in existence—might be utilized along the libertarian paternalism contours that Sunstein and Thaler promote. The example is useful in that addiction to hard drugs is something most people find abhorrent and a ready candidate for positive nudging. As I presented above, Sunstein and Thaler even use drug addiction as a possible candidate that might justify subliminal nudging. The thought experiment draws out a larger argument of this paper, so I will briefly discuss Stevenson's thesis.

Stevenson outlines several environments where a nudge in the form of a default of requiring vaccinations against cocaine addiction might be considered beneficial to society at large. Prisoners incarcerated on drug charges, welfare recipients, public schoolchildren, and even air traffic controllers are all examples Stevenson uses to illustrate his premise. The central idea is this: We can think of various reasons that all of the above categories of persons would benefit from a default of vaccination. The problem, though, is that these considerations would take place alongside stronger inclinations on the part of policymakers that would substitute for and in some cases dominate any considerations led by libertarian paternalism.

Take welfare recipients as an example. Having welfare recipients accept vaccination against cocaine abuse as a condition for receiving aid could be considered beneficial on libertarian paternalistic grounds. Welfare recipients are most likely better off without pouring scarce resources into an addiction. Instead, these funds should be used for their intended purpose of bringing welfare recipients out of poverty. Furthermore, welfare acceptance is voluntary so recipients are free to opt out of the program altogether if they find cocaine vaccination too invasive of their private activity. The problem, though, is that this consideration based upon the logic of libertarian paternalism would inevitably reside alongside other considerations that do not follow from libertarian paternalism and it becomes difficult to divorce this pure motive of nudging from other motives.

As Stevenson points out, scholars such as Christina Fong argue that reciprocity, not rational choice optimization, is the primary motivator behind redistribution through the welfare system.[22] That is, voters are generally sympathetic to the plight of the poor and are willing to provide more resources than a rational choice model would predict, but only when they feel that the poor are not wasting redistributed funds on illicit substances such as cocaine or crack. Once these ulterior motives are discovered, voters tend to be largely unsympathetic to these wayward recipients and are willing to incur a cost to punish them, even when this punishment is negative-sum. Accordingly, voters are far more likely to punish wayward recipients based upon disapprobation rather than a consideration of optimal redistribution.

If this is indeed the case, then policymakers will undoubtedly respond to these other motives alongside of or

even in substitution of libertarian paternalism. To illustrate this point, compare the welfare scenario to that of public schools. Cocaine vaccination could be beneficial in these sorts of public environments, as it would prevent early addiction and stop the contagion of addiction fostered by peer pressure and network externalities. Despite these benefits, Stevenson maintains that policymakers are far more likely to be sympathetic to this latter category of persons than welfare recipients and accordingly will be far less likely to impose vaccinations based upon other motives such as reciprocity. Instead, any gains from having a default of vaccination would be balanced against considerations of imposing an unwanted practice. In other words, a nudge would be less likely to turn into a shove.

This comparison shows that what the economist wishes to implement is not always conducive to the public choice environment. Stevenson's thought experiment illustrates the dilemma policymakers face when presented with a viable means of nudging. Contra the cafeteria example, encouraging cocaine vaccination would undeniably be useful in certain environments but would be equally likely to run up against countervailing notions of reciprocity and social utilitarianism that have little to do with libertarian paternalism. The thought experiment is certainly not trivial as the state of Florida just passed a requirement that welfare recipients be screened for drug use. It is easy to imagine this enforced drug screening moving to enforced vaccination. It is difficult to see how libertarian paternalism is the dominant force behind these political outcomes.

Ignoring the policymaking dimension is unfortunately nothing new in paternalistic attitudes generated by economic research. James Tobin, an advocate of many policy initiatives fraught with political difficulties, such as incomes policy and the "Tobin tax" on foreign exchange reserves, once responded in an interview regarding the skepticism of Buchanan and the broader Public Choice school:

> If we are advising government officials, politicians, voters, it's not for us economists to play games with them. It's not for Keynes to say, I am not going to suppress the *General Theory* and not tell the House of Commons, the Labour Party, the Tories, whomever, that it would be possible to reduce unemployment by public works expenditure. If I am giving advice to them about war finance—or whatever else my advice will be not to do bad things—I am not going to decide myself that they are so evil and irresponsible that I don't give them advice about what actions will do what. I don't think that Jim Buchanan has, or I have, the right to withhold advice from Presidents of the United States or Members of Congress or the electorate on the grounds that if they knew what we know, they would misuse it. I don't think that is for us to decide."[23]

Tobin's remarks get at the heart of this dilemma and expose the real danger of advocacy without institutional analysis. Tobin's assertion that it is not for the economist to decide whether policymakers are capable of implementing their suggested policy is difficult to reconcile with the purported objective of prescriptive analysis; that is, using theory to better orient behavior to acceptable normative goals. If policy is ineffective in gaining these goals, whether due to the base theory or to some aspect of the political institutions through which it will be administered, then it cannot be considered a valid recommendation. After all, what results from one's recommendations is the outcome of importance, not the substance of the recommendations themselves.

A similar conclusion can be applied to behavioral economic policy. It is not the theory that is in question. The more popular results of behavioral economics have been replicated across a wide range of environments and are robust to a variety of institutional parameters. Nevertheless, the organization of this research into a framework that incorporates the policymaker herself is sorely lacking.

V. Conclusion

So why should those who hold anti-paternalistic views cede their pessimism, even on *a priori* grounds? Behavioral economists have failed to produce a theory that speaks to how policy will bring about effective change in practice. Barring such evidence, it seems that those who advocate a stance of anti-paternalism should find more reason to advocate their stance on *a priori* grounds based upon the findings of behavioral economics as they demonstrate even greater shortcomings in human decision-making than previously recognized. Sunstein's original claim that these results endorse a sentiment of anti-anti-paternalism amounts to stating that results showing that humans are more flawed in making decisions than we previously believed prescribes greater responsibility for humans at the level of government with its accompanying expansion in discretion and authority over a vastly more complex set of human interactions. Again, far from challenging anti-paternalism, behavioral economics seems to offer new evidence toward strengthening this position. At the very least, it does not *ipso facto* call for a cessation in such attitudes.

At the heart of this non-sequitur is the lack of nuance in describing the relevant institutions and environmental features before the so-called planner; that is, the public choice architecture by which decisions are rendered. It is ironic that a research program that so carefully examines the choice architecture in the private sphere would fail to do so in the public sphere. This violates Buchanan's dictum that choice in the marketplace and choice in politics should be assessed from the same state of assumptions. If indeed choice does operate differently in practice, then a theory incorporating the decisions of policymakers must account for this. In the context of implications derived from behavioral economics, a theory must be offered to show how policymakers themselves will somehow not be susceptible to the very biases and miscalculations that they seek to curtail in the marketplace. Giving policymakers access to laboratory research or fine-tuned optimization schemes simply won't do. After all, subjects often do just as poorly, even when offered these same tools. Why should policymakers be any different?

As the ever-prescient Hayek also said, "Are we really so confident that we have achieved the end of all wisdom that,

in order to reach more quickly certain now visible goals, we can afford to dispense with the assistance which we received in the past from unplanned development and from our gradual adaptation of old arrangements to new purposes?"[24] It is, after all, through our freedom to choose that the spontaneous order of the marketplace corrects for many of the behavioral aberrations we encounter in the laboratory. Richard Thaler ironically provides one of the strongest examples of this in his private capacity as a partner in the firm Fuller & Thaler Asset Management, Inc., which arbitrages against perceived behavioral aberrations in investment markets.[25] Thaler's firm is a shining example of how to properly incorporate newly-acquired knowledge from the frontiers of scientific discovery, not through paternalistic coercion, but through voluntary, competitive recourse.

This reinforces the notion that adopting behavioral economics into policymaking must consider not only the private choice architecture in which it hopes to improve but the public choice architecture in which it must inevitably operate. This is why it is imperative that we couch these discoveries within pre-existing theories of political economy. Let us hope, in the case of behavioral economics applied to law, that the equally-important findings in the Public Choice and Bloomington Schools are at some point bound to this still-maturing field of discovery.

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The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers

By Robert S. Eitel and Kent D. Talbert***

with contributions from Williamson S. Evers

Note from the Editor:

This paper examines the U.S. Department of Education's administration of the Race to the Top Fund, Race to the Top Assessment Program, and other programs. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the Department's regulations. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- No Child Left Behind Act of 2001: http://www2.ed.gov/policy/elsec/leg/esea02/beginning.html#sec1
- Race to the Top Fund, Purpose: http://www2.ed.gov/programs/racetothetop/index.html
- Race to the Top Assessment Program, Purpose: http://www2.ed.gov/programs/racetothetop-assessment/index.html
- Elementary and Secondary Education Act (ESEA) Flexibility: http://www.ed.gov/esea/flexibility
- Press Release, U.S. Department of Education, Obama Administration Releases Final Application for Race to the Top-Early Learning Challenge (Aug. 23, 2011): http://www.ed.gov/news/press-releases/obama-administration-releases-final-application-race-top-early-learning-challeng
- Post of Anita Kumar to Virginia Politics Blog on WashingtonPost.com: McDonnell on MSNBC: Race to the Top Too Burdensome (June 1, 2010, 07:52 EDT): http://voices.washingtonpost.com/virginiapolitics/2010/06/mcdonnell_explains_decision_to.html
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Late in the afternoon on April 11, 1965, President Lyndon B. Johnson sat with his childhood school teacher, Mrs. Kate Deadrich Loney, on the lawn of the former Junction Elementary School in Johnson City, Texas. The reason for the meeting of a bespectacled retired teacher and her famous former pupil was the signing of the Elementary and Secondary School Act of 1965 ("ESEA"). With the President's signature, the federal government's role in elementary and secondary education began to increase rapidly, with Congress establishing the U.S. Department of Education ("Department") in 1979.

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Today, the ESEA authorizes funding for key portions of school district budgets across the country. Despite this leverage, the Department has generally adhered to statutory limitations disallowing federal agency involvement in K-12 curriculum, courses, or instruction, focusing instead on issues such as aid for disadvantaged students, accountability, civil rights, and evaluation. Since 2009, this has changed: Actions taken by the Obama Administration signal an important policy shift in the nation's education policy, with the Department placing the nation on the road to federal direction over elementary and secondary school curriculum and instruction.

With only minor exceptions, the General Education Provisions Act ("GEPA"), the Department of Education Organization Act ("DEOA"), and the ESEA, as amended by the No Child Left Behind Act of 2001 ("NCLB"), ban federal departments and agencies from directing, supervising, or controlling elementary and secondary school curriculum, programs of instruction, and instructional materials.[1] The ESEA also protects state prerogatives on Title I content and achievement standards.[2] At the direction of the present Administration, however, the Department has begun to slight these statutory constraints. Since 2009, through three major initiatives—the Race to the Top Fund,[3] the Race to the Top Assessment Program,[4] and conditional NCLB waiver guidance (the "Conditional NCLB Waiver Plan")[5]—the Department has created a system of discretionary grants and waivers that herds state education authorities into accepting elementary

and secondary school standards and assessments favored by the Department.[6] Left unchallenged by Congress, these standards and assessments will ultimately direct the course of elementary and secondary study in most states across the nation, running the risk that states will become little more than administrative agents for a nationalized K-12 program of instruction and raising a fundamental question about whether the Department is exceeding its statutory boundaries. This road to a national curriculum has been winding and highly nuanced—and, as we will see below, full of irony.

Five parts compose this paper. Part I analyzes the limitations that GEPA, the DEOA, and the ESEA place on the Department. Part II provides background on the rise of the Common Core State Standards Initiative (CCSSI). Part III gives an overview of the Race to the Top Fund and illustrates how the Race to the Top Fund has encouraged states to adopt Common Core standards. Part IV reviews the components of the two awardees under the Department's Race to the Top Assessment Program that are working to develop assessments and align them with the Common Core standards. These assessments are critical, as they are designed to link the Common Core standards to a common (that is, national) content for curricula and instructional materials. Part V discusses how the Department is using ESEA waiver authority to consolidate the nationalizing effects of the CCSSI and the Partnership for Assessment of Readiness for College and Careers ("PARCC") and SMARTER Balanced Assessment Consortium ("SBAC") assessments. The final part provides conclusions and recommendations for policy-makers and interested observers.

I. Limitations Imposed on the Department by Congress

Historically, legislative prohibitions on federal direction, control, or supervision of curricula, programs of instruction, and instructional materials have limited the influence of the federal government in the elementary and secondary school arena. This paper discusses each authority below.

A. General Education Provisions Act

A long-standing law governing the administration of federal education programs, GEPA includes one of the first limitations upon federal involvement in curriculum.[7] Though the law has changed over the years from its earliest version, the substance remains the same. In its current form, the prohibition is a broad-sweeping rule of construction—

> No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.[8]

An "applicable program" is "any program for which the Secretary [of Education] or the Department has administrative responsibility as provided by law" but excludes Higher Education Act programs.[9] Under the prohibition, one must construe federal education programs not to grant authority to any "department, agency, officer, or employee of the United States" to exercise any "direction, supervision, or control over the curriculum, [or] program of instruction . . . of any educational institution, school, or school system."[10] The rule of construction against direction, supervision, or control also applies to the "selection of library resources, textbooks, or other printed or published instructional materials"[11] and reaches federal departments and agencies other than the Department.[12]

B. Department of Education Organization Act

Enacted in 1979, the DEOA established the Department of Education as an executive branch department administered under the supervision and direction of the Secretary of Education.[13] Similar but not identical to the curriculum prohibition in GEPA, the DEOA prohibits the Secretary and other officers of the Department from exercising direction, supervision, or control over curriculum, as well as over the selection and content of library resources, textbooks, and other instructional materials.[14] The one exception to the general prohibition is if such activities are "authorized by law."[15] Framed as a rule of construction, the prohibition states,

> No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.[16]

In addition to the direct language limiting the Secretary's and officers' authority in curriculum, Congress included clear statements in the law that the creation of a new Department of Education does not displace the role of state and local governments in education. Primary authority for education continues with state and local governments, as evidenced by Finding 4 of the DEOA: "[I]n our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States."[17] In addition, when it created the Department, Congress reaffirmed the limitations placed upon federal involvement in education:

> It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.[18]

The legislative history of the DEOA confirms the primary role of state and local governments in education. In testimony before the Senate Governmental Affairs Committee, Mary Berry, the Assistant Secretary for Education of the Department of Health, Education, and Welfare, warned that the federal presence in education "has and must continue to be a secondary role—one that assists, not one that directs local and State governments, which have historically shouldered the primary responsibility for . . . public education."[19] In like manner, Senator David Durenberger stressed the importance of Congressional oversight so as to preserve the diversity of state and local approaches to education:

> The States have a rich mixture of programs to respond to their citizens' educational needs. A centralized approach to education would be fatal to this diversity . . . If Congress does not exercise proper oversight, State and local jurisdiction over education will be threatened by the federal government regardless of whether education is in a new department or remains a division of an existing department.[20]

Members of the U.S. House of Representatives also expressed reservations. Representative Leo J. Ryan described the enabling legislation as "the worst bill I have seen . . . . It is a massive shift in the emphasis by the Federal Government from supporting the local efforts of school districts and State departments of education to establishing and implementing a national policy in the education of our children."[21] One can find a strong statement of concern in the Dissenting Views of Representatives John N. Erlenborn, John W. Wydler, Clarence J. Brown, Paul N. McCloskey, Jr., Dan Quayle, Robert S. Walker, Arlan Stangeland, and John E. (Jack) Cunningham: "[T]his reorganization . . . will result in the domination of education by the Federal Government . . . . [The legislation is] a major redirection of education policymaking in the guise of an administrative reorganization—a signal of the intention of the Federal government to exercise an ever-expanding and deepening role in educational decision-making."[22] These members concluded by raising the possibility of the Department becoming a national school board: "If we create this Department, more educational [decision-making] as to course content, textbook content, and curriculum will be made in Washington at the expense of local diversity. The tentacles will be stronger and reach further. The Department of Education will end up being the Nation's super [school board]."[23] With these criticisms in the record, the Department opened its doors on May 4, 1980.

C. Elementary and Secondary Education Act of 1965

Congress had set limits on federal involvement in elementary and secondary education well before the establishment of the Department. With language comparable to GEPA and DEOA, the ESEA includes a rule of construction limiting the ability of federal officers and employees to mandate, direct, or control curriculum:

> Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State and local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.[24]

Accordingly, the ESEA denies authority to officers or employees of the federal government to mandate, direct or control curriculum or programs of instruction.[25] Additionally, the ESEA goes further than GEPA and DEOA to limit directly the use of federal funds for a curriculum. Under 20 U.S.C. § 7907 (b), "no funds provided to the Department under this Act may be used . . . to endorse, approve or sanction any curriculum designed to be used in an elementary school or secondary school."[26]

The intent of Congress is clear: The federal government cannot mandate, direct, supervise, or control curriculum or programs of instruction.[27] Indeed, the legislative history of the DEOA underscores this, as does its statement of intent "to protect the rights of State and local governments . . . in the areas of educational policy[]" and to "not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and local school systems."[28] Yet, as explained below, the Department is evading these prohibitions and using proxies to cement national standards and assessments that will inevitably direct the content of K-12 curriculum, programs of instruction, and instructional materials across the nation.

II. Rise of the Common Core Standards

To appreciate the authors' concerns about the Department's incremental march down the road to a national curriculum, one must first understand the Common Core State Standards Initiative ("CCSSI"), a creature not of state legislatures but rather of two Washington, D.C.-based organizations, the National Governors Association's Center for Best Practices ("NGA Center") and the Council of Chief State School Officers ("CCSSO"), which coordinated the CCSSI to establish voluntary, national elementary and secondary school education standards in mathematics and English language arts.[29] Other organizations provided advice and guidance concerning the direction and shape of the CCSSI; they include Achieve, Inc., ACT, Inc., the College Board, the National Association of State Boards of Education, and the State Higher Education Executive Officers.[30] In addition, the Bill & Melinda Gates Foundation and the Charles Stewart Mott Foundation provided financial backing, as did others.[31]

The standards define the knowledge and skills students should have in their K-12 education in order to graduate from high school and to succeed in entry-level, credit-bearing college courses and in workforce training programs.[32] Advocates of the Common Core standards argue that they are: (1) aligned with college and work expectations; (2) clear, understandable and consistent; (3) built upon strengths and lessons of current state standards; (4) informed by other top performing countries;[33] and (5) evidence-based.[34] In addition, CCSSI supporters contend that the standards include rigorous content and application of knowledge through high-order skills.[35]

In developing the standards, the NGA Center and CCSSO consulted with representatives from participating states, a wide

range of educators, content experts, researchers, national organizations, and community groups.[36] For purposes of development and receipt of public comments, the writers of the standards divided the standards into two categories: (1) college- and career-ready standards (which address what students are expected to have learned when they have graduated from high school); and (2) K-12 standards (which address expectations for elementary school through high school).[37] Common Core supporters released draft college- and career-ready graduation standards for public comment in September of 2009 and draft K-12 standards in March of 2010.[38] Announced on June 2, 2010, the final K-12 Common Core State Standards ("CCSS") incorporated the college- and career-ready standards.[39] This marked the final step in the development of the Common Core standards. After development, states began to adopt the standards. Currently, forty-five states, the District of Columbia, and two territories have adopted the CCSS in English language arts and mathematics.[40]

The Common Core standards have generated intense debate and controversy. Proponents of the CCSS argue the standards will provide multiple benefits to students:

> The standards will provide more clarity about and consistency in what is expected of student learning across the country . . . . This initiative will allow states to share information effectively and help provide all students with an equal opportunity for an education that will prepare them to go to college or enter the workforce, regardless of where they live. . . . [Common standards] will ensure more consistent exposure to materials and learning experiences through curriculum, instruction, and teacher preparation among other supports for student learning.[41]

Other supporters argue that the Common Core standards "will ensure that we maintain America's competitive edge, so that all of our students are well prepared with the skills and knowledge necessary to compete with not only their peers here at home, but with students from around the world."[42]

Critics vigorously dispute the rigor of the Common Core standards and contend that they will not produce better results among students.[43] Recent testimony by Professor Jay P. Greene in the U.S. House of Representatives before the Subcommittee on Early Childhood, Elementary, and Secondary Education illustrates this criticism:

> [T]here is no evidence that the Common Core standards are rigorous or will help produce better results. The only evidence in support of Common Core consists of projects funded directly or indirectly by the Gates Foundation in which panels of selected experts are asked to offer their opinion on the quality of Common Core standards. Not surprisingly, panels organized by the backers of Common Core believe that Common Core is good. This is not research; this is just advocates of Common Core re-stating their support. The few independent evaluations of Common Core that exist suggest that its standards are mediocre and represent little change from what most states already have.[44]

Similarly, two other experts, Professor Sandra Stotsky and Ze'ev Wurman, found that by grade 8 the mathematics standards were "a year or two behind the National Mathematics Advisory Panel's recommendations, leading states, and . . . international competition."[45] They also concluded that the Common Core's mathematics and English language arts standards do not support the conclusion that the standards "provide a stronger and more challenging framework for the mathematics and English language arts curriculum than . . . California's current standards and Massachusetts' current (2001) and revised draft (2010) standards do."[46] Of significant note, Dr. Stotsky and Mr. Wurman view the Common Core project as a "laudable effort to shape a national curriculum."[47] Still, other critics worry about the expense of implementing the Common Core standards.[48]

III. The Common Core Standards and the Race to the Top Fund

In early 2009, President Obama signed into law the American Recovery and Reinvestment Act (ARRA),[49] which provided funds for the Department's Race to the Top program, consisting largely of the Race to the Top Fund and the Race to the Top Assessment Program.[50] The Race to the Top Fund is a competitive grant program designed with the hope to spur innovation in elementary and secondary education. With $4 billion to disburse, the program attracted applications from forty-six states.[51] Supporters of the Race to the Top Fund contend that it requires states to create conditions for reform by improving student achievement, narrowing achievement gaps, increasing graduation rates, and ensuring students are prepared for success in college and careers. The Race to the Top Fund attempts reform in four areas: (1) adopting internationally benchmarked standards and assessments that prepare students for success in college and the workplace; (2) building data systems that measure student success and inform teachers and principals about how they can improve their practices; (3) increasing teacher and principal effectiveness and achieving equity in their distribution; and (4) turning around the lowest-achieving schools.[52]

The Race to the Top Fund also includes several "priorities."[53] Priority 1 is an "absolute priority" for a Comprehensive Approach to Education Reform.[54] Priority 2 is a "competitive preference priority" for Emphasis on Science, Technology, Engineering, and Mathematics (STEM).[55] Priorities 3-6 are "invitational priorities," respectively, relating to innovations in early learning, the expansion and use of longitudinal data systems, coordination of elementary and secondary education with postsecondary learning, and school-level reform efforts.[56] With respect to implementation of the ARRA, the Department first published its Notice of Proposed Priorities, Requirements, Definitions, and Selection Criteria for the Race to the Top Fund on July 29, 2009.[57] Thereafter, it received comments from over 1,000 individuals and organizations, including teachers, principals, governors, chief state school officers, and others.[58] The Department invited applications for Phase 1 of the competition on November 18, 2009,[59] and for Phase 2 on April 14, 2010.[60] Announced on March 29, 2010, Delaware and Tennessee won the Phase 1 competition.[61] Phase 2 winners, announced on August 24, 2010, were the District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, New York, North Carolina, Ohio, and Rhode Island.[62]

In order to participate in the Race to the Top Fund, the Department required each state to adopt common K-12 standards.[63] The State Reform Conditions Criteria of the Race to the Top Fund required each state to demonstrate work toward jointly developing and adopting a common set of evidence-based, internationally benchmarked K-12 standards.[64] Indeed, the guidance to the peer reviewers of the Race to the Top applications points to an effort to compel a single set of standards: A state earns "high" points if it is part of a standards consortium consisting of a *majority* of states that jointly develop and adopt common standards.[65] Conversely, a state receives "medium" or "low" points "if the consortium includes one-half of the States in the country or less."[66] Importantly, the "internationally benchmarked standards" refer to a "common set of K-12 standards" that the Department defines as "a set of content standards that define what students must know and be able to do and that are substantially identical across all states in a [standards] consortium. A State may supplement the common standards with additional standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area."[67] As their applications show, the twelve winners of the Race to the Top Fund competition adopted or indicated their intent to adopt the CCSS for purposes of meeting the requirement of "adopting internationally benchmarked standards."[68] Although the Department did not expressly mandate states to adopt the CCSS in order to participate in the Race to the Top Fund competition, it did not have to do so, as nearly every state had adopted, or was about to adopt, the CCSS—many induced to do so by the prospect of Race to the Top grants. While remaining facially neutral, the Department could rest easy in the knowledge that most states would come to the competition having already signaled intent to adopt or having adopted the CCSS.[69]

Standards drive curriculum, programs of instruction, and the selection of instructional materials. A change to common K-12 standards will inevitably result in changes in curriculum, programs of instruction, and instructional materials to align with the standards. This is critical to understanding the importance of the road that the Department has taken. As Dr. Greene has stated, "To make standards meaningful they have to be integrated with changes in curriculum, assessment and pedagogy."[70] Secretary Duncan has echoed this view, noting the linkage between standards, curriculum, and assessments: "[C]urriculum can only be as good as the academic standards to which the assessments and curriculum are pegged."[71]

School districts, too, believe that new common standards require a change in curriculum. In September 2011, the Center on Education Policy published survey results finding that 64% of the school districts in states adopting the CCSS agreed or strongly agreed that those standards would require new or substantially revised curriculum materials in math; 56% similarly agreed for English language arts.[72] These survey results further show that 55% of districts in CCSS-adopting states have already begun to develop or purchase (or will shortly do so) new math curriculum materials aligned with the CCSS.[73] For English language arts, 53% have done so or will do so.[74]

The Department understands that the adoption of the Common Core standards requires changes in curriculum. Perhaps more importantly, it also knows that these standards will displace existing state standards—"replace the existing patchwork of State standards"[75]—and effectively nationalize not only state standards but also curricular content. The Department published this exchange between the Department and members of the public responding to the Department's Notice of Final Priorities for the Race to the Top Fund:

> *Comment*: Several commenters recommended that we clarify the meaning of a "significant number of States" within a consortium [that develops and adopts a common set of K-12 standards]. One recommended that the number of States be set at a minimum of three if the quality of their common standards is comparable to the common standards developed by members of the National Governor's Association and the Council of Chief State School Officers. Others suggested that instead of a minimum number, the criterion should focus on the importance or potential impact of the proposed work.
>
> *Discussion*: The *goal of common K-12 standards is to replace the existing patchwork of State standards* that results in unequal expectations based on geography alone. *Some of the major benefits of common standards will be* the shared understanding of teaching and learning goals; consistency of data permitting research on effective practices in staffing and instruction; and *the coordination of information that could inform the development and implementation of curriculum, instructional resources,* and professional development. The Department believes that the cost savings and efficiency resulting from collaboration in a consortium should be rewarded through the Race to the Top program when the impact on educational practices is pronounced. *And generally, we believe that the larger the number of States within a consortium, the greater the benefits and potential impact.*[76]

The Department's concerns about "a patchwork of State standards" and unequal geographic expectations do not reflect a proper understanding of America's federal system, the role of the states in setting education policy, or the statutory prohibitions limiting the Department's involvement in curriculum matters. This view—that "the larger the number of States" in setting standards, the better[77]—underscores the Department's desire to herd the states into accepting the CCSS, which was arguably the only standards-based consortium with a number of states large enough to please the Department during the Race to the Top competition.

Several education leaders have severely criticized the Department for using the Race to the Top Fund to drive states toward the Common Core standards without regard to the thoughtful initiatives that may have been taken by individual states not participating in a consortium. For example, Texas Education Commissioner Robert Scott has expressed concerns about the CCSS leading to national standards and the eventual nationalization of schools.[78] In a November 25, 2009, letter to Senator John Cornyn of Texas, Commissioner Scott wrote,

> I believe that the true intention of this effort [Common Core Standards Initiative] is to establish one set of national

education standards and national tests across the country. Originally sold to states as voluntary, states have now been told that participation in national standards and national testing would be required as a condition of receiving federal discretionary grant funding under the American Recovery and Reinvestment Act (ARRA) administered by the [Department]. The effort has now become a cornerstone of the Administration's education policy through the [Department's] prioritization of adoption of national standards and aligned national tests in receiving funds.[79]

Commissioner Scott continued in that vein:

With the release of the RTTT [Race to the Top Fund] application, it is clear that the first step toward nationalization of our schools has been put into place. I do not believe that the requirements will end with the RTTT; I believe that USDE will utilize the reauthorization of the Elementary and Secondary Education Act (ESEA) to further the administration's takeover of public schools . . . .[80]

Within four months of Commissioner Scott's letter to Senator Cornyn, the Department wrote that "[i]t is the expectation of the Department that States that adopt assessment systems developed with Comprehensive Assessment Systems grants [Race to the Top Assessment Program] will use assessments in these systems *to meet the assessment requirements in Title I of the ESEA*."[81] Like the requirement that a state participate in a Common Core standards consortium composed of a large number of states, the Race to the Top Assessment Program has also served to "grease" the nationalizing influence of these initiatives.

IV. Race to the Top Assessment Program

Also authorized by the ARRA, the Race to the Top Assessment Program provides $362 million in funding "to consortia of states to develop assessments . . . and measure student achievement against standards designed to ensure that all students gain the knowledge and skills needed to succeed in college and the workplace."[82] The new assessments seek to measure student knowledge and skills against a common set of college-and career-ready standards[83] in mathematics and English language arts.[84] The assessments also must measure student achievement and student growth over a full academic year, as well as include "summative assessment components" in mathematics and English language arts administered at least annually in grades 3 through 8 and at least once in high school.[85] The assessments must evaluate all students, including English learners and students with disabilities, and produce data (including student achievement and student growth data) for use in evaluating: (1) school effectiveness; (2) individual principal and teacher effectiveness; (3) principal and teacher professional development and support needs; and (4) teaching, learning, and program improvement.[86] As with the Race to the Top Fund, the Race to the Top Assessment Program effectively promotes the Common Core standards. More importantly, this program funds the consortia that are developing assessments that will, in turn, inform and animate K-12 curriculum and instructional materials based on Common Core standards.

The Race to the Top Assessment Program is not the federal government's first effort to establish nationwide testing. In his State of the Union Address on February 4, 1997, President Clinton proposed to "lead an effort over the next two years to develop national tests of student achievement in reading and math."[87] This evoked a strong congressional response. Congress prohibited the use of Fiscal Year 1998 funds to "field test, pilot test, implement, administer or distribute in any way, any national tests,"[88] required a detailed review of the Department's test development contract, directed a study and report by the National Academy of Sciences, and, most significantly, prohibited the federal government from "requir[ing] any State or local educational agency or school to administer or implement any pilot or field test in any subject or grade" or "requir[ing] any student to take any national test in any subject or grade."[89] Congress also included similar prohibitions on testing in the ESEA and GEPA, with limited exceptions.[90] As carried out by the consortia, the Race to the Top Assessment Program should raise similar concerns for Congress.

As a part of the Race to the Top Assessment Program competition, each state within the applying consortium must provide assurances that it will adopt common college- and career- ready standards and remain in the consortium.[91] Thus, rather than permitting state and local authorities to use standards and assessments that uniquely fit a given state as required by the ESEA, the Race to the Top Assessment Program requires each state in the consortium to use common standards across the respective states of the consortium. The result is that the Race to the Top Assessment Program moves states away from standards and assessments unique to a given state and into a new system of common standards and assessments across the consortia states. With this major shift (and so as to continue to curry favor with the Department), participating (that is, most) states will now be compelled to change curriculum and instruction to align with the common standards and assessments.

On September 2, 2010, Secretary Duncan announced the winners of the Race to the Top Assessment Program.[92] Two large state consortia won initial awards totaling $330 million—the Partnership for Assessment of Readiness for College and Careers Consortium ("PARCC") and the SMARTER Balanced Assessment Consortium ("SBAC").[93] With these federal funds, the consortia have begun to design and implement comprehensive assessment systems in mathematics and English language arts for use in the 2014-2015 school year.[94] Both PARCC and SBAC also received supplemental awards in the amounts of $15.9 million each "to help participating States successfully transition to common standards and assessments."[95]

Through the Race to the Top Assessment Program, the Department displaces state assessment autonomy with new common assessments for all states in the consortia, directed and influenced by $362 million in federal funds and program requirements.[96] As the Secretary stated, "[t]he Common Core standards developed by the states, coupled with the new generation of assessments, will help put an end to the insidious practice of establishing 50 different goalposts for educational

success."[97] Further, other remarks from the Secretary underscore the far-reaching impact that the assessment consortia will have on curricula and instructional materials:

> And both consortia will help their member states provide the tools and professional development needed to assist teachers' transitions to the new assessments. PARCC, for example, will be *developing curriculum frameworks* and ways to share great lesson plans. The SMARTER Balanced Assessment coalition will *develop instructional modules* . . . to support teachers in understanding and using assessment results.[98]

Describing the work of PARCC and SBAC to include "developing curriculum frameworks" and "instructional modules,"[99] the senior leadership of the Department clearly understands that the assessment consortia will drive curriculum and instruction.

Significantly, in the Department's formal award notice to PARCC, it also announced a supplemental award of $15.9 million "to help participating States successfully transition to common standards and assessments."[100] PARCC's top priority for this award is "to help its member states make a successful transition from current state standards and assessments to the implementation of Common Core State Standards (CCSS) and PARCC assessments by the 2014-2015 school year."[101] In supporting the priority, PARCC's strategy includes "[c]ollaborative efforts to develop the highest priority curricular and instructional tools . . . ."[102] Among other things, PARCC intends to use the funds awarded by the Department for instructional tools, model instructional units, model 12th grade bridge courses, and a digital library of tools[103]:

- "The supplemental funds provide an important opportunity to . . . strengthen PARCC's plans by developing a robust set of high quality instructional tools that will support good teaching, help teachers develop a deeper understanding of the CCSS and their instructional implications, and provide early signals about the types of student performance and instruction demanded by the PARCC assessments."[104]
- "[The supplemental funds will be used to] [d]evelop a framework that will define the priority tool set most important for improving teaching and learning and for supporting implementation of the CCSS and PARCC assessments. This priority tool set may include a mix of instructional, formative assessment, professional development and communication tools, for use by teachers, students and administrators."[105]
- "[The PARCC will] [f]ocus the development of tools on a set of robust, high-quality model instructional units that highlight the most significant advances in the CCSS and PARCC assessments."[106]
- "PARCC plans to use some of the supplemental resources to develop college readiness tools aligned to the CCSS and PARCC assessments, such as model 12th grade bridge courses for students who don't score college ready on the high school assessments, or online tools to help diagnose students' gaps in college-ready skills."[107]
- "PARCC's initial proposal calls for the development of a digital library of tools . . . . The broader set of tools in the library will provide choices and supplemental materials (beyond the instructional units) for teachers to use. The development of the library also will identify materials that can be used to inform the development of the instructional units or even become the instructional units, perhaps with minor modification."[108]

In its November 22, 2011, webinar entitled *Model Content Frameworks for ELA/Literacy*, PARCC goes a step further, suggesting possible uses of model content frameworks to "[h]elp inform curriculum, instruction, and assessment" as member states transition to the CCSS.[109] Through its use of federal funding, PARCC also provides direct "Guidance for Curriculum Developers" to "us[e] the module chart with the standards to sketch out potential model instructional unit plans," and to "recogniz[e] the shifts in the standards from grade to grade and us[e] these shifts as grade-level curricula are developed and as materials are purchased to align with the curricula."[110]

As with PARCC, SBAC received a supplemental award of $15.9 million to "help" states move to common standards and assessments.[111] SBAC notes that it will use the extra federal funding "to carry out activities that support its member states as they begin to implement the Common Core State Standards, including . . . curriculum materials . . . ."[112] In its *Supplemental Funding Scope Overview Table* dated January 16, 2011, SBAC directly mentions the use of federal funds to support curriculum materials, as well as a digital library.[113] Under the supplemental award, SBAC intends to allocate federal funds—

- "to develop curriculum materials, identify which efforts are aligned to the SBAC learning progressions, and define key approaches to teaching and learning"[114]
- "[to] contract[] with professional organizations, universities, and non-profit groups . . . to adapt their curriculum materials to SBAC specifications to upload to the digital library"[115]
- "[to upload] SBAC-approved curriculum materials . . . to the digital library."[116]

Additionally, with these federal funds, SBAC expects to create a "model curriculum" and instructional materials "aligned with the CCSS."[117] SBAC will also require its member states to implement systematically the CCSS by fully integrating assessment with curriculum and instruction.[118]

Through these awards, which use assessments to link the Common Core standards of CCSSI with the development of curricula and instructional materials, PARCC and SBAC (as grantees of the Department) enable the Department to do indirectly that which federal law forbids. The assessment systems that PARCC and SBAC develop and leverage with federal funds, together with their hands-on assistance in implementing the CCSS in substantially all the states, will direct large swaths of state K-12 curricula, programs of instruction, and instructional materials, as well as heavily influence the remainder.

The language used by both consortia in their supplemental funding materials leaves no question about their intentions

to use federal funds to develop curricular and instructional materials based on the CCSS. PARCC's strategy is to "develop the highest priority curricular and instructional tools . . . ."[119] to "help teachers develop a deeper understanding of the CCSS and their instructional implications, and provide early signals about the types of . . . instruction demanded by PARCC assessments"[120] and to develop "model 12th grade bridge courses."[121] SBAC is similarly direct: It intends to allocate federal funds to "develop curriculum materials . . . and define key approaches to teaching and learning"[122] and "[to] contract[] with professional organizations, universities, and non-profit groups . . . to adapt their curriculum materials to SBAC specifications to upload to the digital library."[123] These PARCC and SBAC supplemental funding materials, together with recent actions taken by the Department concerning ESEA waiver requirements, have placed the agency on a road that will certainly cause it to cross the line of statutory prohibitions against federal direction, supervision or control of curriculum and instructional materials, upsetting the historic structure of federalism.[124]

V. Conditional NCLB Waiver Plan

In 2011, state agitation about NCLB's accountability requirements and the slow pace of Congress in reauthorizing the ESEA created a policy vacuum that the Obama Administration is quickly filling through executive action. Building on its Race to the Top initiatives, this effort will serve to cement the Common Core standards and PARCC-SBAC assessments in most states, setting the table for a national curriculum, programs of instruction, and instructional materials. With conditions that mimic important elements of Race to the Top's ingredients, the Conditional NCLB Waiver Plan will result in the Department leveraging the states into a de facto long-term national system of curriculum, programs of instruction, and instructional materials, notwithstanding the absence of legal authority in the ESEA.[125]

By way of background, on September 23, 2011, the Department announced the Conditional NCLB Waiver Plan, which allows states to waive several major accountability requirements of the ESEA "in exchange for rigorous and comprehensive State-developed plans designed to improved educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of education."[126] The ESEA lists specific items that a state must include in a waiver request to the Secretary of Education.[127] Those items are: (1) identification of the federal programs affected by the proposed waiver; (2) a description of which federal statutory or regulatory requirements are to be waived and how the waiver of those requirements will increase the quality of instruction for students and improve the academic achievement of students; (3) for each school year, identification of specific measurable educational goals for the state educational agency ("SEA") and each local educational agency ("LEA"), Indian tribe, or school affected by the potential waiver; (4) a description of the methods used to measure annually the progress for meeting these goals and outcomes; (5) an explanation of how the waiver will assist the SEA and each affected LEA, Indian tribe, or school in reaching those goals; and (6) a description of how a school will continue to provide assistance to the same population served by the ESEA program for which a waiver is requested.[128] The Conditional NCLB Waiver Plan does all this and much more.

Critically, in exchange for receiving a waiver, the Department requires states to agree to four conditions: (1) adopt college- and career-ready standards[129] in at least reading/language arts and mathematics and develop and administer annual, statewide, aligned assessments that measure student growth in at least grades 3 through 8 and at least once in high school; (2) develop and implement differentiated accountability systems that recognize student growth and provide interventions for the lowest-performing schools and those with the largest achievement gaps; (3) develop and implement new systems for evaluating principal and teacher performance, based in part on student academic growth; and (4) remove burdensome reporting requirements that have little impact on student outcomes.[130] Each state must meet these conditions in order for the Secretary to grant the waiver application—a decision completely within the discretion of the Secretary under the ESEA.[131]

The Department requires SEAs seeking waivers to make several decisions, two of which are especially relevant to those concerned about the Department's legislative limitations. First, the state must declare whether it has "adopted college- and career-ready standards" in reading/language arts and mathematics "that are common to a significant number of States" consistent with the Department's definition of such standards—in effect, the CCSS.[132] Alternatively, states may adopt such standards certified by its state network of institutions of higher education, as long as they are consistent with the Department's definition of such standards—the Common Core standards.[133] Second, in its application, the state must declare whether it is "participating in one of the two State consortia [PARCC or SBAC] that received a grant under the Race to the Top Assessment competition."[134] If not, the state must represent that it is planning to adopt, or has already adopted and administered, "statewide aligned, high-quality assessments that measure student growth in reading/language arts and in mathematics in at least grades 3-8 and at least once in high school in all LEAs."[135]

The Conditional NCLB Waiver Plan provides two opportunities for states to apply for waivers on November 14, 2011, and February 21, 2012. On November 14, eleven states filed requests for waivers.[136] With few exceptions, each state declared that it has "adopted college- and career-ready standards in at least reading language arts and mathematics that are common to a significant number of states"—the CCSS.[137] (Minnesota adopted the CCSS for reading/language arts but not for mathematics, and Kentucky, the first state to adopt the CCSS in 2010, has adopted Common Core standards approved by its state network of higher education institutions.)[138] Ten of the initial eleven states filing requests for waivers participate in at least "one of two State consortia that received a grant under the Race to the Top Assessment competition"—PARCC or SBAC.[139] Another twenty-eight states and Puerto Rico have informed the Department that they intend to apply for waivers by the second deadline of February 21, 2012.[140] If the initial filings are any indication, most states seeking waivers in February will also commit to the Common Core standards and

PARCC-SBAC assessments in exchange for waivers of NCLB's accountability requirements.[141]

Given the states' near universal acceptance of CCSS and the common assessment consortia, the Department's announcement of the Conditional NCLB Waiver Plan is not surprising. Indeed, to obtain a waiver, states must adopt and implement common standards and assessments. The Department set the table in 2009 and 2010, using the Race to the Top Fund and the Race to the Top Assessment Program to entice competing states into accepting the Common Core standards and the assessment consortia. With an eye on the 2014-15 academic year, the consortia are using the Common Core standards to develop their assessments with the goal of writing content for curriculum, programs of instruction, and instructional materials. The Conditional NCLB Waiver Plan will ensure that nearly every state seeking a waiver remains forever committed to the Common Core standards of CCSSI, PARCC-SBAC assessments, and the curriculum, program, and instructional changes that they inspire. Any state effort to untether from the conditions imposed by the Department in exchange for having received an ESEA waiver will certainly result in the Department revoking the waiver. Moreover, given the extensive costs imposed by complying with the waiver (California has refused to seek waivers on cost grounds), the likelihood of any state doing so after having spent significant funds required by the waiver conditions is minimal. Like the dazed traveler in the popular Eagles' song *Hotel California*, states can check out any time they want, but they can never leave.

VI. Conclusions and Recommendations

Joseph A. Califano, Jr., former Secretary of Health, Education, and Welfare once wrote, "In its most extreme form, national control of curriculum is a form of national control of ideas."[142] Unfortunately, in three short years, the present Administration has placed the nation on the road to a national curriculum. By leveraging funds through its Race to the Top Fund and the Race to the Top Assessment Program, the Department has accelerated the implementation of common standards in English language arts and mathematics and the development of common assessments based on those standards. By PARCC's and SBAC's admission, these standards and assessments will create content for state K-12 curriculum and instructional materials. The Department has simply paid others to do that which it is forbidden to do. This tactic should not inoculate the Department against the curriculum prohibitions imposed by Congress.

The authors understand that the Common Core standards started as an initiative—of the NGA Center and the CCSSO, but the Department's decision to cement the use of the standards and assessment consortia through ESEA waiver conditions—a power that Congress has not granted in the waiver statute—changes matters considerably. Given the intense desire of most states to escape the strict accountability requirements of the ESEA, most states will agree to the Department's conditions in order to obtain waivers. By accepting the Department's conditions, these states will be bound indefinitely to the Common Core standards, PARCC-SBAC assessments, and the curriculum and instructional modules that arise from those assessments. As already evidenced by the eleven states that have already applied for waivers, most states will accept the Common Core standards and the PARCC-SBAC assessment consortia conditions. Once this consummation occurs, the Department will not permit a state to walk away from that commitment without the state losing its coveted waivers. It is also highly doubtful that states will turn away from the Common Core standards and assessments after making the heavy investment that these initiatives require. In the view of the authors, these efforts will necessarily result in a *de facto* national curriculum and instructional materials effectively supervised, directed, or controlled by the Department through the NCLB waiver process.

In light of these conclusions, this paper makes seven recommendations:

- First, Congress should immediately pass legislation clarifying that the Department cannot impose conditions on waivers requested by states under the ESEA.
- Second, the appropriate committees of Congress should conduct hearings on the Department's implementation of the Race to the Top Fund, the Race to the Top Assessment Program, and the Conditional NCLB Waiver Plan to ascertain the Department's compliance with GEPA, the DEOA, and the ESEA.
- Third, Congress should review the curriculum and related prohibitions in GEPA, the DEOA, and the ESEA to determine whether legislation should be introduced to strengthen the ban on federal involvement in elementary and secondary curriculum, programs of instruction, and instructional materials.
- Fourth, Congress should request the U.S. Government Accountability Office (GAO) to conduct a comprehensive review of the elementary and secondary education programs of the Department, including programs implemented under the ARRA and ESEA, to identify those that fail to comply with the GEPA, the DEOA, and the ESEA prohibitions, with the GAO submitting to the chairmen and ranking members of the appropriate committees a written report with specific findings by no later than September 30, 2012.
- Fifth, the Congress should require the Secretary to undertake a review of the Department's regulations appearing at Title 34 of the Code of Federal Regulations, as well as guidance relating to elementary and secondary programs to identify those that fail to comply with GEPA, the DEOA, and the ESEA, with the Secretary submitting to the chairmen and ranking members of the appropriate committees a written report with specific findings by no later than September 30, 2012.
- Sixth, Governors, State Superintendents of Education, State Boards of Education, and State Legislators should reconsider their respective states' decisions to participate in the CCSSI, the Race to the Top Fund, and the Race to the Top Assessment Program.
- Seventh, the eleven states that have applied for waivers under the Department's Conditional NCLB Waiver Plan should

amend their waiver applications to delete the Department's four non-statutory conditions; states that apply in round two should omit the four conditions from their applications and include only the statutory requirements of 20 U.S.C. § 7861.

Endnotes

1 20 U.S.C. § 1232a (the General Education Provisions Act limitation on federal involvement in curriculum); 20 U.S.C. § 3403(b) (the Department of Education Organization Act limitation); 20 U.S.C. § 7907(a) (the Elementary and Secondary Education Act limitation).

2 Though the American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115 (2009), and not the ESEA authorized the Race to the Top Fund and the Race to the Top Assessment Program, Congress has repeatedly stated in the ESEA that standards and assessments are the authority of states, not the federal government. *See* 20 U.S.C. § 6311(b)(1)(A) ("[A] State shall not be required to submit such standards [Title I content and achievement standards] to the Secretary."); 20 U.S.C. § 6311(e)(1)(F) ("The Secretary shall . . . not have the authority to require a State, as a condition of approval of the State [Title I] plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items."); 20 U.S.C. § 6575 ("Nothing in this title [Title I of ESEA] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction."). ARRA did not change this language.

3 The authority for the Race to the Top Fund is §§ 14005 and 14006(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 282-283 (2009). *See also* Race to the Top Fund, Purpose, http://www2.ed.gov/programs/racetothetop/index.html (last visited Jan. 13, 2012).

4 The authority for the Race to the Top Assessment Program is §§ 14005 and 14006(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 282-283 (2009). *See also* Race to the Top Assessment Program, Purpose, http://www2.ed.gov/programs/racetothetop-assessment/index.html (last visited Jan. 13, 2012).

5 The Department's ESEA Flexibility guidance is referred to throughout as a "Conditional NCLB Waiver Plan," given that the four "principles" that must be met to be eligible for a waiver are functionally "conditions." The four conditions, discussed in Part V are: (1) adopt college and career-ready standards in at least reading/language arts and mathematics, and develop and administer annual, statewide, aligned high quality assessments that measure student growth in at least grades 3-8 and at least once in high school; (2) develop and implement differentiated accountability systems that recognize student growth, and provide interventions for the lowest-performing schools and those with the largest achievement gaps; (3) develop and implement new systems for evaluating principal and teacher performance, based on student academic growth; and (4) remove burdensome reporting requirements that have little impact on student outcomes. U.S. Dep't of Educ., ESEA Flexibility 3-5 (2011), *available at* http://www.ed.gov/esea/flexibility.

6 *See supra* notes 3-5.

7 Elementary, Secondary, and Other Education Amendments of 1969 § 422, Pub. L. No. 91-230, 84 Stat. 121, 169 (1970), amending Title IV of Pub. L. No. 90-247. The corresponding current law provision is 20 U.S.C. § 1232a.

8 20 U.S.C. § 1232a.

9 20 U.S.C. §§ 1221(c)(1), 1234i(2).

10 20 U.S.C. § 1232a.

11 *Id.*

12 *Id.*

13 20 U.S.C. § 3411.

14 20 U.S.C. § 3403(b).

15 *Id.*

16 *Id.*

17 20 U.S.C. § 3401(4).

18 20 U.S.C. § 3403(a).

19 S. Rep. No. 96-49, at 10 (1979).

20 S. Rep. No. 96-49, at 95 (1979).

21 H.R. Rep. No. 95-1531, at 41 (1978).

22 H.R. Rep. No. 95-1531, at 45-46 (1978).

23 H.R. Rep. No. 95-1531, at 47 (1978).

24 20 U.S.C. § 7907(a).

25 Though the last clause of this section of law was at issue in *School District of the City of Pontiac v. Secretary of the United States Department of Education*, 584 F.3d 253, 274 (6th Cir. 2009), in dicta, the United States Court of Appeals for the Sixth Circuit noted the first part of the text "prevents federal officers from controlling school curricula."

26 20 U.S.C. § 7907(b).

27 20 U.S.C. §§ 1232a, 3403(b), 7907(a). The authority for the Race to the Top Fund and Race to the Top Assessment Program is §§ 14005 and 14006(a)(2) of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 282-283 (2009), and not the ESEA. Accordingly, only GEPA and the DEOA are discussed in the analysis of the Race to the Top Fund and Race to the Top Assessment Program.

28 20 U.S.C. § 3403(a).

29 *See* About the Standards, http://www.corestandards.org/about-the-standards (last visited Jan. 13, 2012); Frequently Asked Questions, http://www.corestandards.org/frequently-asked-questions (last visited Jan. 13, 2012).

30 *See* Process, http://www.corestandards.org/about-the-standards/process (last visited Jan. 13, 2012).

31 Nick Anderson, *Common Set of School Standards to be Proposed*, Wash. Post, Mar. 10, 2010, at A1.

32 *See* About the Standards, http://www.corestandards.org/about-the-standards (last visited Jan. 13, 2012).

33 A controversy exists about the extent to which the Common Core standards are internationally benchmarked. The Common Core standards website (http://www.corestandards.org) refers to the standards as internationally benchmarked in some places but merely "informed by" international standards at others. *See* Myths v. Facts, http://www.corestandards.org/about-the-standards/myths-vs-facts (last visited Jan. 13, 2012) ("International benchmarking played a significant role in both sets of standards. In fact, the college and career ready standards include an appendix listing the evidence that was consulted in drafting the standards and the international data consulted in the benchmarking process is included in the appendix.") ("The *Standards* were informed by . . . the highest international standards."); *see also* Frequently Asked Questions, http://www.corestandards.org/frequently-asked-questions (last visited Jan. 13, 2012) ("The standards are being developed by the following criteria: . . . [i]nformed by other top performing countries, so that all students are prepared to succeed in our global economy and society."); National Governors Association and State Education Chiefs Launch Common State Academic Standards, http://www.corestandards.org/articles/8-national-governors-association-and-state-education-chiefs-launch-common-state-academic-standards (last visited Jan. 13, 2012) ("The final standards were informed by nearly 10,000 public comments and by standards in other top performing countries so that all students are prepared to succeed in our global economy."). Some experts dispute whether the Common Core standards have truly undergone formal international benchmarking. *See* Catherine Gewertz, *Common-Core Standards Drew on Ideas from Abroad*, Educ. Wk., Jan. 9, 2012 (quoting Professor Sandra Stotsky), *available at* http://www.edweek.org/ew/articles/2012/01/12/16curriculum.h31.html.

34 *See supra* note 32.

35 *Id.*

36 While forty-eight states, the District of Columbia, and two territories (U.S. Virgin Islands and Northern Mariana Islands) participated in the process to develop the Common Core State Standards, the current number of states that have adopted English language arts and mathematics standards is forty-five, along with the District of Columbia and two territories (U.S. Virgin Islands and Northern Mariana Islands). *See* Introduction to the Common Core State Standards (2010), *available at* http://www.corestandards.org/assets/ccssi-introduction.pdf; In the States, http://www.corestandards.org/in-the-states (last visited Jan. 13, 2012).

37 *See* Process, http://www.corestandards.org/about-the-standards/process (last visited Jan. 13, 2012).

38 *Id.*

39 *See* Introduction to the Common Core State Standards (2010), *available at* http://www.corestandards.org/assets/ccssi-introduction.pdf.

40 *See* In the States, http://www.corestandards.org/in-the-states (last visited Jan. 13, 2012) (showing states that have adopted the Common Core Standards); *see also supra* note 36.

41 *See* Frequently Asked Questions, http://www.corestandards.org/frequently-asked-questions (last visited Jan. 13, 2012).

42 *Id.*

43 *See Education Reforms: Ensuring the Education System Is Accountable to Parents and Communities: Hearing Before the Subcomm. on Early Childhood, Elementary, and Secondary Education of the H. Comm. on Educ. and the Workforce*, 112th Cong. 1-2 (2011) (testimony of Jay P. Green, University of Arkansas), *available at* http://edworkforce.house.gov/UploadedFiles/09.21.11_greene.pdf (last visited Jan. 13, 2012).

44 *Id*.

45 Sandra Stotsky & Ze'ev Wurman, Common Core's Standards Still Don't Make the Grade: Why Massachusetts and California Must Regain Control Over Their Academic Destinies 27 (2010).

46 *Id*.

47 *Id*.

48 *See* Rachel Sheffield, *Implementing Common Core Could Cost States $30 Billion*, heartlander.org, Nov. 28, 2011, *available at* http://news.heartland.org/newspaper-article/2011/11/28/implementing-common-core-could-cost-states-30-billion. In the article, the Director of the Washington Policy Institute's education center estimates the nationwide implementation costs of the Common Core standards "would be $30 billion" based on a range of state estimates. Other estimates are $300 million for Washington state and $760 million for California. *Id.*

49 Pub. L. No. 111-5, 123 Stat. 115 (2009).

50 *See supra* notes 3-4; *see also* 74 Fed. Reg. 59,688 (Nov. 18, 2009); 75 Fed. Reg. 18,171 (April 9, 2010). This article discusses Phases 1 and 2 of the Race to the Top Fund, as well as the Race to the Top Assessment Program. The article does not discuss Phase 3 of the Race to the Top Fund, which distributed $200 million from Public 112-10, the Department of Defense and Full-Year Continuing Appropriations Act, 2011 ("FY2011 Appropriations Act"), to nine state finalists who did not prevail in Phase 1 or 2 of the competition. Nor does the article discuss the recently-awarded Race to the Top Fund grants for improving early childhood care and learning, authorized in the FY2011 Appropriations Act.

51 Alaska, North Dakota, Texas, and Vermont did not submit applications for either Phase 1 or 2 of the Race to the Top Fund competition.

52 74 Fed. Reg. 59,688 (Nov. 18, 2009).

53 See 74 Fed. Reg. 59,836-59,837 (Nov. 18, 2009) for a discussion of the Race to the Top Fund priorities. Funding priorities are a "means of focusing a competition on the areas in which the Secretary is particularly interested in receiving applications. Generally priorities take the form of specific kinds of activities that applicants are asked to include in an application. There are *absolute priorities*, which the applicant must address in order to be considered for funding; *competitive preferences*, which the applicant has the option of choosing whether or not to address and for which they may receive additional points; and invitational priorities, which the applicant is encouraged but not required to address. Applications addressing *invitational priorities* receive no preference over applications that do not meet the priority." U.S. Dep't of Educ., *Handbook for the Discretionary Grant Process* 154 (2009)(emphasis added), *available at* http://www2.ed.gov/policy/gen/leg/foia/foia-hb-01.pdf; 34 C.F.R. § 75.105(c)(1)-(3).

54 74 Fed. Reg. 59,836 (Nov. 18, 2009); see *supra* note 53 for discussion of an "absolute priority."

55 74 Fed. Reg. 59,836 (Nov. 18, 2009); see *supra* note 53 for discussion of a "competitive preference priority."

56 74 Fed. Reg. 59,836-59,837 (Nov. 18, 2009); see *supra* note 53 for discussion of an "invitational priority."

57 74 Fed. Reg. 37,804 (July 29, 2009).

58 74 Fed. Reg. 59,688 (Nov. 18, 2009).

59 74 Fed. Reg. 59,836 (Nov. 18, 2009).

60 74 Fed. Reg. 19,496 (April 14, 2010).

61 Press Release, U.S. Department of Education, Delaware and Tennessee Win First Race to the Top Grants (Mar. 29, 2010), *available at* http://www2.ed.gov/news/pressreleases/2010/03/03292010.html.

62 Press Release, U.S. Department of Education, Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), *available at* http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants.

63 74 Fed. Reg. 59,843 (Nov. 18, 2009).

64 See the discussion of State Reform Conditions Criteria at 74 Fed. Reg. 59,843 (Nov. 18, 2009) and the definition of "common set of K-12 standards" at 74 Fed. Reg. 59,838 (Nov. 18, 2009) ("a set of content standards that define what students must know and be able to do and that are substantially identical across all States in a consortium. A State may supplement the common standards with additional standards, provided that the additional standards do not exceed 15 percent of the State's total standards for that content area.").

65 74 Fed. Reg. 59,855-59,856 (Nov. 18, 2009); *see also* 75 Fed. Reg. 19,515-19,516 (Apr. 14, 2010) (emphasis added).

66 74 Fed. Reg. 59,855 (Nov. 18, 2009); *see also* 75 Fed. Reg. 19,516 (Apr. 14, 2010).

67 *See supra* note 64.

68 Application of Delaware at B-3 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase1-applications/delaware.pdf; Application of Tennessee at 48 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase1-applications/tennessee.pdf; Application of District of Columbia, at 53 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/district-of-columbia.pdf;; Application of Florida at 73 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/florida.pdf; Application of Georgia at 62 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/georgia.pdf; Application of Hawaii at 45 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/hawaii.pdf; Application of Maryland at 75 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/maryland.pdf; Application of Massachusetts at 52 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/massachusetts.pdf; Application of New York at 24 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/new-york.pdf; Application of North Carolina at 58 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/north-carolina.pdf; Application of Ohio at B1-1 and B1-2 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/ohio.pdf; Application of Rhode Island at A-8 (2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/rhode-island.pdf; *see also* Letter from Dr. Kerri L. Briggs, State Superintendent of Education, District of Columbia, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 29, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/district-of-columbia.pdf; Letter from Eric J. Smith, Commissioner, Florida Department of Education, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 29, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/florida.pdf; Letter from William Bradley Bryant, State Superintendent of Schools, Georgia, and Wanda Barrs, Chair, State Board of Education, Georgia, to Arne Duncan,

Secretary, U.S. Department of Education, at 1 (July 26, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/georgia.pdf; Amendment of July 27, 2010, at 6, *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/hawaii.pdf; Letter from Nancy Grasmick, State Superintendent of Schools, Maryland, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 30, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/maryland.pdf; Letter from Mitchell Chester, Commissioner, Elementary and Secondary Education, Massachusetts, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 26, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/massachusetts.pdf; Letter from David Steiner, Commissioner of Education, New York, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (July 27, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/new-york.pdf; Letter from June St. Clair Atkinson, State Superintendent, Department of Public Instruction, North Carolina, to Arne Duncan, Secretary, U.S. Department of Education, at 1 (June 10, 2010), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/north-carolina.pdf; Amendment of July 27, 2010, at 1, *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/ohio.pdf; Amendment of August 2, 2010, at 17 (at 10 in Minutes of Board of Regents for Elementary and Secondary Education), *available at* http://www2.ed.gov/programs/racetothetop/phase2-applications/amendments/rhode-island.pdf.

69 74 Fed. Reg. 59,733 (Nov. 18, 2009) ("In [the Race to the Top Fund], the phrase "common standards" does not refer to any specific set of common standards, such as the common core standards currently under development by members of the National Governors Association and the Council of Chief State School Officers. The Department declines to make changes in order to endorse any particular standards-development consortium.").

70 Lindsey Burke, *Publicizing the Hidden Costs of the National Standards Push*, Educ. Notebook, Sept. 12, 2011, at 1, *available at* http://links.heritage.org/hostedemail/email.htm?h=ec4d3bd2a208dbd824288c7fa9ecb9c4&CID=9795639416&ch=2E03C8C87B70F318B54BE93A9A394F60.

71 *See* Remarks of Secretary of Education Arne Duncan delivered to State Leaders at Achieve's American Diploma Project Leadership Team: Beyond the Bubble Tests: The Next Generation of Assessments 4 (Sept. 2, 2010), *available at* http://www.ed.gov/news/speeches/beyond-bubble-tests-next-generation-assessments-secretary-arne-duncans-remarks-state-l.

72 *See* Nancy Kober & Diane Stark Rentner, Ctr. on Educ. Pol'y, Common Core State Standards: Progress and Challenges in School Districts' Implementation 4 (2011), *available at* http://www.cep-dc.org/displayDocument.cfm?DocumentID=374.

73 *Id*. at 6.

74 *Id*.

75 See 74 Fed. Reg. 59,733 (Nov. 18, 2009) for the Department's response to commenters' recommendations on the number of states within a consortium; *see infra* note 76.

76 74 Fed. Reg. 59,733 (Nov. 18, 2009) (emphasis added).

77 See *supra* note 65 for the award of high points to states that are a part of a standards consortium that includes a majority of the states.

78 Letter from Robert Scott, Commissioner, Texas Education Agency, to United States Senator John Cornyn (Nov. 25, 2009), *available at* http://www.edweek.org/media/common_core_standards_letter.pdf.

79 *Id*.

80 *Id*.

81 75 Fed. Reg. 18,171-18,172 (Apr. 9, 2010) (emphasis added).

82 75 Fed. Reg. 18,171 (Apr. 9, 2010); *see also* Cooperative Agreement Between the U.S. Department of Education and the Partnership for Assessment of Readiness of College and Careers 5 (2011), *available at* http://www2.ed.gov/programs/racetothetop-assessment/parcc-cooperative-agreement.pdf (award of $169,990,272 and supplemental award of $15,872,560); Cooperative Agreement Between the U.S. Department of Education and the SMARTER Balanced Assessment Consortium and the State of Washington (fiscal agent) 5 (2011) *available at* http://www2.ed.gov/programs/racetothetop-assessment/sbac-cooperative-agreement.pdf (award of $159,976,843 and supplemental award of $15,872,696).

83 75 Fed. Reg. 18,177 (Apr. 9, 2010) ("Common set of college- and career-ready standards" means "a set of academic content standards for grades K-12 that (a) define what a student must know and be able to do at each grade level; (b) if mastered, would ensure that the student is college- and career-ready . . . by the time of high school graduation; and (c) are substantially identical across all States in a consortium. A State may supplement the common set of college- and career-ready standards with additional content standards, provided that the additional standards do not comprise more than 15 percent of the State's total standards for that content area.").

84 75 Fed. Reg. 18,171 (April 9, 2010).

85 *Id*.

86 *Id.*

87 Address Before a Joint Session of the Congress on the State of the Union, 33 Weekly Comp. Pres. Doc. 136 (Feb. 4, 1997).

88 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998 § 305(a), Pub. L. No. 105-78, 111 Stat. 1467, 1505 (1997).

89 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998 §§ 306-310, Pub. L. No. 105-78, 111 Stat. 1467, 1505-1507 (1997).

90 *See* 20 U.S.C. § 7909(a) ("[N]o funds provided under this Act [ESEA] to the Secretary or to the recipient of any award may be used to develop, pilot test, field test, implement, administer, or distribute any federally sponsored test in reading, mathematics, or any other subject, unless specifically and explicitly authorized by law."). Congress provided a limited exception for international comparative assessments administered to a representative sample of pupils under the Third International Mathematics and Science Study (TIMSS). 20 U.S.C. § 7909(b)); *see also* 20 U.S.C. § 1232j(a) ("[N]o funds provided to the Department of Education or to an applicable program, may be used to pilot test, field test, implement, administer or distribute in any way any federally sponsored national test in reading, mathematics, or any other subject that is not specifically and explicitly provided for in authorizing legislation enacted into law."). Here, Congress also provided a limited exception for TIMSS and other international comparative assessments administered to a representative sample of pupils. 20 U.S.C. § 1232j(b).

91 75 Fed. Reg. 18,174 (Apr. 9, 2010).

92 *See* Remarks of Secretary Arne Duncan, *supra* note 71, at 1-11.

93 *See id.* at 1. The PARCC Consortium consists of twenty-three states (AL, AZ, AR, CO, FL, GA, IL, IN, KY, LA, MD, MA, MS, NJ, NM, NY, ND, OH, OK, PA, RI, SC, TN) and the District of Columbia, available at http://www.parcconline.org/about-parcc (last visited Jan. 13, 2012). The SBAC consists of twenty-eight member states (AL, CA, CO, CT, DE, HI, ID, IA, KS, KY, ME, MI, MO, MT, NV, NH, NC, ND, OR, PA, SC, SD, UT, VT, WA, WV, WI, WY), available at http://www.k12.wa.us/SMARTER/States.aspx (last visited Jan. 13, 2012).

94 *See* Remarks of Secretary Arne Duncan, *supra* note 71, at 1-2.

95 Grant award notification letter from Joseph Conaty, Director, Academic Improvement and Teacher Quality Programs, Office of Elementary and Secondary Education, U.S. Department of Education, to the Honorable Charlie Crist, Governor, Florida (Sept. 28, 2010), *available at* http://www2.ed.gov/programs/racetothetop-assessment/parcc-award-letter.pdf; *see also* Grant award notification letter from Joseph Conaty, Director, Academic Improvement and Teacher Quality Programs, Office of Elementary and Secondary Education, U.S. Department of Education, to the Honorable Christine Gregoire, Governor, Washington (Sept. 28, 2010), *available at* http://www2.ed.gov/programs/racetothetop-assessment/sbac-award-letter.pdf.

96 75 Fed. Reg. 18,171-18,185 (Apr. 9, 2010).

97 *See* Remarks of Secretary Arne Duncan, *supra* note 71, at 4.

98 *See id.* at 7 (emphasis added).

99 *See id.*

100 Grant award notification letter from Joseph Conaty, Director, Academic Improvement and Teacher Quality Programs, Office of Elementary and Secondary Education, U.S. Department of Education, to the Honorable Charlie Crist, Governor, Florida (Sept. 28, 2010), *available at* http://www2.ed.gov/programs/racetothetop-assessment/parcc-award-letter.pdf.

101 PARCC Proposal for Supplemental Race to the Top Assessment Award 1 (2010), *available at* http://www.edweek.org/media/parccsupplementalproposal12-23achievefinal.pdf.

102 *Id*. at 1.

103 *Id*. at 3-5.

104 *Id*. at 3.

105 *Id*. at 4.

106 *Id*.

107 *Id*. at 5.

108 *Id*.

109 *See* Partnership for Assessment of Readiness for College and Careers, Webinar: Model Content Frameworks for ELA/Literacy, at 14, (Nov. 22, 2011), *available at* http://www.parcconline.org/sites/parcc/files/PARCC%20MCF%20for%20ELA-Literacy%20Webinar_112211.pdf.

110 *Id.* at 17.

111 Grant award notification letter from Joseph Conaty, Director, Academic Improvement and Teacher Quality Programs, Office of Elementary and Secondary Education, U.S. Department of Education, to the Honorable Christine Gregoire, Governor, Washington (Sept. 28, 2010), *available at* http://www2.ed.gov/programs/racetothetop-assessment/sbac-award-letter.pdf.

112 Press Release, SMARTER Balanced Assessment Consortium, SMARTER Balanced Receives Approval for $15.8 Million Supplemental Budget (Jan. 10, 2011), *available at* http://www.k12.wa.us/SMARTER/PressReleases/ApprovalSupplementalBudget.aspx.

113 SMARTER Balanced Assessment Consortium, Supplemental Funding, Scope Overview Table 2-4 (2011), *available at* http://www.k12.wa.us/SMARTER/pubdocs/SBAC_Supplemental_Funds.pdf.

114 *Id*. at 2.

115 *Id*.

116 *Id.*

117 *Id*. at 3.

118 *Id*. at 4.

119 *See* PARCC Proposal for Supplemental Race to the Top Assessment Award, *supra* note 101, at 1.

120 *See id*. at 3.

121 *See id*. at 5.

122 *See* SMARTER Balanced Assessment Consortium, *supra* note 113, at 2.

123 *Id.*

124 See Part V for a discussion of ESEA waiver requirements; see also 20 U.S.C. §§ 1232a, 3403(b) for the prohibitions upon federal involvement in curriculum and instructional materials.

125 *See* 20 U.S.C. § 7861 (legal authority for ESEA waivers).

126 Dear Colleague Letter from Arne Duncan, Secretary, U.S. Department of Education, to the Chief State School Officers (Sept. 23, 2011), *available at* http://www2.ed.gov/print/policy/gen/guid/secletter/110923.html.

127 20 U.S.C. § 7861(b)(1).

128 *Id.*

129 "College-and career-ready standards" are

> content standards for kindergarten through 12th grade that build towards college and career readiness by the time of high school graduation. A State's college- and career-ready standards must be either (1) *standards that are common to a significant number of States*; or (2) standards that are approved by a State network of institutions of higher education, which must certify that students who meet the standards will not need remedial course work at the postsecondary level.

U.S. Dep't of Educ., ESEA Flexibility 7 (2011), *available at* http://www.ed.gov/esea/flexibility.

130 *Id.* at 3-5.

131 20 U.S.C. § 7861(a) ("The Secretary may waive any statutory or regulatory requirement of this Act . . . ."). Noticeably absent from the Department's guidance is any in-depth explanation for its authority to require conditions-based waivers. In adding four conditions to the statutory requirements for a waiver, the Department has ignored Article I, Section 1 of the U.S. Constitution, which vests Congress, not the Executive Branch, with exclusive authority to make laws. The Administration recognized this several months earlier, when the Department took the position that college-and career-ready standards required a legislative change to the ESEA. *See* U.S. Dep't of Educ., A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act 7-8 (2010), *available at* http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf. No authority exists in the ESEA to permit the Secretary to grant waivers to SEAs in exchange for conditions. The Secretary unilaterally issued the Conditional NCLB Waiver Plan because Congress had not yet reauthorized the ESEA. As President Obama stated on September 23, 2011, "Congress hasn't been able to do it, so I will." This statement is no legal justification for the Administration to add conditions to the law through executive action, particularly where, as here, the Department failed to engage in the rulemaking required by the Administrative Procedures Act, 5 U.S.C. § 553.

132 U.S. Dep't of Educ., ESEA Flexibility Request 9 (2011), *available at* http://www.ed.gov/esea/flexibility.

133 *Id.*

134 *Id.* at 10.

135 *Id.*

136 Colorado, Florida, Kentucky, Georgia, Indiana, Massachusetts, Minnesota, New Jersey, New Mexico, Oklahoma, and Tennessee.

137 *See* ESEA Flexibility, http://www.ed.gov/esea/flexibility (last visited on Jan. 15, 2012) (listing ESEA flexibility requests received).

138 *See* Minn. Dep't of Educ., ESEA Flexibility Request of Minnesota (Nov. 14, 2011), *available at* http://www2.ed.gov/policy/eseaflex/mn.pdf; *see also* Kentucky ESEA Flexibility Request (Nov. 14, 2011), *available at* http://www2.ed.gov/policy/eseaflex/ky.pdf.

139 Colorado, Florida, Kentucky, Georgia, Indiana, Massachusetts, New Jersey, New Mexico, Oklahoma, and Tennessee are members of either PARCC or SBAC or both. *See also* U.S. Dep't of Educ., ESEA Flexibility Request 10 (2011), *available at* http://www.ed.gov/esea/flexibility.

140 *See* ESEA Flexibility, http://www.ed.gov/esea/flexibilty (last visited on Jan. 15, 2012) (noting a "Second Submission Window").

141 Significantly, California and Texas have indicated that they do not intend to apply for waivers.

142 Joseph A. Califano, Jr., Governing America: An Insider's Report from the White House and the Cabinet 297 (1981).

Civil Rights

School Discipline and Disparate Impact

*By John R. Martin**

Note from the Editor:

This paper analyzes the U.S. Department of Education's proposed use of disparate impact theory in examining school discipline in schools across the country. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about discipline and disparate impact. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- Arne Duncan, Secretary, U.S. Dep't of Educ., Remarks on the 45th Anniversary of "Bloody Sunday" at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010): http://www2.ed.gov/news/speeches/2010/03/03082010.html
- Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline Conference: Addressing Disparities to Ensure Equal Educational Opportunities (Sept. 27, 2010): http://www.justice.gov/crt/speeches/perez_eosconf_speech.php
- Roger Clegg, *The Dangers of Disparate-Impact Policy*, Wash. Times, Oct. 20, 2010: http://www.washingtontimes.com/news/2010/oct/20/the-dangers-of-disparate-impact-policy/
- Press Release, New Data from U.S. Department of Education Highlights Educational Inequities Around Teacher Experience, Discipline and High School Rigor (Mar. 6, 2012): http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teache
- U.S. Commission on Civil Rights, School Discipline and Disparate Impact Briefing Report (March 2012): http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf

At the historic Edmund Pettis Bridge in Selma, Alabama, U.S. Secretary of Education Arne Duncan announced an initiative to examine disparities in achievement, academic opportunity, and discipline to determine whether schools across the country are discriminating against racial and ethnic minorities.[1] The Department of Education would use both data collection and investigations of individual school districts—called compliance reviews—as part of this initiative. The Department would seek to root out both direct discrimination and indirect discrimination, i.e., facially neutral policies and practices that have a disparate impact. This was a change in policy by the Obama Administration. The Department during the Bush Administration had not used "disparate impact analysis in its examination of complaints or compliance reviews."[2] When the Department finds what it deems to be discrimination, Secretary Duncan noted, "it can ultimately withhold federal funds in extreme cases to schools and districts that refuse to remedy discrimination."[3] The Department planned to begin thirty-eight compliance reviews by the end of the fiscal year, including reviews of discipline issues in five states.[4]

Secretary Duncan seemed to assume that disparities are caused by discrimination, whether intentional or unintentional. Martin Luther King, Jr. "would have been dismayed to learn of schools that seem to suspend and discipline only young African-American boys," he said. There are "deep" and "pronounced" "disparities in discipline," and there is "still" a "need to challenge policies which subsidize or needlessly result in grossly disparate impacts for children of color."[5] Similarly, Attorney General Eric Holder said in a speech that it is "quite simply, unacceptable" that "students of color" are "disproportionately likely to be suspended or expelled," asserting that the disparities were at a minimum due to unintentional discrimination by schools.[6]

I. Title VI

Title VI of the Civil Rights Act of 1964 at Section 601 provides that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[7] Section 602 authorizes federal agencies that provide financial assistance to programs and activities to "effectuate the provisions of [Title VI] . . . by issuing rules, regulations or orders of general applicability . . . ."[8] Although Title VI's text does not include a disparate-impact provision, an effects test, a results test, or the like, the Department of Education promulgated a regulation pursuant to Section 602 prohibiting recipients from "utiliz[ing]

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criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color or national origin, or have the *effect* of defeating or substantially impairing accomplishments of the objectives of the program as respect individuals of a particular race, color, or national origin," thus reserving the authority to use disparate-impact theory.[9]

As noted above, however, there is no mention of use of disparate-impact theory in the language of the statute. No one disagrees that direct or intentional discrimination, such as disciplining a black student more harshly than a similarly situated white student, is discrimination "on the ground of race." But it is a different situation when a neutrally administered, facially neutral policy results in higher rates of discipline for one race over another. The racial disparity in this scenario occurs because students of one race have committed infractions of a neutral rule at a higher rate in the school or school district.

Congress has included explicit disparate-impact, results, or effects provisions in other civil rights statutes. The absence of any such provision offers evidence that Congress did not intend for discrimination under Title VI to encompass disparate impact. For example, the 1991 amendments to Title VII explicitly authorized a "disparate impact" cause of action and codified the burden of proof necessary to establish an "unlawful employment practice based on disparate impact."[10] Section 2 of the Voting Rights Act (VRA) prohibits electoral changes "which *result*[] in a denial or abridgement" of the right to vote.[11] One circumstance that may be considered in determining whether political processes deny or abridge the right to vote is the "extent to which members of a protected class have been elected to office in the State or political subdivision."[12] Thus, Congress included a results test in which the process is judged, at least in part, by its outcome, even if the process was not created with discriminatory intent. The Americans with Disabilities Act (ADA) prohibits the following:

> using qualification standards, employment tests or other selection criteria *that screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity.[13]

Thus, as the above examples show, Congress knows how to prohibit actions or policies based on their effects. The VRA and the ADA do not use the term "disparate impact," but they turn on the outcome of the actions at issue. In Title VI, on the other hand, Congress only prohibited actions taken "on the ground of" race, color, or national origin.

Alexander v. Sandoval

The Supreme Court has never ruled on whether Title VI authorizes agencies such as the Department of Education to promulgate disparate-impact regulations. Its opinion in *Alexander v. Sandoval*, however, indicates that the Court would rule them invalid if the question were squarely presented.[14] The Court in a 5-4 decision held that there is no private right of action to enforce disparate-impact regulations under Title VI.

In *Sandoval*, a driver's license applicant challenged Alabama's policy of only giving driver's license exams in English as violating disparate-impact regulations promulgated under Title VI. A Department of Justice regulation similar to the one issued by the Department of Education prohibited funding recipients from "utiliz[ing] criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin . . . ."[15] *Sandoval* assumed, without deciding, that disparate-impact regulations were authorized by Section 602, but held that there was no private cause of action to enforce them.[16]

Justice Scalia wrote for the majority that for purposes of this case, three aspects of Title VI "must be taken as a given."[17] First, Section 601 created a private cause of action for individuals to sue and obtain both injunctive relief and damages.[18] Second, it is "beyond dispute . . . that § 601 prohibits only intentional discrimination."[19] And third, the Court would assume without deciding that Section 602 "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."[20]

Because Section 601 prohibits only intentional discrimination and permits facially neutral policies that have a disparate effect, a regulation issued pursuant to it cannot prohibit facially neutral policies.[21] A private right of action to enforce the disparate-impact regulation therefore "must come, if at all, from the independent force of § 602."[22]

The Court, however, found no congressional intent in Section 602 to create any rights other than those conferred in Section 601:

> Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." . . . Whereas §601 decrees that "[n]o person . . . shall . . . be subjected to discrimination," . . . the text of § 602 provides that "[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601]." . . . Far from displaying congressional intent to create new rights, § 602 limits agencies to "effectuat[ing]" rights already created by § 601.[23]

Section 602 thus does not create a new private right of action to sue under a disparate-impact theory. Nor can regulations promulgated under it. A regulation cannot create a new right that Congress omitted in the statute. Agencies "may play the sorcerer's apprentice but not the sorcerer himself."[24]

The majority in *Sandoval* suggested that it would invalidate a regulation purporting to effectuate a statute that prohibits only intentional discrimination and permits facially neutral policies that have a disparate impact, when the regulation prohibits those very same policies: "We cannot help observing, however, how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601, . . . when § 601 permits the very behavior that the regulations forbid."[25] Justices Kennedy and Thomas joined Justice Scalia's majority opinion in *Sandoval*, which strongly signaled that such regulations went beyond the statute and were invalid, and the addition of Chief Justice Roberts and Justice

Alito to the Court strengthens the likelihood that the majority would strike down such regulations now.[26]

II. The Department of Education

When the Department learns that a school or school district has a policy, practice, or procedure that has an adverse impact on minority students, it essentially shifts the burden of proof to the district to justify the racial disparity. Ricardo Soto, Principal Deputy Assistant Secretary at the Office for Civil Rights, explained in his statement to the U.S. Commission on Civil Rights:

> Unlike cases involving different treatment, cases involving disparate-impact theory do not require that a school had the intent to discriminate. Rather, under the disparate-impact theory, the pertinent inquiry is whether the evidence establishes that a facially neutral discipline policy, practice, or procedure causes a significant disproportionate racial impact and lacks a substantial, legitimate educational justification. Even if there is a substantial, legitimate educational justification, a violation may still be established under disparate impact if the evidence establishes that there are equally effective alternative policies, practices, or procedures that would achieve the school's educational goals while having a less significant, adverse racial impact.[27]

Thus, once a disparity is discovered, the district must show "a substantial, legitimate educational justification" for the policy, practice, or procedure, *and* that there are no "equally effective alternative[s]" that would have a "less significant, adverse racial impact."

This is analogous to the disparate-impact regime codified in the 1991 amendments to Title VII of the Civil Rights Act of 1964. Under Title VII, an employment practice based on disparate impact is unlawful only if, after the plaintiff shows a disparate impact, the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[28] If the defendant meets this burden, the plaintiff may "still succeed by showing that the employer refused to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[29]

However, unlike Title VII, the text of Title VI has no disparate-impact provision or effects test, as discussed above. The Department of Education's approach shifts the burden to school districts to prove a negative, that they are not discriminating, which is not set out in the text of the statute.

III. Is There Evidence of Discrimination?

If disparities exist among racial and ethnic groups in school discipline, there are three possible explanations: (1) teachers and school officials are discriminating on the basis of race or national origin; (2) students of different races and national origins misbehave in school at different rates; or (3) a combination of the two. Secretary Duncan and Attorney General Holder seem to believe the first explanation. The underlying premise is that white students, for example, will commit infractions at the same rate as black students. But disparities among racial and ethnic groups exist in many areas, as social scientists so often report. The data in areas analogous or related to school discipline caution that one should not assume proportionality in rates of misbehavior and discipline among racial and ethnic groups.

For example, there are disparities between whites and blacks in crime rates. A disproportionate number of blacks are in prison in the United States, not because of discrimination by police, prosecutors, or courts, but because blacks commit crimes at a higher rate than whites, as even liberal social scientists concede. Professor Amy L. Wax of the University of Pennsylvania Law School has written:

> Contrary to frequently voiced accusations and despite voluminous literature intent upon demonstrating discrimination at every turn, there is almost no reliable evidence of racial bias in the criminal justice system's handling of ordinary violent and non-violent offenses. Rather, the facts overwhelmingly show that blacks go to prison more often because blacks commit more crimes. As a noted criminal law scholar sympathetic to black concerns stated in an exhaustive summary of the literature, "[v]irtually every sophisticated review of social science evidence on criminal justice decision making has concluded, overall, that the apparent influence of the offender's race on official decisions concerning individual defendants is slight." With respect to arrests, "few or no reliable, systematic data are available that demonstrate systematic discrimination." Rather, "arrests can by and large be taken as reasonable reflections of the involvement in serious crime of members of different racial groups." Likewise, . . . blacks are not singled out for stricter or more frequent prosecution. Nor do they receive longer sentences once criminal history and other sentencing factors are taken into account. In short, for ordinary violent and property crimes, "the answer to the question, 'Is racial bias in the criminal justice system the principal reason that proportionately so many more blacks than whites are in prison,' is no."[30]

There are also disparities in the rates of out-of-wedlock births and single-parent families. Disparities in family structure could be a contributing factor to disparities in school discipline. The estimated out-of-wedlock birth rates in the United States in 2010 were 17% for Asian or Pacific Islander, 29% for non-Hispanic whites, 53.3% for Hispanics, 65.6% for American Indians or Alaska Natives, and 72.5% for non-Hispanic blacks.[31] The rates of children estimated to be living in single-parent families in 2009 were 16% for Asian and Pacific Islanders, 24% for non-Hispanic whites, 40% for Hispanics, 53% for American Indians, and 67% for blacks.[32] Growing up in single-parent families puts children at greater risk of dropping out of school and becoming a teen parent.[33] Family composition is a predictive factor in cognitive performance.[34] Data from Wisconsin also suggests that "the probability of incarceration for juveniles in families headed by never-married single mothers [is much] higher than for juveniles in the two-parent family."[35]

Studies have also found disparities in test scores. To take just one example: For the high school class of 2009, out of

2400 possible points on the SAT test, 1623 was the average score for Asian students, 1581 for white students, 1448 for American Indian or Alaska Native students, 1362 for Mexican and Mexican American students, 1345 for Puerto Rican students, and 1276 for black students.[36] Given the differences in crime rates, family structure, and test scores, one would not be surprised to find disparities in school infractions and discipline.

Researchers have not been able to find clear evidence of discrimination by school officials. The Department of Education recently published new data surveying 72,000 students, approximately 85% of the nation's enrollment. Asian students received proportionally much less discipline than white students. They were 6% of enrollment but only received 2% of in-school suspensions, 3% of first-time out-of-school suspensions, 1% of multiple out-of-school suspensions, and 2% of expulsions. White students were 51% of enrollment and received 39% of in-school suspensions, 36% of first-time out-of-school suspensions, 29% of multiple out-of-school suspensions, and 33% of expulsions. Black students were 18% of enrollment and received 35% of in-school suspensions, 35% of first-time out-of-school suspensions, 46% of multiple out-of-school suspensions, and 39% of expulsions. If school officials discriminated against black students in favor of white students, then they also discriminated against white students in favor of Asian students. Of course, racial disparities in discipline do not prove discrimination because there may be disparities in behavior.

Meanwhile, discipline rates for Hispanic students were almost exactly proportional to their overall enrollment. They were 24% of enrollment, 23% of in-school suspensions, 25% of first-time out-of-school suspensions, 22% of multiple out-of-school suspensions, and 24% of expulsions.[37] Under even disparate-impact theory, there was no evidence of discrimination against Hispanics.

One study found differences in punishment for students sent by teachers to the principal's office. Black and Hispanic students were more likely to receive suspensions or expulsions relative to white students for similar offenses.[38] But the study's authors admitted they did not take into account which students committed prior infractions, "a variable that might well be expected to have a significant effect on administrative decisions regarding disciplinary consequences."[39] The authors' own data showed that black students were 2.19 times as likely to be referred for misbehavior as white students in elementary school and 3.79 times as likely as white students in middle school,[40] making it much more likely that the black students were repeat offenders in any particular encounter. Since repeat offenders may rightly receive more punishment, the study cannot tell us whether administrators unfairly punished anyone.

A Texas study found that "African-American and Hispanic students were more likely than white students to experience repeated involvement with the school disciplinary system for multiple school code of conduct violations."[41] But the paper noted that the "reader should not discount the possibility of overrepresentation of African-Americans among students who are repeatedly disciplined flows from the previous finding that African-American students are disproportionately involved in the discipline system in the first place."[42]

Another paper attempted to isolate discrimination by controlling for the "student's overall behavior problems, characteristics of the classroom (i.e., overall level of disruption), and the teacher's ethnicity."[43] The black students had a higher-than-expected rate of office disciplinary referrals when controlling for these factors, but another finding in the study calls into doubt whether the higher rate was due to discrimination: black male students in classrooms with black teachers were more likely to receive office disciplinary referrals than the other students.[44] The authors concluded that the "findings do not suggest that a cultural or ethnic match between students and their teachers reduces the risk of [office disciplinary referrals] among Black students."[45] This finding indicates that there may be problems with the theory that teachers were discriminating against black students.

Some researchers have noted differences in the types of offenses committed by white and black students resulting in office referrals, with whites more likely to commit objective offenses and blacks more likely to commit subjective ones. White students were "significantly more likely than black students to be referred to the office for smoking, leaving without permission, vandalism, and obscene language." Meanwhile, black students were "more likely to be referred for disrespect, excessive noise, threat, and loitering."[46] The subjective offenses have elsewhere been termed "defiance."[47] All of these offenses could be serious, but threatening behavior—even if subjective—would be more serious than skipping class. Moreover, threats and other forms of defiance might well be more disruptive in a classroom setting than obscene language. Of course, none of these behaviors will be helpful for the student later in life, and any good teacher would try to stop them all. These different kinds of offenses illustrate the on-the-ground judgment calls teachers and administrators have to make every day, decisions that may not be easily amenable to quantifiable disparate-impact analysis.

IV. Disparate Impact as Policy

According to Assistant Secretary of Education for Civil Rights Russlynn Ali, "Disparate impact is woven through all civil rights enforcement in [the Obama] administration."[48] Using disparate-impact theory in civil rights enforcement has of course been subject to criticism from some sectors over the decades. Any selection criteria in employment, housing, admissions, or elsewhere will almost invariably have a disparate impact on some group, no matter how valid or necessary the criteria. Disparate-impact theory assumes the natural order of things is proportionate representation in all walks of life. Proportionate outcomes, however achieved, are the only sure way to avoid charges of discrimination under the theory. But ensuring outcomes—by putting a hand on the scale, awarding bonus points to certain groups, etc.—results in direct discrimination against one group in favor of another. One is now treating similarly situated people differently on the basis of race, ethnicity, or gender. As Roger Clegg has written:

> [W]hat is really rotten at the core of disparate-impact theory is this: Under the guise of combating the problem

> of "unintended discrimination," the theory demands deliberate discrimination. It requires selection devices to be chosen with an eye on the racial, ethnic, and gender bottom line that such devices will create. Such a practice would be condemned as discriminatory under any other circumstances—and rightly so. If a bigoted Los Angeles employer determined that he had been hiring "too many" Asians and Jews by giving a particular test, and therefore deliberately discards the test for one that he knows will result in fewer of them being hired, all would agree that this violates the law. And yet it is precisely this calculation that disparate-impact theory applauds.[49]

The Supreme Court had a similar view in *Wards Cove Packing Co. v. Atonio*. If mere racial disparities in hiring, regardless of the underlying pool of qualified job applicants, means there is a prima facie case of discrimination, then the "only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII."[50]

Using disparate-impact theory to analyze school discipline arguably presents similar issues. The surest way for a school to avoid coming to the attention of the Department of Education or the Department of Justice is to have racially proportionate disciplinary numbers. In a school where minority students are disciplined at higher rates than white students, a simple way to decrease the imbalance is to discipline minority students less. But by deliberately doing so the school is intentionally discriminating. Further, such a policy would harm the other students in the school if it leads to more classroom disruptions, particularly so for students in schools that have more discipline problems. Richard Arum and Melissa Velez found that minority students "are exposed to school environments with high levels of disorder, violence and concerns over safety" and therefore "face the disparate impact of inadequate and ineffective discipline in U.S. schools." "Significantly," they go on to say, "in schools with higher levels of disciplinary administration, we . . . have found that the gap between African-American and white student test performance does not exist."[51]

Testimony before the U.S. Commission on Civil Rights demonstrated that teachers and administrators are very concerned about disparities in discipline. A teacher from the suburban Washington, D.C. area testified that her district monitors the disciplinary rates in her classes for African-American and Hispanic students relative to the other students. The district's expectation is that there will not be disparities, and she is held to account if there are.[52]

Two school districts told the Commission they have changed their discipline policies in order to reduce racial disparities in discipline. The Winston-Salem/Forsyth County Schools in North Carolina revised their discipline policies to "address the disproportionate discipline of African-American students in the district."[53] The Tucson Unified School District outlined the "shift" in its discipline policies with the goal "to ensure . . . the reduction of disciplinary incidents" for African-American students. Expected outcomes for African-American students are "[r]educed discipline referrals to the office" and "[r]educed suspensions and expulsions."[54] As laid out above, these discipline policy revisions present the risk of deliberate discrimination.

Of the seventeen school districts that responded to the Commission, nine reported using the Positive Behavior Intervention Support (PBIS) program, a "systems approach to preventing and responding to classroom and school discipline problems." One goal of the PBIS program is to "eliminate[e] the disproportional number and racial predictability of the student groups that occupy the highest and lowest achievement categories."[55] The Obama Administration has also urged the adoption of alternative disciplinary policies to reduce disparities.[56] Of course, there is nothing wrong with schools implementing programs to improve student behavior, which may eventually result in less disparity in discipline among different groups. The danger is that schools will weaken disciplinary measures in order to equalize the rates, which will only increase disruptive behavior.

The Obama Administration has criticized both zero-tolerance policies and school administrators' discretion in meting out discipline, often in the same speech, because both have led to racial disparities.[57] Certainly mechanistic, zero-tolerance policies often lead to absurd results, but zero-tolerance and discretion are the only two policy options school districts have.[58] One is left with the impression that the nation's schools will continue to be criticized unless and until they achieve racial balance in discipline.

V. Conclusion

Disparate-impact regulations go beyond the text of Title VI's prohibition of discrimination "on the ground of race, color or national origin," and the Supreme Court has suggested that it will strike down such regulations if the question is presented. As in other areas of civil rights law, disparate-impact theory creates an incentive to achieve racially proportionate outcomes so as to avoid legal liability, or, in the case of public schools, to avoid the loss of federal funds. Findings regarding whether schools across the nation are discriminating in discipline on the basis of race are mixed at best. The most difficult and crucial job for many schools is maintaining order and discipline so that students are able to learn without disruptions in the classroom. The Department's use of disparate-impact theory may lead to a reduction in good order and discipline in many schools if school boards and principals believe they must weaken their policies to achieve a racial balance.

Endnotes

1 Arne Duncan, Secretary, U.S. Dep't of Educ., Remarks on the 45th Anniversary of "Bloody Sunday" at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010), *available at* http://www2.ed.gov/news/speeches/2010/03/03082010.html.

2 Arne Duncan, Secretary, U.S. Dep't of Educ., Press Conference Call on Civil Rights Enforcement, Transcript at 5 (Assistant Secretary for Civil Rights Russlynn Ali speaking) (Mar. 8, 2010), *available at* www2.ed.gov/news/av/audio/2010/03/03082010.doc; *see also* Mary Ann Zehr, School Discipline Inequities Become a Federal Priority, Educ. Wk., Oct. 30, 2010 ("Kenneth L. Marcus, . . . who headed the Education Department's civil rights office in 2003 and 2004 . . ., said he . . . recalls that most education cases were brought

by the agency under the 'different treatment' rather than 'disparate impact' course of action.").

3 Arne Duncan, *supra* note 1; *see also* 42 U.S.C. § 2000d-1 (agency may terminate funding to recipient that discriminates on the basis of race, color, or national origin).

4 Sam Dillon, *Officials Step Up Enforcement of Rights Laws in Education*, N.Y. Times, Mar. 8, 2010; Arne Duncan, Press Conference Call on Civil Rights Enforcement, *supra* note 2, at 10 (Assistant Secretary for Civil Rights Russlynn Ali speaking).

5 Arne Duncan, *supra* note 1. A few months after Secretary Duncan's speech, Assistant Attorney General for Civil Rights Thomas Perez went further, claiming that "students of color are receiving different and harsher disciplinary punishments than whites for the same or similar infractions." Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline Conference: Addressing Disparities to Ensure Equal Educational Opportunities (Sept. 27, 2010), *available at* http://www.justice.gov/crt/speeches/perez_eosconf_speech.php.

6 Attorney General Holder Speaks at 100 Black Men of Atlanta Inaugural Members Leadership Summit (Feb. 25, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120225.html. The Department of Education published data from a national survey of more than 72,000 students showing that while black students made up 18% of the sample, they were 35% of the students suspended once and 39% of the students expelled. Press Release, New Data from U.S. Department of Education Highlights Educational Inequities Around Teacher Experience, Discipline and High School Rigor (Mar. 6, 2012), *available at* http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teache**.**

7 42 U.S.C. § 2000d.

8 *Id.* § 2000d-1.

9 34 C.F.R. § 100.3(b)(2) (emphasis added).

10 42 U.S.C. § 2000e-2(k)(1)(A).

11 *Id.* § 1973.

12 *Id.* § 1973(b).

13 *Id.* § 12112 (emphasis added).

14 532 U.S. 275 (2001).

15 28 C.F.R. § 42.104(b)(2) (emphasis added).

16 Alexander v. Sandoval, 532 U.S. 275, 282 (2001).

17 *Id.* at 279.

18 *Id.* at 279-80.

19 *Id.* at 280 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582 (1983); Alexander v. Choate, 469 U.S. 287 (1985)). The dissent disagreed that Section 601 prohibits only intentional discrimination. *See, e.g.*, *Sandoval*, 532 U.S. at 281 n.1.

20 *Sandoval*, 532 U.S. at 281.

21 *Id.* at 285 ("It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.").

22 *Id.* at 286.

23 *Id.* at 288-89 (citations omitted).

24 *Id.* at 291 ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.").

25 *Id.* at 286 (citing Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring in judgment) ("If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory *effect* . . . do not simply 'further' the purpose of Title VI; they go well *beyond* that purpose.") (emphasis in original).

26 *See generally* John Arthur Laufer, Note, Alexander v. Sandoval *and Its Implications for Disparate Impact Regimes*, 102 Colum. L. Rev. 1613 (Oct. 2002) (arguing the *Sandoval* opinion strongly suggests a majority of the Court views disparate impact regulations as an invalid exercise of administrative power under section 602). The dissenting Justices would hold that agencies have a much broader administrative power under Title VI. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, averred that for "three decades" the Court has "treated § 602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in § 601, even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited." *Sandoval*, 532 U.S. at 305 (Stevens, J., dissenting).

27 Statement of Ricardo Soto, Principal Deputy Assistant Secretary, Office for Civil Rights, U.S. Dep't of Educ., Before the U.S. Commission on Civil Rights' Briefing on School Discipline and Disparate Impact (Feb. 11, 2011) , *in* U.S. Commission on Civil Rights, School Discipline and Disparate Impact Briefing Report 55 (March 2012) [hereinafter School Discipline Report], *available at* http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.

28 42 U.S.C. § 2000e-2(k)(1)(A).

29 Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C)).

30 Amy L. Wax, Race, Wrongs, and Remedies 91(2009) (quoting Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 50, 71, 79 (1996)).

31 Brady E. Hamilton et al., U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control & Prevention, Nat'l Center for Health Statistics, Nat'l Vital Statistics Reports, Vol. 60, No. 2, Births: Preliminary Data for 2010,Table 1 (Nov. 2011).

32 The Annie E. Casey Found., Kids Count Data Ctr., Data Across States: Children in single-parent families by race (Percent)—2009.

33 *See* Mark Mather, Population Reference Bureau, U.S. Children in Single-Mother Families (May 2010).

34 Richard Arum & Melissa Velez, *Class and Racial Differences in U.S. School Disciplinary Environments*, at 4, *chapter in* Improving Learning Environments in Schools: Lessons from Abroad (Forthcoming: Palo Alto, Stanford University Press).

35 Patrick Fagan, Heritage Found., Congress's Role in Improving Juvenile Delinquency Data (Mar. 10, 2000).

36 Mary Beth Marklein, *SAT Scores Show Disparities by Race, Gender, Family Income*, USA Today, Aug. 26, 2009.

37 U.S. Dep't of Educ., Office for Civil Rights, The Transformed Civil Rights Data Collection 2 (Mar. 2012), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf.

38 *See* Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, Sch. Psychol. Rev., Vol. 40, No. 1, at 85, 95 (2011) [hereinafter Skiba et al., *Race is Not Neutral*].

39 *Id.* at 103.

40 *Id.* at 93.

41 Tony Fabelo et al., Council of State Gov'ts Justice Ctr., Pub. Pol'y Research Inst., Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement 42 (2011).

42 *Id.* at 42 n.80. This study included a multivariate analysis in an attempt to compare students of different races who were otherwise from similar backgrounds, including socioeconomic background. But it did not isolate whether the students came from a single parent household. Instead, acknowledging the importance of family structure, the analysis included as a variable the percentage of families in the student's *county* headed by a single parent. *Id.* at 94. This variable does not remotely capture the family structure of an individual student. The analysis thus classified many students as coming from similar backgrounds when they differed with regard to their family situation.

43 Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, J. Educ. Psychol., Vol. 102, No. 2, at 508, 510 (2010).

44 *Id.* at 511, 514.

45 *Id.* at 515.

46 Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, Urb. Rev., Vol. 34, No. 4, at 317, 332 (Dec. 2002).

47 Skiba et al., *Race Is Not Neutral*, *supra* note 38, at 101. In contrast, a 2010 study of elementary students did not find that black students were more likely than white students to receive an office disciplinary referral for defiance. *See* Bradshaw, *supra* note 43, at 513.

48 Zehr, *supra* note 2.

49 Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, Briefly . . . Persp. on Legis., Reg., & Litig., Nat'l Legal Center for the Pub. Int., Vol. 5, No. 12, at 11-12 (Dec. 2001).

50 Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989), *modified by* Civil Rights Act of 1991, Pub. L. No. 102-166; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) ("[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."); Ricci v. DeStefano, 129 S. Ct. 2658, 2683 (2009) ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.") (Scalia, J., concurring).

51 Arum & Velez, *supra* note 34, at 35-36.

52 Statement of Jaime Frank *in* School Discipline Report, *supra* note 27, at 28-29.

53 Letter from Donald L. Martin, Jr., Superintendent, Winston-Salem/Forsyth County Schools, to Lenore Ostrowsky, Office of the Staff Director, U.S. Commission on Civil Rights (Dec. 10, 2010).

54 Letter from Augustine Romero, Director of Academic and Student Equity, and Jimmy Hart, Director of Academic Equity for African American Studies, Tucson Unified School District to Martin Dannenfelser, Staff Director, U.S. Commission on Civil Rights (Dec. 13, 2010).

55 Letter from Romain Dallemand, Superintendent, Rochester (MN) Public Schools, to Martin Dannenfelser (Nov. 30, 2010).

56 Press Release, Secretary Duncan, Attorney General Holder Announce Effort to Respond to School-to-Prison Pipeline by Supporting Good Discipline Practices (July 21, 2011), *available at* http://www.ed.gov/news/press-releases/secretary-duncan-attorney-general-holder-announce-effort-respond-school-prison-p.

57 *See, e.g.*, Attorney General Holder Speaks at 100 Black Men of Atlanta Inaugural Members Leadership Summit, *supra* note 6; Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline Conference: Addressing Disparities to Ensure Equal Educational Opportunities, *supra* note 5.

58 Ironically, "many schools enacted zero tolerance policies at least in part due to federal pressure." Statement and Rebuttal of Commissioner Gail Heriot *in* School Discipline Report, *supra* note 27, at 104 n.16 (citing Gun Free Zones Act of 1996, P.L. 104-208, and Department of Education policy declaring that schools would face serious consequences for not stopping sexual harassment between students).

Madness, Deinstitutionalization & Murder

*By Clayton E. Cramer**

For those of us who came of age in the 1970s, one of the most shocking aspects of the last three decades was the rise of mass public shootings: people who went into public places and murdered complete strangers. Such crimes had taken place before, such as the Texas Tower murders by Charles Whitman in 1966,[1] but their rarity meant that they were shocking.

Something changed in the 1980s: these senseless mass murders started to happen with increasing frequency. People were shocked when James Huberty killed twenty-one strangers in a McDonald's in San Ysidro, California in 1984, and Patrick Purdy murdered five children in a Stockton, California schoolyard in 1989. Now, these crimes have become background noise, unless they involve an extraordinarily high body count (such as at Virginia Tech) or a prominent victim (such as Rep. Gabrielle Giffords). Why did these crimes go from extraordinarily rare to commonplace?

For a while, it was fashionable to blame gun availability for this dramatic increase. But guns did *not* become more available before or during this change. Instead, federal law and many state laws became more restrictive on purchase and possession of firearms, sometimes in response to such crimes.[2] Nor has the nature of the weapons available to Americans changed all that much. In 1965, *Popular Science* announced that Colt was selling the AR-15, a semiautomatic version of the M-16 for the civilian market.[3] The Browning Hi-Power, a 9mm semiautomatic pistol with a thirteen-round magazine, was offered for sale in the United States starting in 1954,[4] and advertised for civilians in both the U.S. and Canada at least as early as 1960.[5] If gun availability does not explain the increase of mass public murders, what else might?

At least half of these mass murderers (as well as many other murderers) have histories of mental illness. Many have already come to the attention of the criminal justice or mental health systems before they become headlines. In the early 1980s, there were about two million chronically mentally ill people in the United States, with 93 percent living outside mental hospitals. The largest diagnosis for the chronically mentally ill is schizophrenia, which afflicts about 1 percent of the population, or about 1.5 percent of adult Americans.[6] A 1991 estimate was that schizophrenia costs the United States about $65 billion annually in direct and indirect costs.[7]

The $19 billion in direct costs (as of 1991) included the criminal justice system dealing with a few spectacular and terrifying crimes (such as mass public shootings), and millions of infractions, arrests, and short periods of observation.[8] A 1999 study found that 16.2 percent of state prison inmates, 7.4 percent of federal prison inmates, and 16.3 percent of jail inmates, were mentally ill.[9] As of 2002, about 13 percent of mentally ill state prison inmates nationwide had been convicted of murder.[10] A detailed examination of Indiana murder convicts found that 18 percent were diagnosed with "schizophrenia or other psychotic disorder, major depression, mania, or bipolar disorder."[11]

In the 1960s, the United States embarked on an innovative approach to caring for its mentally ill: deinstitutionalization. The intentions were quite humane: move patients from long-term commitment in state mental hospitals into community-based mental health treatment. Contrary to popular perception, California Governor Ronald Reagan's signing of the Lanterman-Petris-Short Act of 1967[12] was only one small part of a broad-based movement, starting in the late 1950s.[13] The Kennedy Administration optimistically described how the days of long-term treatment were now past; newly-developed drugs such as chlorpromazine meant that two-thirds of the mentally ill "could be treated and released within 6 months."[14]

At about the same time, two different ideas came to the forefront of American progressive thinking: that there was a *right* to mental health treatment, and a *right* to a more substantive form of due process for those who were to be committed to a mental hospital. If there was a right to mental health treatment, then judges could use the threat of releasing patients as a way to force reluctant legislatures to increase funding for treatment.[15]

The notion of due process for the mentally ill was not radical. American courts have been wrestling with this question from the 1840s onward.[16] While perhaps not up to the exacting standards of the American Civil Liberties Union, by the end of the nineteenth century, there was something recognizably like due process before the mentally ill were committed.[17] What changed in the 1960s was the result of ACLU attorneys such as Bruce J. Ennis, who claimed that less than 5 percent of mental hospital patients "are dangerous to themselves or to others" and that the rest were improperly locked up "because they are useless, unproductive, 'odd,' or 'different.'"[18]

Until the 1960s, courts used a medical model when considering commitment: the government's actions were part of "the historic *parens patriae* power, including the duty to protect 'persons under legal disabilities to act for themselves.' . . . The classic example of this role is when a State undertakes to act as 'the general guardian of all infants, idiots, and lunatics.'"[19] Instead, public safety alone became the legitimate basis for commitment, and with it, a more exacting standard, a bit less than is required for convicting criminal defendants.[20]

Neither a right to treatment nor a more demanding application of due process alone was particularly destructive, but in combination they made hundreds of thousands of seriously mentally ill people homeless,[21] where many died of exposure[22] and violence.[23] They fell through the cracks, living shorter,

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more miserable lives, and often greatly degrading the quality of urban life for everyone else.[24] A fraction became something quite a bit more unsettling than the mentally ill person begging on the street or disrupting the public library: they became the mad mass murderers of the modern age.

John Linley Frazier was one of the first such examples. Like many other schizophrenics, he first exhibited symptoms in his early 20s. Fixated on ecology, after a traffic accident he became convinced that God had given him a mission to rid the Earth of those who were altering the natural environment. Frazier's mother and wife recognized how seriously ill he was, and tried to obtain treatment for him, but he refused it.

In October of 1970, Frazier warned them that "some materialists might have to die" in the coming ecological revolution. The following Monday, Frazier murdered "Dr. Victor M. Ohta, his wife, their two young sons, and the doctor's secretary."[25] He blindfolded them, tied them up, shot each of them, and threw them into the pool. Then he burned the house to return it back to the environment. Frazier's bizarre behavior and statements soon led to his arrest. He was found legally sane, convicted, and sentenced to life in prison.[26] (The legal definition of insane is considerably narrower than the psychiatric definition of insane; it also seems that juries sometimes convict even clearly insane defendants, out of fear that they might be released after being declared "cured.")

Patrick Purdy, a mentally ill drifter, used his Social Security Disability payments to buy guns, while having a series of run-ins with the law. After one suicide attempt in jail in 1987, a mental health evaluation concluded that he was "a danger to his health and others."[27] In January 1989, Purdy went onto a schoolyard in Stockton, California with an AK-47 rifle, murdered five children and wounded twenty-nine others, before taking his own life.[28]

Federal prosecutors held back for a few days from indicting Laurie Wasserman Dann in May 1988 for a series of harassing and frightening phone calls—and in those few days, she went on a rampage, killing one child in an elementary school, wounding five children and one adult, and distributing poisoned cookies and drinks to fraternities at Northwestern University. She had a history of odd behavior going back at least two years, riding the elevator in her apartment building for hours on end.[29]

Buford Furrow was a member of a neo-Nazi group in Washington State. Conflicts with his wife led her to take him to a mental hospital, where he threatened suicide and "shooting people at a nearby shopping mall." He threatened nurses with a knife. At trial, he told the judge about his mental illness problems and suicidal/homicidal fantasies. The judge refused to hospitalize Furrow, sending him to jail instead. Released within a few months, Furrow went to Los Angeles in August 1999, where he acted out the fantasy that he had earlier told the court: he shot up a Jewish community center, wounding five people, and murdering an Asian-American mail carrier nearby.[30]

Larry Gene Ashbrook was another killer who gave plenty of warning, writing letters to local papers referring "to encounters with the CIA, psychological warfare, assaults by co-workers and being drugged by police." Neighbors had long noticed his bizarre behavior—exposing himself in response to laughter that he thought (incorrectly) was directed at him. In September 1999, he went into a Fort Worth, Texas Baptist Church. He screamed insults about their religion, then killed seven people inside, before killing himself.[31]

In April 2007, David W. Logsdon of Kansas City, Missouri beat to death a neighbor, Patricia Ann Reed, and stole her late husband's rifle. At the Ward Parkway Center Mall, he shot and killed two people at random, wounding four others.[32] Only the fortuitous arrival of police, who shot Logsdon to death, prevented a larger massacre.

According to Logsdon's sister, Logsdon had a history of mental illness and alcoholism. His family contacted police over Logsdon's deteriorating mental condition and physical conditions in Logsdon's home. The police took Logsdon to a mental hospital for treatment in October 2005, concerned that he was suicidal. He was released six hours later with a voucher for a cab and a list of resources to contact.

In this case, the problem was not that the law prevented Logsdon from being held. Instead, Logsdon's early release was because of a shortage of beds in Missouri public mental hospitals. In addition, Missouri in 2003 had eliminated mental health coordinator positions in its community mental health centers as a cost-cutting measure.[33]

After Russell Eugene Weston Jr. shot two police officers at the U.S. Capitol in 1999, he explained to the court-appointed psychiatrist that he needed to do it because "Black Heva," the "most deadliest disease known to mankind," was being spread by cannibals feeding on rotting corpses. He needed to get into the Capitol "to gain access to what he called 'the ruby satellite,' a device he said was kept in a Senate safe." Weston explained that the two "cannibals" he had shot to death, police officers "Jacob J. Chestnut and John M. Gibson," were "not permanently deceased." Weston explained that he needed access to the satellite controller so that he could turn back time.

Before this incident, Weston had been involuntarily hospitalized for fifty-three days in Montana after threatening a neighbor, but he was then released. According to Weston's parents, he had been losing the battle with schizophrenia for two decades before he went to the Capitol.[34]

An employee of the Postal Service, Jennifer Sanmarco was removed from her Goleta, California workplace in 2003 because she was acting strangely, and placed on psychological disability. She moved to Milan, New Mexico, where her neighbors described her as "crazy as a loon." "A Milan businessman said he sometimes had to pick her up and bring her inside from the cold because she would kneel down and pray, as if in a trance, for hours." She returned to the Goleta mail sorting facility in January 2006—and murdered five employees, before taking her own life.[35]

When I was first writing these paragraphs in April 2007, America was mourning a tragedy at Virginia Tech, where Cho Seung-Hui murdered thirty-two students and faculty before taking his own life. His psychological problems had been evident for some months before, and he was briefly hospitalized after a stalking incident. The special judge appointed to determine whether Seung-Hui should be involuntarily committed concluded that he was a danger to himself—but allowed Seung-Hui to commit himself. The next day, Seung-Hui left the hospital, and soon he was back on campus, living

in a world of paranoid schizophrenia, culminating in the largest gun mass murder in U.S. history.[36]

Many other spectacularly horrifying crimes followed that one. Jiverly Wong murdered thirteen people before killing himself at a Binghamton, New York immigrant-assistance center in April 2009. Letters by Wong to local news media demonstrate what "Dr. Vatsal Thakkar, assistant professor of psychiatry at NYU's Langone Medical Center" described as "major mental illness, quite possibly paranoid schizophrenia."[37]

Rep. Gabrielle Giffords was one of many people shot at a town hall meeting in Tucson in January 2011. The alleged shooter, Jared Lee Loughner, had a history of police contacts involving death threats, and was expelled from college for bizarre actions that clearly established that he was mentally ill. A series of disturbing web postings and YouTube videos also confirmed that Loughner's grasp on reality was severely impaired.[38] Court-ordered psychiatric evaluations concluded that Loughner was suffering from schizophrenia, and was incompetent to stand trial.[39]

Nor were these problems specific to the United States and its "gun culture" as some contend. Other nations which started down the same road toward deinstitutionalization a few years after the United States have suffered many similar mass murders.

In eastern France, Christian Dornier, thirty-one, under treatment for "nervous depression," murdered fourteen people in three villages.[40] He was later found not guilty by reason of insanity.[41] Eric Borel, sixteen, murdered his family with a hammer and a baseball bat, then went on a shooting rampage in the nearby town of Cuers, France in September 1995. He killed twelve people besides himself.[42] In March 2002, Richard Durn murdered eight local city officials and wounded nineteen others in Nanterre, a suburb of Paris. Durn had a master's degree in political science and "a long history of psychological problems." He was chronically unemployed. After his arrest, he was described as "calm but largely incoherent," but then leaped to his death through a window.[43]

In April 2002, nineteen-year old Robert Steinhaeuser went into a school from which he had been expelled in Erfurt, Germany and murdered eighteen people before killing himself.[44] In April 2011, Wellington Menezes de Oliveira went into a school in Rio De Janeiro, Brazil, murdering twelve children, before killing himself. His suicide note was unclear, but a police officer described de Oliveira as a "hallucinating person."[45] Later the same month, Tristan van der Vlis went into a shopping mall in Alphen aan der Rijn, the Netherlands, and shot six people to death. In spite of very strict Dutch gun licensing laws, and van der Vlis's history of mental illness hospitalization and suicide attempts, he had a gun license.[46]

Along with the spectacular cases of public mass murder, there were many minor tragedies involving one-on-one murders, soon forgotten outside the family and friends of their victims. In 1983, the seventeen-year-old daughter of my landlord was murdered in San Francisco's Golden Gate Park. The killer had a long history of mental problems, some of which had sent him to prison, but none of which had caused hospitalization. As so often happens, this tragedy led to another. The continuing legal battles over the killer's sanity soon led the murder victim's grief-stricken father to sneak a gun into the courtroom, and open fire.[47]

Edmund Emil Kemper III was a sexual sadist who killed his paternal grandparents at age fifteen, in an attempt to punish his mother. California hospitalized him until he was twenty-one, and then released him on parole in 1969. Over a bit less than a year, starting in May 1972, Kemper shot, stabbed, and strangled eight women, including his mother. (The rest of what he did is too horrifying to describe.) He repeatedly called the police to persuade them that he was the killer. Eventually, he was arrested, found legally sane, convicted, and sentenced to life in prison.[48]

Herbert William Mullin was another schizophrenic whose illness arrived just as California was deinstitutionalizing its mental patients. Until 1969, just before Mullin's 22nd birthday, it was not obvious that he was mentally ill. Mullin was persuaded to voluntarily enter Mendocino State Hospital, on California's north coast on March 30. Six weeks later, having refused to participate in treatment programs—and under no legal obligation to remain—he left.

Mullin had trouble holding jobs, because he was "hearing voices," which understandably frightened employers. Over several months, he was in and out of mental hospitals in California and Hawaii for brief periods, sometimes voluntarily, sometimes not. On his return to California, his behavior so scared his parents that within thirty miles of the airport, his parents stopped to call the Mountain View Police Department. Mullin was again hospitalized against his will at Santa Cruz General Hospital for a few weeks, and was again discharged, "less noisy and belligerent"—but not well.

Mullin's parents tried to find long-term hospitalization for their son, who was clearly dangerous to others. But California's hospitals were busily emptying out; they were not looking to take new patients. In light of Mullin's history of voluntarily entering, then leaving mental hospitals, it might not have mattered, without an involuntary commitment.

In four months of late 1972 and early 1973, Mullin murdered thirteen people in the Santa Cruz area. Why? Mullin believed that murder prevented the San Andreas Fault from rupturing. Mullin was found legally sane and guilty of ten murders.[49]

While most of these murders involved guns, there were many others that did not. Some are often completely unknown outside the community where they happened because the body count was low. In Rohnert Park, California, a thirty-three-year-old paranoid schizophrenic named Hoyt was arrested outside his mother's home, holding a sword. Inside, his mother lay dying of sword wounds. A relative described the problem: the mental health system can do nothing until a mental patient "becomes a threat to himself or others." Hoyt had stopped taking his medication, and there was nothing that could be done: "'He's over 18, he can't be forced to stay on his medications until something happens. . . . Well, something has happened.'"[50]

In May 1998, San Francisco put twenty-one-year-old Joshua Rudiger on probation and ordered him to enter a live-in treatment center in San Francisco after shooting a former friend with a bow and arrow. Authorities knew that Rudiger was mentally ill; he had been confined to Atascadero State Hospital

for six months, diagnosed as suffering from schizophrenia and bipolar disorder—and then declared cured, and able to stand trial for the bow and arrow incident.

Rudiger never showed up at the treatment center, nor did anyone go looking for him. In one of the more disturbing understatements of the day, Carmen Bushe, the head of community services for San Francisco's Probation Department observed, "It's perhaps not necessarily a cohesive system." When Rudiger next came to the attention of police, it was for slashing the throats of four homeless people, killing one, and drinking the blood of the others.[51] When arrested, Rudiger told police that he was a 2600-year-old vampire. Yet the jury concluded that he was legally sane, because he knew what he was doing, and he knew it was wrong. Rudiger was sentenced to twenty-three years to life.

Rudiger's mental problems started at age four.[52] But others were people who made it to adulthood before mental illness appeared. Richard Baumhammers was an immigration attorney—and yet something went wrong sometime in his 20s, when he became convinced that someone had poisoned him on a trip to Europe. He "had been treated since 1993 for mental illness and had voluntarily admitted himself to a psychiatric ward at least once . . . ." When the final break happened, he killed five people.[53] A jury found him legally sane, and convicted him of first-degree murder. The court sentenced Baumhammers to death.[54]

In 1986, Juan Gonzalez was arrested for shouting threats on the street, "I'm going to kill! God told me so!" Doctors diagnosed him with a "psychotic paranoid disorder," gave him some antipsychotic medicines to take, made an appointment for outpatient treatment, and released him after two days. Within a few days he went on a rampage on the Staten Island Ferry with a sword, killing two people, and wounding nine. If not for the presence of a retired police officer who disarmed Gonzalez at gunpoint, the death toll might have been much higher.[55]

Gonzalez was finally considered too dangerous to release, and the courts ordered his involuntary commitment to a mental hospital. He repeatedly contested his commitment. In March 2000, the courts granted Gonzalez unsupervised leave from the hospital, with a number of conditions on his actions for five years.[56]

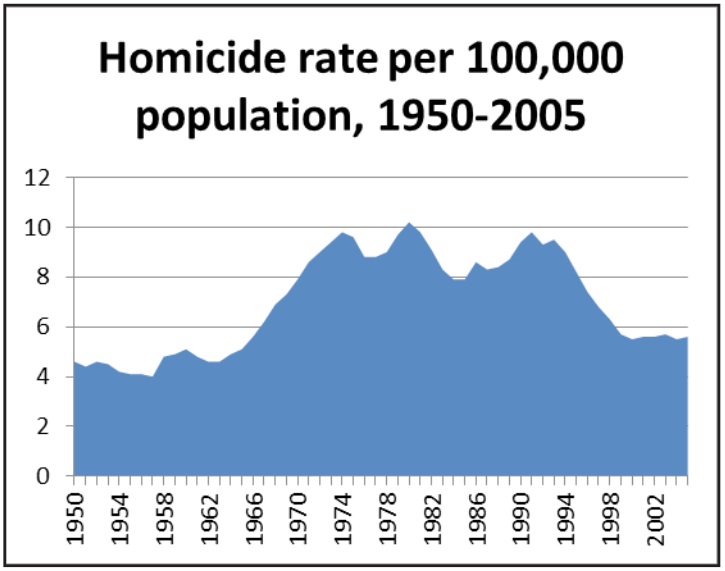
When *The New York Times* did a detailed study of 100 U.S. rampage killers in 2000, they pointed out that there was often plenty of warning:

> Most of them left a road map of red flags, spending months plotting their attacks and accumulating weapons, talking openly of their plans for bloodshed. Many showed signs of serious mental health problems.
>
> . . .
>
> The Times' study found that many of the rampage killers… suffered from severe psychosis, were known by people in their circles as being noticeably ill and needing help, and received insufficient or inconsistent treatment from a mental health system that seemed incapable of helping these especially intractable patients. . . .

The *Times* found what it called "an extremely high association between violence and mental illness." Of the 100 rampage murderers, forty-seven "had a history of mental health problems" before committing murder, twenty had been previously hospitalized for mental illness, and forty-two had been previously seen by professionals for their mental illness. While acknowledging that mental illness diagnoses "are often difficult to pin down . . . 23 killers showed signs of serious depression before the killings, and 49 expressed paranoid ideas."[57]

There is no shortage of these tragedies that have one common element: a person whose exceedingly odd behavior, sometimes combined with minor criminal acts, would likely have led to confinement in a mental hospital in 1960. After deinstitutionalization, these people remained at large until they killed. The criminal justice system then took them out of circulation (if they did not commit suicide), but this was too late for their victims.

There is a clear statistical relationship between deinstitutionalization and murder rates. Violent crime rates rose dramatically in the 1960s, most worrisomely in the murder rate.[58]



One explanation for this doubling of murder rates from 1957 to 1980 is that the Baby Boomers (the children born in the ten years after World War II) were reaching their peak violent crime years of adolescence. Some conservatives blamed the civil liberties revolution of the Warren Court for rendering the criminal justice system impotent to deal with crime, and the expansion of drug abuse by the Flower Power generation of the 1960s. This fails to answer what caused the decline in violent crime—and specifically murder—in the 1990s. This was variously ascribed to the Baby Boom Echo generation passing out of its peak violent crime years, and to increasingly tough sentencing for violent crimes.

According to Professor Bernard E. Harcourt, sociologists examining the expansion of imprisonment in the 1990s—the so-called "incarceration revolution"—missed the even more important component of institutionalization: mental hospitals. When adding mental hospital inmates to prisoners, there is an astonishingly strong negative correlation between the institutionalization rate, and the murder rate: "The correlation

between the aggregated institutionalization and homicide rates is remarkably high: -0.78." Harcourt found that even when adjusting for changes in unemployment and the changing fraction of the population that was at their peak violent crime ages, the negative correlation remained strong—and did a better job of predicting both the 1960s rise and the 1990s decline in murder rates than other models.[59] Similar results appear when using state level data for institutionalization and murder rates, and controlling for more variables.[60]

It is easy to see why the deinstitutionalization of the mentally ill would cause a rise in violent crime rates, including murder. When Massachusetts opened Worcester Hospital in the early nineteenth century, the law limited its admissions to "the violent and furious." Dr. Samuel B. Woodward, the hospital's first superintendent, noted that "More than half of those manifesting monomania and melancholia [roughly equivalent to paranoid schizophrenia and psychotic bipolar disorder in modern terms] are said to exhibit a propensity to homicide or suicide."[61] The opening of state asylums in Vermont in 1836 and New Hampshire in 1840 "contributed to the decline in . . . spouse and family murders during the 1850s and 1860s."[62] Accounts of mass murder (usually involving families killed by mentally ill members) appear often enough in this period to understand why concerns about insanity could lead to hospitalization.[63]

Curiously, during the period before deinstitutionalization, the mentally ill seem to have been *less* likely to be arrested for serious crimes than the general population. Studies in New York and Connecticut from the 1920s through the 1940s showed a much lower arrest rate for the mentally ill.[64] In an era when involuntary commitment was relatively easy, those who were considered a danger to themselves or others would be hospitalized at the first signs of serious mental illness. The connection between insanity and crime was apparent,[65] and the society took a precautionary approach. Mentally ill persons who were not hospitalized were those not considered a danger to others. This changed as deinstitutionalization took effect.

As early as 1976, studies of deinstitutionalized New York City mental patients showed that they had disproportionate arrest rates for rape, burglary, and aggravated assault.[66] A study of San Mateo County, California mental hospital patients also showed disproportionate arrest rates for murder, rape, robbery, aggravated assault, and burglary: for murder, 55 times more likely to be arrested in 1973, and 82.5 times more likely in 1972. Mental patients were about nine times more likely to be arrested for rape, robbery, aggravated assault, and burglary than the general population of the county.[67] Even patients with no pre-hospitalization arrests were five times as likely to be arrested for violent crimes as the general population.[68] Studies in Denmark and Sweden similarly show that psychotics are disproportionately violent offenders.[69] Recent surveys in the United States also show that "violence and violent victimization are more common among persons with severe mental illness than in the general population."[70]

One recent study arguing otherwise suggests that mental illness alone is not the cause, but one of several risk factors that in combination increase violence rates. Mental illness and substance abuse seem to be an especially dangerous combination.[71] It is important to remember that even though the mentally ill are a disproportionately violent population, most of this population is primarily a threat to themselves.[72]

Deinstitutionalization created a revolving door, in which those who committed minor crimes might be briefly held for observation, but were then again released to the community. Once a mentally ill offender ends up in the criminal justice system for the most serious crimes, such as murder or rape, sympathy for their mental illness declines quite dramatically. As some of the examples given above demonstrate, juries and judges often find people who were clearly mentally ill to be legally sane.

Deinstitutionalization played a substantial role in the dramatic increase in violent crime rates in America in the 1970s and 1980s. People who might have been hospitalized in 1950 or 1960 when they first exhibited evidence of serious mental illness today remain at large until they commit a serious felony. The criminal justice system then usually sends these mentally ill offenders to prison, not a mental hospital.

The result is a system that is bad for the mentally ill: prisons, in spite of their best efforts, are still primarily institutions of punishment, and are inferior places to treat the mentally ill. It is a bad system for felons without mental illness problems, who are sharing facilities with the mentally ill, and are understandably afraid of their unpredictability. It is a bad system for the victims of those mentally ill felons, because in 1960, a mentally ill person was much more likely to have been hospitalized before victimizing someone else. It is a bad system for the taxpayers, who foot the bill for expensive trials and long prison sentences for the headline tragedies, and hundreds of thousands of minor offenses, instead of the much less expensive commitment procedures and perhaps shorter terms of treatment.

Deinstitutionalization of the mentally ill was one of the truly remarkable public policy decisions of the 1960s and 1970s, and yet its full impact is barely recognized by most of the public. Partly this was because the changes did not happen overnight, but took place state-by-state over two decades, with no single national event. While homelessness received enormous public attention in the early 1980s, the news media's reluctance to acknowledge the role that deinstitutionalization played in this human tragedy meant that the public safety connection was generally invisible to the general public. The solution remains unclear, but recognizing the consequences of deinstitutionalization is the first step.

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Mexico's Federal Law of Firearms and Explosives

*By David B. Kopel**

Introduction

In recent years, gun control has become an important international issue. For example, some persons have claimed that the gun laws in the United States are responsible for the many homicides perpetrated in Mexico's drug war.[1] The Organization of American States has proposed a gun control treaty for the western hemisphere, which President Obama has urged the U.S. Senate to ratify.[2] Currently, the United Nations General Assembly is drafting an international Arms Trade Treaty.[3] In contrast to the Bush Administration, the Obama Administration has announced its support for the treaty.

Accordingly, scholars, policy-makers, and concerned citizens around the world are seeking to better understand the gun control laws in different nations. And of course Americans, who often visit Mexico, have an especially important need to understand Mexico's laws.[4]

Although Mexico, like the United States and Switzerland, has a federal system of government, gun control laws in Mexico are set by the national government.

Part I of this Article is an English translation of the Mexican Constitution's guarantee of the right to arms, as well as predecessor versions of the constitutional guarantee.

Part II explains the operation of Mexico's gun control system, and provides some historical and statistical information about gun ownership in Mexico, and gun smuggling.

I. Constitution of Mexico

Like some other nations in the region,[5] Mexico in its constitution guarantees the personal right to arms:

> Article 10. The inhabitants of the United Mexican States have a right to arms in their homes, for security and legitimate defense, with the exception of arms prohibited by federal law and those reserved for the exclusive use of the Army, Navy, Air Force, and National Guard. Federal law will determine the cases, conditions, requirements, and places in which the carrying of arms will be authorized to the inhabitants.[6]

The above language is a revision of the 1917 Constitution, which stated:

> Article 10: The inhabitants of the United Mexican States are entitled to have arms of any kind in their possession for their protection and legitimate defense, except such as are expressly forbidden by law, or which the nation may reserve for the exclusive use of the army, navy, or national guard; but they may not carry arms within inhabited places without complying with police regulations.[7]

The current version replaced "are entitled" with "have a right," but the right is now limited to the home.

In the 1857 Constitution, there was an explicit right to carry:

> Article 10: Every man has the right to have and to carry arms for his security and legitimate defense. The law will indicate which arms are prohibited and the penalty for those that will carry prohibited arms.[8]

The later versions, besides eliminating the right to carry, phrased the right in gender-neutral language.

II. Mexican Federal Law of Firearms and Explosives

A. Background and Summary of the Law

In the middle of the twentieth century, Mexico was a popular hunting destination for Americans, and Mexican hunters invented a new shooting sport. "Silhouette shooting"—shooting at metal silhouette targets in the shape of game animals—originated in Mexico in the early 1950s. Mexican hunters were looking for ways to sharpen their eyes between hunting seasons, and so began shooting at live animals which had been placed on a high ridgeline, visible in silhouette from hundreds of yards away. Whoever shot the animal would win a prize. American hunters near the Mexican border—most notably the Tucson Rifle Club—adopted the sport, but used life-sized metal targets instead—hence the sport's name of *Siluetas Metalicas*.[9]

In Mexico as in the United States, civil unrest in 1968 led to important new restrictions on firearms. Before then, many types of rifles, shotguns and handguns were freely available. Anti-government student movements, however, scared the government into closing firearms stores, and registering all weapons. The rate of compliance with the registration has been very low.

The most important gun laws are contained in the Federal Law of Firearms and Explosives (*Ley Federal de Armas de Fuego y Explosivos*). The law establishes a Federal Arms Registry controlled by the Ministry of National Defense.

1. Types of Guns

Article Two of the Federal Law of Firearms allows possession and carrying of handguns (*pistolas*) in calibers of .380 or less, although some calibers are excluded, most notably .357 magnum and 9mm parabellum. Shotguns (*escopetas*) are permitted in 12 gauge or smaller. Rifles (same word in English and Spanish) are also permitted, in .30 caliber or smaller.

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2. The Permitting System

Gun permits, for a one-year term, are issued by the military department of defense, SEDENA (*Secretaría de la Defensa Nacional*). The SEDENA subdivision in charge of gun licensing is the *Dirección General del Registro Federal de Armas de Fuego y Control de Explosivos*.[10] In Mexico, the military plays a leading role in domestic law enforcement.

An applicant must belong to a shooting club in order to obtain a permit. If he does, it is straightforward to obtain a permit to own one handgun for home protection.

A person may, in theory, obtain a permit for up to 10 firearms. All guns must be registered with the Ministry of National Defense within 30 days of acquisition. Licensees may only buy ammunition for the caliber of gun for which they are licensed.

To apply for a permit, a person must go to the nearest military base. The military is legally required to issue or reject a license within 50 days of the application. A license applicant must be at least 18 years old, must have fulfilled any obligation of military service, must have the physical and mental capacity to use firearms safely, have no criminal convictions involving firearms, must not be a consumer of drugs, and must have an "upright" way of life.

There is only one firearms store, UCAM (*Unidad de Comercialización de Armamento y Municiones*). It is owned and operated by the military, and located in Mexico City.

Private sales of long guns are legal, but the buyer must register the gun within 30 days with the military's arms registry.

By police fiat, possession of firearms above .22 caliber is severely restricted.

A separate license is necessary for the transportation of firearms. Guns in transit must be unloaded and contained in a case.

A special permit for collectors allows the possession of more guns, including military-caliber firearms. The military police frequently inspect gun collectors, to ensure that the arms are stored so as to prevent theft.

The grounds for issuing a carry permit are: a need due to occupation or employment; special circumstances related to one's place of residence; or other reasonable grounds. A carry permit applicant must also post a bond, and must supply five character references. Farmers and other rural workers are allowed (in theory at least) to carry legal handguns, .22 caliber rifles, and shotguns, as long as they stay outside of urban areas, and obtain a carry license.

But in practice, carry licenses are restricted to the wealthy and the politically connected.[11] In a nation of 105 million people, there are only 4,300 carry licenses.

Temporary gun licenses for sporting purposes may be issued to tourists by Mexican Embassies or Consulates. Mexican law provides penalties of 5 to 30 years in prison for tourists who attempt to bring a firearm, or even a single round of ammunition, into Mexico without prior permission. In the past, the law was enforced stringently, even in cases where the violation was accidental, such as a Texan who drove across the border for dinner, and forgot that there was some ammunition in his car.[12] In December 1998, however, the Mexican Congress enacted legislation relaxing the law for first-time, unintentional violations involving only a single gun. Now, first-timers will be fined $1,000, but not imprisoned. The exemption does not apply for military weapons or prohibited calibers.

In Mexico, there are no shooting ranges open to the general public. Nor is there any public land for hunting. As a result, the only persons who can hunt are those who can afford to pay an outfitter, or are friends with a landowner.

The *Small Arms Survey*, an international gun control think tank based in Geneva, estimates that there are about 15,500,000 total firearms in civilian hands in Mexico,[13] but acknowledges that the size of the civilian gun stock is very murky.[14] About 5,000,000 guns are legally registered.

B. The Cross-Border Trade in Arms

Like the Fourth of July, Cinco de Mayo is closely connected to American guns. The French Emperor Napoleon III, after assuming dictatorial powers in France, began looking for more nations to rule, and so in 1862, he invaded Mexico. Although defeated at the Battle of Puebla on May 5, he eventually deposed Mexico's President Benito Juárez. Napoleon III proclaimed the Austrian prince Maximilian von Habsburg as Emperor of Mexico. In northern Mexico, Juárez gathered an army of resistance. The United States was a crucial source of arms for the Mexican nationalists. They procured one thousand .44 caliber short rifles (Winchester Model 1866 carbines), as well as 500 rounds of ammunition for every gun. Inscribed with the initials "R.M." (República de México), the Winchesters are now valuable collector items. They helped the Mexican people win the war, remove the puppet government of Napoleon III, and re-establish the Mexican republic. The victory is commemorated every year on the fifth of May.

Today, however, some American guns play a harmful role in Mexico. The United States government is currently providing extensive assistance to the Mexican government to help Mexico deal with the problem of violent *narcotraficantes.* At present, Mexico suffers from a tremendous homicide problem, resulting from Mexican President Felipe Calderón's escalation of the drug war. From 2007 to 2008, drug war homicides rose over one hundred percent, to 5,612.[15] While most of the fatalities are the *narcotraficantes* themselves—killed by the police or by gang rivals—innocent civilians and police have also been killed. As a Congressional Research Service report explained: "[T]he government's crackdown, as well as turf wars among rival DTOs [drug trafficking organizations], has fueled an escalation in violence throughout the country, including states along the U.S.-Mexico border."[16]

During the Clinton Administration, the U.S. Bureau of Alcohol, Tobacco, and Firearms (BATF) initiated a program called Operation Forward Trace.[17] United States law requires that licensed firearms dealers keep registration forms (Federal Form 4473) of their customers. Especially targeting gun buyers with Hispanic names, BATF examined the 4473 forms for federally-licensed firearms dealers in southwestern states, and then investigated the customers. BATF paid particular attention to customers who had purchased self-loading rifles or low-cost handguns. (In late 2001, the Bureau's name was

changed to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE).)

A few months after George W. Bush became President, the Mexican and American Attorneys General unveiled a joint program under which Mexican law enforcement officials could ask the BATFE to conduct computerized traces of guns that had been seized by Mexican law enforcement. That program is now known as "Project Gunrunner," and is operated by American law enforcement officials in Mexico and in American border states.[18]

Project Gunrunner has become part of the Mérida Initiative, by which the U.S. government provides extensive financial support to law enforcement organizations in the Central America, with the bulk of the funds going to Mexico. Most of the Mérida money is used to purchase equipment.

Another cooperative Mexican-American project is operation Armas Cruzadas, in which several American law enforcement agencies[19] work with their Mexican counterparts to interdict arms smugglers. In addition, United States anti-drug programs are also tasked with preventing gun-running into Mexico.[20]

One more anti-smuggling program is a joint effort of the federal BATFE and the National Shooting Sports Foundation (the trade association for the American firearms industry). "Don't Lie for the Other Guy" trains firearms store owners and employees how to spot "straw purchasers." A straw purchaser is someone with a clean record who can legally buy guns, but who is illegally buying the gun on behalf of an ineligible person—such as a boyfriend with a felony conviction, or an arms smuggler.[21]

C. The Supply of Illegal Guns in Mexico

An oft-repeated claim is that 90% of Mexican crime guns come from the United States. The more accurate statement would be that the Mexican police choose to give a selected minority of seized firearms to the United States BATFE offices in Mexico, and of those guns that are turned over the BATFE, a high percentage are traced to the United States, in the sense that the guns were at one point manufactured or sold in the United States.[22] This does not mean that the guns were necessarily sold in the civilian United States market; for example, a gun might have been lawfully sold to a Mexican police agency and then stolen. Or the gun might have been manufactured for U.S. Army use during the Vietnam War, later captured by the communist government which currently rules Vietnam, and then exported on the international black market.

One reason that a Mexican crime gun would not be turned over to the BATFE for tracing is that the gun has no manufacturer mark or serial numbers, so a trace would be impossible. Under long-standing U.S. law, any firearm manufactured in the United States for sale must have a serial number and manufacturer mark. However, in China, the firearms manufacturing companies (which are run by former military officers, and function as a profit center for the People's Liberation Army and its business network) have produced many guns with no markings at all, or with only a simple country identification but no serial number or manufacturer name. These guns show up in very large quantities in the international black market, which supplies warlords, dictators, drug gangs, and other international rogues.

Sometimes, the Mexican government itself refuses to allow BATFE to trace guns. In 2008, Mexican police in Reynosa, a border town near the southern tip of Texas, made the largest weapons seizure in Mexican history: 288 "assault rifles," 428,000 rounds of ammunition, 287 grenades, and a grenade launcher.[23] BATFE asked to see the serial numbers on the guns in order to trace them; the Mexican government refused.[24]

At other times, an initial trace may be successful, but further investigation is thwarted. February 15, 2007, was "Black Thursday" in Mexico—the day that drug gangsters in central Mexico murdered four law enforcement officers.

BATFE traced the murder weapons to a gun store in Laredo, Texas, and found the man who had purchased the guns. He asserted that he had sold them to a total stranger whom he met at a shooting range. While BATFE wanted to investigate further and discover the trafficking network that had delivered the guns to the murderers, the Mexican government blocked the investigation. According to the *San Antonio Express-News*:

> [T]he ATF wouldn't get much from their Mexican counterparts, who imposed an almost total information blackout about the arrests of 14 suspects, including the alleged shooters. Not even the four widows know what happened to their husbands' alleged killers. The mystery extends to local journalists and municipal police, who are told only the arrested are still in prison but not tried. And, federal authorities have so far refused Express-News interview requests to discuss the case.
>
> The ATF's Elias Bazan, who oversaw the Laredo office at the time, said Mexico's investigators squandered an opportunity to provide the results of their interrogations and any evidence, outside of the guns' serial numbers, that would point to how the weapons were smuggled from the Laredo side.
>
> "We don't have anything from the Mexican government, so we're screwed," Bazan said of his Laredo investigation, which was shut down as a result.[25]

It seems apparent that some narcos have smuggling networks which are protected by corrupt Mexican government officials.

The evidence also indicates that there are major weapons sources unrelated to the United States civilian market. In 2007-08, the Mexican government confiscated almost two thousand hand grenades—weapons which are certainly not sold at U.S. gun stores or gun shows. Also seized by the Mexican government were rocket-propelled grenade launchers, rocket launchers, and anti-tank weapons—all of them arms which appear to have been diverted from military stocks, and none of which can be bought in American stores.[26]

After investigating the Mexican black market in arms, reporters William La Jeunesse and Maxim Lott summarized the sources of narco weapons:

> —The Black Market. Mexico is a virtual arms bazaar, with fragmentation grenades from South Korea, AK-47s from China, and shoulder-fired rocket launchers from Spain, Israel, and former Soviet bloc manufacturers.

—Russian crime organizations. Interpol says Russian Mafia groups such as Poldolskaya and Moscow-based Solntsevskaya are actively trafficking drugs and arms in Mexico.

—South America. During the late 1990s, the Revolutionary Armed Forces of Colombia (FARC) established a clandestine arms smuggling and drug trafficking partnership with the Tijuana cartel, according to the Federal Research Division report from the Library of Congress.

—Asia. According to a 2006 Amnesty International Report, China has provided arms to countries in Asia, Africa, and Latin America. Chinese assault weapons and Korean explosives have been recovered in Mexico.

—The Mexican Army. More than 150,000 soldiers deserted in the last six years, according to Mexican Congressman Robert Badillo. Many took their weapons with them, including the standard issue M-16 assault rifle made in Belgium.

—Guatemala. U.S. intelligence agencies say traffickers move immigrants, stolen cars, guns, and drugs, including most of America's cocaine, along the porous Mexican-Guatemalan border. On March 27, La Hora, a Guatemalan newspaper, reported that police seized 500 grenades and a load of AK-47s on the border. Police say the cache was transported by a Mexican drug cartel operating out of Ixcan, a border town."[27]

Professor George W. Grayson, author of the book Mexico's Stuggle with "Drugs and Thugs" calls the 90% factoid a "wildly exaggerated percentage," which is being pushed by President Calderón for purposes of domestic Mexican politics.[28]

In any case, the profits of the Mexican drug cartels are estimated to be twenty-five billion dollars a year—or about two percent of Mexico's gross domestic product.[29] The Mexican government estimates that the gross revenues of weapons trafficking into Mexico are twenty-two million dollars per year.[30] In other words, weapons acquisition costs the drug cartels only about one percent of annual profits, and a tiny fraction of gross revenues. Accordingly, the cartels appear to have substantial extra revenue to spend on buying weapons, should law enforcement successes result in an increase in the black market price of arms.

For the full article, visit SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588296.

Endnotes

1 *E.g.*, Stephen Dinan, *Obama Blames U.S. Guns in Mexico*, Wash. Times, Apr. 17, 2009.

2 The treaty is commonly known as "CIFTA," for its Spanish acronym, *Convención InteramericanaContra La Fabricación Y El Tráfico Ilícitos De Armas De Fuego, Municiones, Explosivos Y OtrosMateriales Relacionados*. The document is called a "Convention" rather than "Treaty," because "Convention" is a term of art for a multilateral treaty created by a multinational organization.

3 U.N. Office for Disarmament Affairs, Towards an Arms Trade Treaty, *available at* http://www.un.org/disarmament/convarms/ArmsTradeTreaty/html/ATT.shtml (last visited Oct. 5, 2009).

4 The nation's formal name is *Estados Unidos Mexicanos*.

5 For other nations, see Guatemala Constitución art. 38 (*Tenencia y portación de armas. Se reconoce el derecho de tenencia de armas de uso personal, no prohibidas por la ley, en el lugar de habitación. No habrá obligación de entregarlas, salvo en los casos que fuera ordenado por el juez competente. Se reconoce el derecho de portación de armas, regulado por la ley.*) ("Possession and carrying of arms. The right of possession of arms for personal use is recognized, not prohibited by the law, in the home. There will be no obligation to surrender them, save in cases that are ordered by a competent judge. The right of carrying of arms is recognized, and regulated by the law."); Constitution de la République d'Haïti art. 268-1 (*Tout citoyen a droit à l'auto-défense armée, dans les limites de son domicile mais n'a pas droit au port d'armes sans l'autorisation expresse et motivée du Chef de la Police*) ("Every citizen has the right to armed self defense, within the bounds of his domicile, but has no right to bear arms without express well-founded authorization from the Chief of Police."); U.S. Const. amend. II ("A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

6 The official text in Spanish reads:

> *Artículo 10. Los habitantes de los Estados Unidos Mexicanos tienen derecho a poseer armas en su domicilio, para su seguridad y legítima defensa, con excepción de las prohibidas por la Ley Federal y de las reservadas para el uso exclusivo del Ejército, Armada, Fuerza Aérea y Guardia Nacional. La ley federal determinará los casos, condiciones, requisitos y lugares en que se podrá autorizar a los habitantes la portación de armas.*

Available at http://pdba.georgetown.edu/Constitutions/Mexico/textovigente2008.pdf.

7 As enacted in 1917, Article 10 stated:

> *Artículo 10: Los habitantes de los Estados Unidos Mexicanos tienen derecho a poseer armas en su domicilio, para seguridad y legítima defensa, con excepción de las prohibidas por la ley federal y de las reservadas para el uso exclusivo del Ejército, Armada, Fuerza Aérea y Guardia Nacional. La ley federal determinará los casos, condiciones, requisitos y lugares en que se podrá autorizar a los habitantes la portación de armas.*

Available at http://www.georgetown.edu/pdba/Constitutions/Mexico/mexico1917.html.

8 The 1857 version:

> *Artículo 10: Todo hombre tiene derecho de poseer y portar armas para su seguridad y legítima defensa. La ley señalará cuáles son las prohibidas y la pena en que incurren los que las portaren.*

Available at http://www.juridicas.unam.mx/infjur/leg/conshist/pdf/1857.pdf.

9 The sport originally used high-power rifles to shoot at metal silhouettes of wild chickens, javelinas, turkeys, sheep, and other game. In the 1970s, the National Rifle Association put silhouette shooting into its competition schedule, and created separate classes for smallbore rifle, air rifles, and both smallbore and centerfire handguns. This allowed the competitions to take place on much smaller ranges than the 500 meter ranges which had been standard for the high-power event. Since then, the sport has spread worldwide, and many competitive shooters specialize in silhouette competition. *Siluetas Metalicas* remains the proper name for silhouette shooting with high-power rifles (6mm and up).

10 The starting web page for the military's gun licensing program is available at http://www.sedena.gob.mx/index.php?id=121.

11 An applicant may appeal a denial to the District Court, although the prospects for success are nil.

12 *See* United States v. Bean, 537 U.S. 77(2002) (A licensed American firearms dealer, who resided in Laredo, Texas, spent the day working at a gun show, and later drove to dinner in Nuevo Laredo, Mexico; he had told his employees to remove all arms and ammunition from his car, but the employees missed one box of shotgun shells. Bean was convicted of a felony and served prison time in Mexico.). At the time, United States law was interpreted to prohibit arms possession by persons convicted in foreign courts of felonies. Federal law also provided an administrative procedure for the restoration of firearms rights by persons whom the Bureau of Alcohol, Tobacco, and Firearms deemed to be suitable to possess arms. 18 U.S.C. § 925(c). However, since 1992, Congress has prohibited BATF from expending appropriations to make determinations on restoration of rights. In *Bean*, the Supreme Court majority held that BATF's inability to process Bean's application for a restoration of rights did not amount

to a "denial" which would allow a federal court to review BATF's decision, and then to decide that Bean's rights should be restored.

Several years later, the Supreme Court ruled that the federal ban on arms possession by a person convicted of a felony in "any court" should not be read as encompassing foreign courts. Small v. United States, 544 U.S. 385 (2005); 18 U.S.C. § 922(g)(1).

13 Small Arms Survey 2007: Guns and the City 47, *available at* http://www.smallarmssurvey.org/files/sas/publications/yearb2007.html. The Small Arms Survey is a research institution at the Graduate Institute of International Studies, in Geneva, Switzerland.

14 Small Arms Survey 2003: Development Denied 87, *available at* http://www.smallarmssurvey.org/files/sas/publications/yearb2003.html (Brazil's civilian gun stock is large but unknown; "The same may be true of Mexico, but even less is known about the situation there.").

15 *Bush Says America Should Work to Stop Guns from Entering Mexico from U.S*. Cybercast News Service, Jan. 14, 2009, http://cnsnews.com/public/content/article.aspx?RsrcID=41937; Kristin Bricker, *Mexico's Drug War Death Toll: 8,463 And Counting*, Narcosphere, Dec. 31, 2008, http://narcosphere.narconews.com/notebook/kristin-bricker/2008/12/mexicos-drug-war-death-toll-8463-and-counting.

16 Congressional Research Service, *Merida Initiative for Mexico and Central America: Funding and Policy Issues* 2 (Apr. 19, 2010) *available at* http://assets.opencrs.com/rpts/R40135_20100419.pdf.

17 In 2001 the BATFE was moved from the Department of the Treasury to the Department of Justice.

18 Congressional Research Service, *The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF): Budget and Operations* (May 30, 2008), http://www.fas.org/sgp/crs/row/RL32724.pdf.

19 On the American side, *Armas Cruzadas* is led by the Immigration and Customs Enforcement (ICE), with assistance from Customs and Border Protection (CBP), BATFE, and the Drug Enforcement Administration (DEA).

20 These include the 2007 Southwest Border Counternarcotics Strategy, the 2008 National Drug Control Strategy, and the 2007 U.S. Strategy for Combating Criminal Gangs from Central America and Mexico.

21 The federal law prohibiting straw purchase is 18 U.S.C. § 922(g) & (n).

22 William La Jeunesse & Maxim Lott, *The Myth of 90 Percent: Only a Small Fraction of Guns in Mexico Come From U.S.*, FOXNews.com, Apr. 2, 2009, http://www.foxnews.com/politics/elections/2009/04/02/myth-percent-guns-mexico-fraction-numberclaimed/. For additional analysis, see Scott Stewart, *Mexico's Gun Supply and the 90 Percent Myth*, Stratfor.com, Feb. 10, 2011, *available at* http://www.stratfor.com/weekly/20110209-mexicos-gun-supply-and-90-percent-myth.

23 Jo Tuckman, *Mexico Considers Banning Toy Guns to Cut Child Aggression*, Guardian (London), Jan. 12, 2009.

24 Todd Bensman, *Gunrunners' Land of Plenty,* Express-News (San Antonio), Nov. 30, 2008. The *Guardian* article in the previous footnote mentions the Reynosa seizure, and is more precise in describing what was seized than in the *Express News* article, so it was used for the item inventory.

25 *Id.* In the late 1980s, the BATF started using the three-letter abbreviation "ATF" for itself, in an attempt to mimic the more-prestigious FBI and DEA and their three-letter abbreviations.

26 Stewart M. Powell, Dudley Althaus & Gary Martin, *Obama Vows Action of Flow of Guns into Mexico: He Pledges to Help Stem Violence Related to Drug Gangs*, Houston Chron., Jan. 13, 2009; Jonathan Roeder & Jorge Alejandro Medellín, *U.S. Arms Fuel Drug Violence on Border*, Universal (Mexico City), Aug. 3, 2005, http://www2.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=11425&tabla=miami.

27 **La Jeunesse & Lott,** *supra* note 22. **A report by the U.S. Government** Accountability Office suggested that the 90% figure might be correct. *See* Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges 16 (GAO-09-709, Government Accountability Office, June 2009). The report theorized that because most gun seizures take place in northern Mexico, most of the guns must come from the United States. The hypothesis overlooks the possibility that the gangster guns, coming from a variety of sources, are moved to northern Mexico by the gangsters, because northern Mexico is the region where the gangsters are most active, as northern Mexico is the launching point for the trafficking of drugs and persons into the United States. The GAO report is critiqued in Stewart, *supra* note 22.

28 Washington Diplomat, June 2009, at 14.

29 The United States and Mexico: Towards a Strategic Partnership (Wilson Center, Mexico Institute, Jan. 2009).

30 Dudley Althaus, *Obama to Help Mexico Cut Drug Violence*. Express News, Jan. 13, 2009.

Criminal Law & Procedure

Can Someone Please Turn on the Lights? Bringing Transparency to the Foreign Corrupt Practices Act

*By Michael B. Mukasey and James C. Dunlop**

Note from the Editor:

This paper assesses the Department of Justice's authority under the Foreign Corrupt Practices Act. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. The Federalist Society seeks to foster further discussion and debate about the FCPA. To this end, we offer links below to different sides of this issue and invite responses from our audience. To join the debate, you can e-mail us at info@fed-soc.org.

Related Links:

- The United States Department of Justice, Foreign Corrupt Practices Act: http://www.justice.gov/criminal/fraud/fcpa/
- The FCPA Blog: http://www.fcpablog.com/
- The United States Department of Justice, Laypersons Guide to FCPA: http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf
- Statement of Greg Andres, Acting Deputy Assistant Attorney General, Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, on the "Foreign Corrupt Practices Act," June 14, 2011: http://judiciary.house.gov/hearings/pdf/Andres06142011.pdf
- Statement of George Terwilliger, White & Case LLP, Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, on the "Foreign Corrupt Practices Act," June 14, 2011: http://judiciary.house.gov/hearings/pdf/Terwilliger06142011.pdf
- PricewaterhouseCoopers Roundtable Discussion, Navigating Dangerous Waters: FCPA: Managing International Business and Acquisition Compliance Risk: http://www.pwc.com/us/en/foreign-corrupt-practices-act/assets/fcpa_managing_risk.pdf

Passed in 1977, the Foreign Corrupt Practices Act ("FCPA") set out to achieve a laudable goal: to prevent U.S. companies and persons, when conducting business abroad, from corrupting the governments and people they meet. And who can argue with the notion that U.S. companies should not corrupt the governments of countries where they do business or worsen the prospects for citizens of countries whose governments are already corrupt?

Unfortunately, that unobjectionable vision has virtually disappeared in a miasma of aggressive prosecutions by the Justice Department—with $2.95 billion in penalties collected since 2009.[1] The FCPA is almost never litigated in court. Public companies are the typical FCPA target, and such defendants are rarely positioned to litigate criminal charges,[2] or even risk indictment, given (among other things) the substantial risk of federal contract debarment in many industries.[3] The same is often true for individuals, most of whom face substantial prison time if convicted and who are thus unwilling to hang their hopes on uncertain interpretive arguments. As a result, the FCPA has had almost no judicial oversight, with the result that corporations trying to comply with its mandates find they are fighting corruption in the dark, their quest for standards confined to making mitigation arguments in prosecutors' offices.

This has enabled the FCPA's enforcers, the Justice Department, and the Securities and Exchange Commission, to "win" most FCPA cases through plea bargains or settlements, in which regulators set the terms, and into which regulators import their capacious constructions of the FCPA. This regulatory latitude has, in turn, transformed the FCPA into a catch-all for illicit conduct abroad, no matter how removed the target of the enforcement action is from the underlying offense. As Professor Mike Koehler has put it, "the FCPA means what the enforcement agencies say it means."[4] This expansion in statutory scope has led to an explosion in FCPA enforcement by DOJ and the SEC, with an 85% jump in 2010 over the previous year.[5] The statute has truly become the twenty-first century weapon of choice in the prosecutor's arsenal, converting DOJ and the SEC into world-wide "roving commission[s]" that "inquire into evils"—wherever they may be—"and, upon discovery, correct them."[6] And rove they do. Of the ten highest FCPA

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The views set forth herein are the personal views of the authors and do not necessarily reflect those of the law firm with which they are associated.

fines since the statute was enacted, *nine* were imposed on non-U.S. companies.[7]

In our view, these expansive interpretations and aggressive FCPA enforcement actions stray far from the FCPA's basic purpose: preventing corruption and bribery. It is largely pointless to punish corporations whose executives, for example, had no knowledge of misconduct occurring at a subsidiary, perhaps prior to its acquisition, or that had programs and policies designed to prevent the very conduct that took place. Such enforcement actions do not deter because a corporation cannot be deterred from doing something it did not set out to do in the first place. Instead, such enforcement punishes companies' management for not correctly anticipating the prosecutor's latest theory about the reach of the FCPA. This places U.S. corporations at unease by subjecting them to the possibility of large, unforeseen civil and criminal penalties for conduct they are often powerless to define and therefore powerless to prevent.

We believe, however, that these problems could be mitigated, and the FCPA strengthened, by a few relatively simple fixes. Because the FCPA will never be heavily litigated—thus depriving the courts of the opportunity to clarify its murky text—Congress must speak clearly about what conduct does and does not violate the FCPA. To make the FCPA stronger and fairer, Congress should:

1. Provide a compliance defense;

2. Clarify the meaning of "foreign official";

3. Improve the procedures for guidance and advisory opinions from DOJ, and generally enable businesses to obtain guidance more easily;

4. Eliminate criminal successor liability for acquiring companies;

5. Add a "willfulness" requirement for corporate criminal liability; and

6. Limit a company's liability for acts of a subsidiary not known to the parent.

We believe that these fixes would serve the interests of business and regulators alike. Increasing clarity would, among other things, promote DOJ's stated goal of promoting corporate self-policing, and therefore self-reporting, in matters of corruption.[8]

1. ADDING A COMPLIANCE DEFENSE

Currently, it is no defense to corporate liability under the FCPA that a company maintains a program, no matter how rigorous, aimed at ensuring FCPA compliance. This means that even if a company has extensive safeguards in place to prevent bribery abroad by its subsidiaries, its agents, and its subsidiaries' agents, prosecutors can still hold the corporation liable if one of its agents evades those safeguards. We believe this adds unnecessary uncertainty and opens corporations to massive, largely unavoidable, liability, with few offsetting benefits. A statutory compliance defense would eliminate this uncertainty and, in our view, strengthen the FCPA's regulatory effect.

It is true that regulators will "consider" the existence of compliance programs when negotiating penalties if an FCPA violation occurs despite the programs. As one senior DOJ official recently explained, "[w]e take it into consideration and review it, and it is a serious consideration. Over the last 20 years the Department has developed a series of broader factors that we consider that includes compliance, that includes cooperation and self-disclosure."[9] But the scope and significance of that "consideration" varies from program to program and prosecutor to prosecutor, and provides no guaranty to the well-meaning corporation.[10] It is thus not clear "how to design a compliance program,"[11] or what value the program provides as a shield against liability. Such uncertainty leaves companies unsure how to manage corporate risk, with little offsetting benefit. While it is clear from the settlements reached in *Siemens*[12] and *Daimler*[13] that having little or no FCPA compliance programs puts companies at severe risk of prosecution, what about cases like *Johnson & Johnson*[14] in which an existing compliance program warranted "leniency" but not enough to avoid millions in fines and the forced adoption of even stronger compliance procedures?

Creating a compliance defense would help eliminate this uncertainty and concomitantly strengthen the incentive to adopt a robust program. Such programs could, in turn, ensure that corporations prevent bribery more effectively, and achieve the FCPA's goal—eliminating bribery—with far fewer prosecutions and less expenditure of the government's limited resources.[15] It is not unreasonable to require the government to prove as part of its case against a corporation that the corporation's compliance mechanism was defective. The existence of an illegal transaction may well go a long way toward showing that. But if the act in question was committed by a rogue employee who evaded an otherwise well-crafted compliance mechanism, there is no good reason to punish the corporation.

Adding a compliance defense would also bring the United States in line with other countries. Both the United Kingdom and Italy have included compliance defenses in their respective bribery acts. The U.K. Bribery Act ("UKBA"), while making bribery by companies a strict liability offense, also includes an affirmative defense based on a company's having in place "adequate procedures" to detect and deter bribery.[16] In 2011, the Secretary of State for Justice released a 43-page document listing the six guiding principles that a company must consider if it wishes to invoke the defense.[17] The six principles are 1) proportionate procedures; 2) top-level commitment; 3) risk-assessment; 4) due diligence; 5) communication (including training); and 6) monitoring and review. The Guidance further includes eleven case studies and suggestions for how to comply with each principle, and was accompanied by a Quick Start Guide to assist companies in structuring their compliance programs.[18] The Guidance is thus relatively comprehensive and helps enable corporations to protect themselves from anti-bribery liability in the U.K.

Italy affords a similar compliance defense. It enables a company to avoid liability if the company can demonstrate that, prior to the bribery, 1) it had an appropriate organizational and management program designed to prevent the underlying offense; 2) it created an autonomous body to supervise, enforce and upgrade the program; and 3) that autonomous body sufficiently performed its duties.[19]

U.S. sentencing law already applies similar considerations to companies, but only upon conviction. The U.S. Sentencing Commission has promulgated factors based on a company's compliance efforts to consider in mitigation at sentencing for crimes committed under many statutes, including the FCPA.[20] These factors include consideration of whether a company has installed a program that 1) promotes diligent investigation into whether criminal conduct has occurred, 2) establishes set standards and procedures to prevent criminal conduct, 3) dedicates staff to ensure compliance with the program, 4) publicizes the program, and 5) imposes penalties. These guidelines provide a useful starting point for crafting a compliance defense to liability.[21]

Such a defense could be implemented in a variety of ways, but the most definitive would be for Congress to add the defense to the statute's text, followed by the issuance of DOJ regulations to establish its contours. This would create a clear framework in which DOJ could develop a set of best practices, with assurance that all well-meaning companies would implement those practices. Rather than the current ad hoc system—in which companies try to come up with their own compliance programs from scratch and are left guessing about how those programs will be judged by law enforcement should a problem ever arise—DOJ could standardize prevention programs through regulation, and thus improve the quality of such programs everywhere. And besides, it should not be impossible for businesses to follow the law. Little is gained from imposing substantial fines on corporations for conduct they tried to prevent.[22] Requiring DOJ to determine what works best to prevent bribery and then promulgate regulations codifying that determination will ensure that best practices are widely adopted and that corruption is in fact curtailed. It will also align American law more with that of the UK and EU members such as Italy, ensuring more consistent application of anti-corruption laws to multinational corporations. Such a system would yield better outcomes for all.

2. CLARIFY THE MEANING OF "FOREIGN OFFICIAL"

The FCPA prohibits bribing foreign officials. But it is often difficult to determine who constitutes a foreign official. In many countries, the biggest businesses are wholly or partly owned and operated by the government. A recurring question under the FCPA is when executives and employees at these foreign corporations are "officials" within the scope of the statute.

The FCPA defines "Foreign Official" to include "any officer or employee of. . . [an] agency, or instrumentality thereof."[23] So far, there has been agreement among the courts and DOJ that "instrumentality thereof" includes at least some state-owned entities.[24]

That agreement has not extended, however, to the crucial question of how much state ownership is enough to constitute an "instrumentality." DOJ appears to have taken the position that minority ownership, and possibly any ownership, is sufficient. For example, in *Kellogg Brown & Root*, DOJ alleged that a development company was an "instrumentality" of the Nigerian government because a state-owned oil and gas company held 49% of the stock in that development company—thus making it a partially-owned subsidiary of a separate state-owned enterprise.[25] Lowering the bar further, in *Comverse Technology*, DOJ took the position that a Greek telecom company was a government instrumentality because the Greek government was its largest shareholder, possessing a third of the issued share capital.[26]

Recently, courts that have considered the question of instrumentality have taken a less expansive view than DOJ. In *United States v. Carson*, the district court ruled on a motion to dismiss that whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact, and looked to objective factors beyond monetary investment that might indicate that an entity is carrying out government objectives.[27] Similarly, in *United States v. Aguilar*, the court, recognizing that "instrumentality" is not defined in the FCPA, looked to characteristics that fulfilled common definitions of "instrumentality" to determine whether the entity in question fulfilled the meaning of the statute.[28] Together, the factors and characteristics set forth in these opinions should help DOJ and Congress draft guidance and amendments that would clarify the meaning of "instrumentality."

In addition to taking a broad view of instrumentality, regulators likewise take an expansive view of who is an "official." Both DOJ and the SEC consider all employees of an instrumentality—regardless of their position—"foreign officials."[29] This means that, in theory, payments to low-level employees (such as clerks, purchasing staff, spec writers) at an entity in which a foreign government has partial—even minimal—ownership could result in FCPA liability.

DOJ's public statements on this point have been aggressive or smug, or both. An Assistant Chief of DOJ's Fraud Section recently stated that "[i]t's not necessarily the wisest move for a company" to challenge the definition of "foreign official," and that "[q]uibbling over the percentage ownership or control of a company is not going to be particularly helpful as a defense."[30] Other DOJ officials have suggested that the solution is easy: just don't pay bribes—a formulation more clever than intelligent that overlooks normal business expectations relating, for example, to arranging travel for customers to visit plants in aid of sales and to have moderate and reasonable entertainment upon their arrival, or to customs such as gift-giving to mark such personal events as births and weddings and the like. Even if this glib formulation were taken at face value, a company would be faced with the task of focusing its auditing resources so as to assure compliance, a task that cannot be waved off with the equally unhelpful suggestion to audit everything.

This is a problem that will only increase with the recent escalation in sovereign wealth investment,[31] and it is thus ripe for a fix.[32]

In our view, Congress could remedy the problem relatively easily by amending the statute. This would require no more than specifying a percentage ownership by a foreign government that qualifies a corporation as an "instrumentality" of that government.[33] We believe that majority ownership is the most sensible threshold, but any bright-line rule would be an improvement. Likewise, Congress needs to define the term "official" to make clear who counts and who does not. The Head

Janitor is not the same as the Head of Global Purchasing, and the FCPA ought to reflect that reality. Corporations need to know when they are in FCPA terrain so they can structure their interactions and their oversight accordingly.

3. IMPROVE THE PROCEDURES FOR GUIDANCE AND ADVISORY OPINIONS FROM DOJ, AND GENERALLY ENABLE BUSINESSES TO OBTAIN GUIDANCE

The 1988 amendments to the FCPA required DOJ to consult with other public agencies and to hold a notice-and-comment period to determine whether further clarification of the statute was necessary for the business community.[34] DOJ did hold a notice-and-comment period,[35] but opted not to issue any guidelines.[36] This decision may have been reasonable at the time, when the FCPA was, relatively speaking, dormant. But now that enforcement has exploded, guidelines are essential. As one author has put it, "[t]he lack of guidance to the regulated community is especially important now that the law has, in practical terms, changed."[37]

We are not the first to criticize this deficiency and, perhaps in response to such criticisms, DOJ has signaled plans to issue an FCPA guidance statement in 2012.[38] Time will tell whether this "guidance statement" will be a comprehensive guide to complying with the FCPA that addresses the myriad deficiencies highlighted here, or simply a rehash of DOJ's prior, vague pronouncements.[39]

The 1988 amendments also require the Attorney General to answer within 30 days requests for opinions as to whether prospective conduct conforms with DOJ's enforcement policy.[40] If a favorable opinion is obtained, it entitles the opinion-seeker to a rebuttable presumption in any enforcement action that the conduct described in the request complies with the FCPA.[41] But the procedure is cumbersome and untimely – many companies can ill afford the 30 days it might take DOJ to evaluate a transaction or other commercial venture, during which crucial efforts to negotiate and structure the transaction may need to take place. For this reason, and because companies fear the implications of a negative opinion for their future dealings with DOJ, the procedure is rarely used. To date, DOJ has issued only thirty-four opinions,[42] and only eight in the last four years, despite increasing numbers of enforcement actions by the Department.[43]

Apart from any guidance that DOJ might issue to explain its enforcement policy, Congress should provide a means for expedited review of DOJ opinions where commercial or operational circumstances warrant doing so, with a presumption that they do. We believe this is necessary for companies to be able to evaluate the viability of transactions in real time, and not be left guessing as to the outcome of concerns they have already identified and brought to DOJ's attention. Such a process will make compliance easier for businesses and, in doing so, will avert future violations and enforcement actions.

4. ELIMINATE CRIMINAL SUCCESSOR LIABILITY FOR ACQUIRING COMPANIES

Currently, a company can be held criminally liable under the FCPA for actions by a company it acquires even if those actions took place before the acquisition and were entirely unknown to the acquiring company.[44] Examples abound. For instance, in *Snamprogetti Netherlands B.V.*, Snamprogetti, a wholly-owned Dutch subsidiary of ENI S.p.A., engaged in bribery over a ten-year period ending in 2004.[45] Then, in 2006, two years after the bribery had ended, ENI sold Snamprogetti to Saipem S.p.A. In 2010, Snamprogetti, ENI, and Saipem entered a deferred prosecution agreement based on Snamprogetti's bribery. The agreement held Saipem—the non-culpable acquiring company—jointly and severally liable for the $240 million fine imposed on Snamprogetti.[46] By including Saipem in the deferred prosecution agreement, DOJ made clear that it was holding Saipem criminally liable for Snamprogetti's conduct on the basis of successor liability.[47]

There is no statutory basis in the FCPA for criminal successor liability. DOJ's theory thus appears to be based in common law successor liability theory, but successor liability's common law foundation is murky.[48] As one commentator has explained, "[t]he concept of successor liability has not been generally accepted in criminal prosecutions. It is the equivalent of creating a non-*mens rea*, strict liability offense, without criminal intent."[49] Precedent supporting such liability has, so far, generally been limited to the merger context where the bad actor has simply transformed itself into a new corporate entity.[50]

In addition to having only a shaky foundation in common law, successor liability is in tension with the plain terms of the FCPA. The FCPA speaks in terms of *current* action. For example, "[i]t shall *be unlawful* for a domestic concern . . . *to make use* of the mails or any means or instrumentality of interstate commerce . . . ."[51] The statute gives no indication that any discrete FCPA violation is necessarily an ongoing offense, attachable to a successor.

This makes sense, of course, because criminal law exists to punish bad actors. It is a basic tenet of criminal law—embodied by the *mens rea* requirement fundamental to all but the most technical of criminal statutes—that companies, like people, should not be held criminally liable for the actions of others who act independently.[52] But that principle does not currently apply to the FCPA. Indeed, DOJ's strong position on successor liability likely exceeds even the bounds of civil successor liability, which turns on a complex analysis of a variety of factors, including whether the successor company agreed to assume the liability, whether a merger or acquisition simply veiled a fraudulent effort to escape liability, and whether it is actually in the public interest to impose such liability.[53]

DOJ may argue that successor liability is necessary and appropriate 1) to avoid circumstances where FCPA violation might go unpunished due to a corporate merger takeover or reorganization, and 2) because the gain to the prior company from illegal conduct is part of the value of the acquisition or the new relationship. With respect to the former, there may be some validity to DOJ's argument in cases where a corporate restructuring results in the same company, run by the same management, with substantially the same shareholders or owners, and doing the same business under a different form. It has no validity when a merger or takeover results in a new board, new procedures, new management and even new shareholders who are unconnected to the prior company's conduct. It is an

affront to due process to punish a non-culprit—an innocent party—simply to ensure that "no one goes unpunished."

With respect to the second argument—that an acquirer somehow participates in, or ratifies, illegal conduct by a target merely by acquiring it—there may be some validity to the theory in individual cases, where the gain derived from bribes by the target formed the basis of the bargain between it and its acquisition or merger partner. It cannot be the basis of a general theory of successor liability, short of an impact on the transaction itself, where the acquirer had nothing to do with the prior conduct and the target may not even have been subject to the FCPA at the time.

The time has thus come for Congress to step in and set clear parameters. Major transactions are collapsing in the void.[54] Congress should make clear that companies cannot be held criminally liable for the pre-acquisition conduct of an acquired company. If an acquiring company conducts reasonable due diligence,[55] the acquiring company should be exempt as a matter of law—rather than through the gauzy and unpredictable standard of prosecutorial discretion—from criminal liability under the FCPA. In addition to eliminating instances where innocent companies are held liable for the crimes of others, eliminating successor liability will encourage acquiring companies to detect and self-report pre-acquisition violations by the acquired company.[56] DOJ could then prosecute the actual wrongdoers.[57]

5. ADD A "WILLFULNESS" REQUIREMENT FOR CORPORATE CRIMINAL LIABILITY

Individual defendants are criminally liable under the FCPA only if they act "willfully."[58] This requires the Government to prove that the "defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful."[59] But no such limitation exists for companies.[60] As it stands now, a company may be liable under the FCPA whenever an employee or subsidiary, or a subsidiary's employee, violates the statute, regardless of whether executives of the company even know about the conduct, and contrary to evidence (compliance programs, training edicts, direct prohibitions) that the company may have opposed such conduct.

In addition to being in tension with the same basic principles we discussed above, this inconsistency compounds the other problems attendant to DOJ's expansive interpretations of the FCPA. For example, DOJ has taken an aggressive view of the FCPA's territorial reach. In addition to reaching U.S. companies or companies with stock traded on American exchanges, the FCPA extends to any person who "while in the territory of the United States, corruptly [makes] use of . . . any means or instrumentality of interstate commerce or [does] any other act in furtherance of" a bribery scheme.[61] On its face, this provision appears to require that a person be physically present in the United States when using a means of interstate commerce in furtherance of the bribery scheme.[62] But DOJ has rejected this interpretation. It instead maintains that "[a]lthough this section has not yet been interpreted by any court, the Department interprets it as conferring jurisdiction whenever a foreign company or national *causes* an act to be done within the territory of the United States by any person acting as that company's or national's agent."[63] DOJ has enforced the provision on that basis,[64] which means that FCPA liability attaches whenever, for example, a person working for a non-U.S. subsidiary bribes a foreign official by wiring money through or from a bank account located in the United States.

DOJ's view that the FCPA applies to anyone, anywhere, at any time, so long as there is even a tangential connection to the United States, and regardless of the intent of the parent company, demonstrates the dangers posed to U.S. and non-U.S. corporate parents by the absence of a willfulness element. A U.S. company or a non-U.S. company listed on a U.S. exchange is exposed to potential FCPA liability for, say, bribes made outside the United States by the non-U.S. agents of a tertiary subsidiary, in violation of the parent's clear policies, and of which the parent had no knowledge. Indeed, the various actors in our hypothetical probably would not have even realized that U.S. law applied to their conduct. Nothing in the FCPA's text or legislative history suggest that it was intended to have such sweeping application,[65]which contradicts the DOJ's own stated policy. That policy states that a parent is "liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question."[66]

Congress should therefore extend the "willfulness" element to corporate liability. Doing so would ensure that innocent companies that were unaware of the offending conduct taking place, and that did not ratify it, avoid unnecessary liability, while giving corporate parents a stronger incentive to report wrongdoers at their subsidiaries. Under the current regime, even the most blame-free corporate parent would be leery of reporting misconduct by employees of a subsidiary. If non-willful companies were not liable, such reporting would likely increase, enabling regulators to better pursue the actual wrongdoers and to be more fully aware of patterns of actual wrongdoing.

6. LIMIT A COMPANY'S CIVIL LIABILITY FOR ACTS OF A SUBSIDIARY NOT KNOWN TO THE PARENT

Beyond a willfulness requirement for criminal liability, companies should no longer be held civilly liable for books and records misstatements about which they had no knowledge. The SEC currently enforces the FCPA as if it were a strict liability statute. Companies are held liable for the conduct of subsidiaries and subsidiaries' employees even if the company had no idea that the conduct was happening.[67]

Such enforcement actions are contrary to the language of the anti-bribery provisions, which require that a person act "corruptly" and give something of value "knowing" that all or part of it will result in a bribe.[68] They are contrary to the intent of the FCPA's drafters.[69] And they are also contrary to the 1988 amendments, which tightened the mens rea requirement from "while knowing or having reason to know" to simply "while knowing."[70]

In effect, the current practice operates as a massive expansion of respondeat superior liability under the law of agency. Historically, a parent could not be held liable pursuant to respondeat superior unless it exerted such pervasive control over the subsidiary that the difference between the two entities was purely formal,[71] or unless the parent exercised control over

the subsidiary's specific activity giving rise to the litigation.[72] The current practice of charging nearly every company connected to nearly every bribe—regardless of control, involvement, or even knowledge—completely ignores these long-established limitations on liability. It is one thing to assume that a corporate affiliate, joint venture partner, or subsidiary acts as an agent of a U.S. company in the conduct of their joint business. It is quite another to assume that such a related company acts as an agent when paying unauthorized, and secret, bribes.

Here too, we believe Congress could make a quick fix. The simplest solution would be to add a subsection to the statute titled "respondeat superior" clearly explaining that liability does not attach to a corporate parent absent evidence that the parent's officers knew about its subsidiary's misconduct. Such a provision would make clear that the SEC cannot hold every entity in the corporate chain liable for unknown misconduct at a lower level. It would also, like many of our suggested reforms, eliminate the current disincentive on parent corporations to root out and report corrupt practices by their subsidiaries.

* * *

These suggestions are not meant to be exhaustive. The FCPA, while an important statute that has reduced corruption and helped improve business practices abroad, creates a complex regulatory framework, and there are many ways to improve it. What is clear, though, is that the FCPA is not going away anytime soon. It is an extremely broad, extremely powerful statute that enables DOJ and the SEC to extract billions of dollars in fines in well publicized cases against high profile defendants, many with no incentive or ability to fight back. When, such as here, the incentive to prosecute is so strong, regulators hold all the cards, and the standards they apply are not transparent, it is imperative that Congress set clear boundaries. Such boundaries, and such clarity, will make the statute more predictable, will allow corporations an opportunity to comply, and will give corporations a clear framework for alerting regulators to misconduct abroad. Right now, corporations are fighting corruption in the dark, and it is up to Congress to shed a little light. We hope Congress acts soon.

Endnotes

1 In 2011, the financial penalties totaled $508.6 million. *See 2011 Enforcement Index*, The FCPA Blog (Jan. 2, 2012), http://www.fcpablog.com/blog/2012/1/2/2011-enforcement-index.html. In 2010, the government levied a record $1.8 billion in FCPA-related penalties. *See 2010 Enforcement Index*, The FCPA Blog (Jan. 3, 2011), http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html. In 2009, the government issued $641 million in penalties. *Id.* In 2008, the government issued $890 million in penalties; however, that number includes the single largest fine to date—an $800 million settlement by Siemens AG with the DOJ and SEC. *Id.*

2 The literature on the inability of public companies to litigate criminal charges is extensive. The Arthur Andersen adventure, in which the company ultimately won its case, but was nonetheless destroyed, effectively captures the dilemma facing corporations. *See, e.g.*, Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 414 (2010) ("Simply put, businesses are not in the business of setting legal precedent and to challenge this interpretation would first require a business to be criminally indicted—something no board of director member is going to allow to happen in this post-Arthur [Andersen] world . . . ."); Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim. L. Rev. 107 (2006).

3 *See* David E. Dworsky, *Foreign Corrupt Practices Act*, 46 Am. Crim. L. Rev. 671, 690 (2009). Disgorgement is also a possible sanction. *See* Sasha Kalb and Marc Alain Bohn, *Disgorgement: The Devil You Don't Know*, Corporate Compliance Insights (Apr. 12, 2010), http://www.corporatecomplianceinsights.com/2010/disgorgement-fcpa-how-applied-calculated/.

4 Koehler, *supra* note 2, at 410.

5 *See* Melissa Aguilar, *2010 FCPA Enforcement Shatters Records*, Compliance Week (Jan. 4, 2011), *available at* http://www.complianceweek.com/2010-fcpa-enforcement-shatters-records/article/193665/ (noting that "FCPA enforcement actions jumped 85 percent in 2010, shattering the prior record set in 2009 . . . ."). Indeed, prior to 2007, FCPA enforcement actions were comparatively rare. *See, e.g.*, F. Joseph Warin et al., *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. Pa. J. Bus. L. 321, 325 (2011); Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & Bus. 247, 249-50 (2010).

6 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

7 *With Magyar in New Top Ten, It's 90% Non-U.S.*, The FCPA Blog (Dec. 29, 2011), http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html.

8 *See, e.g.,* Alice S. Fisher, Assistant Att'y Gen., Dep't of Justice, Prepared Remarks for the American Bar Association National Institute on Foreign Corrupt Practices Act at 6 (Oct. 16, 2006), *available at* http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.

9 *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 58 (2011) (statement made by Greg Andres, Acting Deputy Assistant Att'y Gen.); *see also* Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.000, United States Attorneys' Manual, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (decision whether to charge).

10 *See, e.g.*, Criminal Information ¶ 39, United States v. Siemens Aktiengesellschaft, No. 1:08-CR-367 (D.D.C. Dec. 12, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensakt-info.pdf (FCPA circulars and policies insufficient as a FCPA compliance program).

11 Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 Ga. L. Rev. 489, 561 (2011).

12 Department's Sentencing Memorandum, United States v. Siemens Aktiengesellschaft, No. 08-CR-00367, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensvenez-sent.pdf (D.D.C. Dec. 12, 2008).

13 Plea Agreement, United States v. Daimler Export & Trade Finance GmbH, No. 10-CR-065 (D.D.C. Mar. 24, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimlerexp-plea.pdf.

14 Deferred Prosecution Agreement at 3, Dep't. of Justice, United States v. Johnson & Johnson (DePuy) (*Johnson & Johnson DPA*), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-dpa.pdf (Jan. 14, 2011) ("J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies.").

15 *See, e.g.*, Walter Ricciardi, Deputy Dir., Div. of Enforcement, Sec. & Exch. Comm'n, Remarks at the PricewaterhouseCoopers Roundtable Discussion, Navigating Dangerous Waters: FCPA: Managing International Business and Acquisition Compliance Risk at 7 (2008), *available at* http://www.pwc.com/us/en/foreign-corrupt-practices-act/assets/fcpa_managing_risk.pdf; Susan F. Friedman, *Mission Possible: Developing in-House Counsel's Role in the Fight Against Global Corruption*, N.Y. L.J. (June 19, 2008), *available at* http://www.law.com/cs/ContentServer?pagename=pubs/nylj_07/

wrapper&childpagename=NY/Article_C/pubs/nylj_07/pubarticlePrinterFriendly&cid=1202422367291&hubtype=FeaturedContent (quoting a speech given by FBI Director Robert Mueller).

16 *See* Bribery Act of 2010, ch. 23, § 7(2) (U.K.). A strict liability regime such as the UKBA's would upend standard attributes of U.S. criminal law such as mens rea requirements in all but regulatory offenses and constitutional presumptions of innocence. *See* discussion at sections 4-6 *infra*.

17 Ministry of Justice, The Bribery Act of 2010, Guidance, March 2011 (U.K.).

18 Ministry of Justice, The Bribery Act of 2010, Quick Start Guide 2011 (U.K.).

19 Legislative Decree no. 231 of 8 June 2001; *see also, e.g.*, Mike Koehler, *The Compliance Defense Around the World*, Corporate Compliance Insights (June 30, 2011), http://www.corporatecomplianceinsights.com/the-compliance-defense-around-the-world/; McDermott, Will & Emery, *Italian Law No. 231/2001: Avoiding Liability for Crimes Committed by a Company's Representatives* (Apr. 27, 2009), *available at* http://www.mwe.com/info/news/wp0409f.pdf.

20 U.S. Sentencing Guidelines Manual § 8B2.1 (2011).

21 The Sentencing Commission's Guidelines are not, by themselves, sufficient because they apply only after conviction. What is crucial is for companies to have a means of avoiding criminal charges up front, at the negotiating stage with prosecutors, when a statutory compliance defense would prevent companies being charged for conduct of which they were unaware.

22 It is widely accepted that at large, complex institutions, no system of internal controls could possibly prevent all forms of willful deceit by employees or agents. The SEC itself has recognized as much. *See* SEC Div. of Corp. Fin., Staff Statement on Management's Report on Internal Controls Over Financial Reporting (2005) ("[D]ue to their inherent limitations, internal controls cannot prevent or detect every instance of fraud. Controls are susceptible to manipulation, especially in instances of fraud caused by the collusion of two or more people including senior management.").

23 15 U.S.C. § 788dd-1(f)(1)(A); § 78dd-2(h)(2)(A); § 78dd-3(f)(2)(A).

24 *See* United States v. Aguilar, 783 F. Supp. 2d 1108, 1118 (C.D. Cal. 2011) (stating that the FCPA did not intend to include or exclude all state-owned entities); United States v. Carson, No. SACR 09-00077-JVS, 2011 U.S. Dist. Lexis 88853, at *10-12 (C.D. Cal. May 18, 2011) (stating that determining whether a state-owned entity is an "instrumentality" is a fact question for the jury); Criminal Information ¶ 14, United States v. Kellogg Brown & Root LLC, No. 09-CR-071 (S.D. Tex. Feb. 6, 2009) *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-06-09kbr-info.pdf (*Kellogg Brown & Root*).

25 *Kellogg Brown & Root*, No. 09-CR-071 at ¶ 14; *see also* Deferred Prosecution Agreement, Attachment A ¶13, United States v. JGC Corporation, No. 11-CR-260 (S.D. Tex. Apr. 6, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf (same Nigerian development company).

26 Non-Prosecution Agreement, Attachment A ¶12, Dep't of Justice, *In re* Comverse Technology, Inc. (Apr. 7, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11comverse-npa.pdf.

27 *See Carson*, 2011 U.S. Dist. Lexis 88853, at *11-12. The several factors relied on by the court to analyze whether a business entity constitutes a government instrumentality include:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state.

Id.

28 *See Aguilar*, 783 F. Supp. 2d at 1115. The characteristics relied upon by the court to determine whether a state-owned corporation is an "instrumentality" of the government include whether

- The entity provides a service to the citizens of the jurisdiction;
- The key officers and directors of the entity are government officials, or are appointed by them;
- The entity is financed in large measure through governmental appropriations or through revenues obtained through taxes, licenses, fees, etc.;
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions; and
- The entity is widely perceived and understood to be performing official functions.

Id.

29 *See* Dep't of Justice, Laypersons Guide to FCPA at 3, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

30 Christopher M. Matthews, *DOJ Official Warns Against Challenging Foreign Official Definition in FCPA Cases*, mainjustice.com (May 4, 2011), http://www.mainjustice.com/justanticorruption.

31 *See*, *e.g.*, Westbrook, *supra* note 11, at 535-36.

32 To illustrate the breadth of this 1/3 standard, the United States government owned a 27% stake in General Motors following GM's emergence from bankruptcy. *See* Ben Klayman & Deepa Seetharaman, *GM Outlook Disappoints, Shares Tumble*, Reuters (Nov. 9, 2011), http://www.reuters.com/article/2011/11/09/us-gm-idUSTRE7A83GQ20111109. Similarly, following the bailout of AIG, the U.S. government owned a 79.9% equity stake in the company. *See* Matthew Karnitsching et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, Wall St. J., Sept. 16, 2008. Thus, by DOJ's standard, every single employee at GM and AIG were, at least for a while, "officials" of the United States government.

33 Doing so would require no more than simply adopting the definition of "instrumentality" in the Foreign Sovereign Immunities Act for the FCPA. *See* 28 U.S.C. § 1603(b)(2) (defining instrumentality as "an organ of a foreign state" or an entity "a majority of whose shares or other ownership interest is owned by a foreign state").

34 *See* § 78dd-1(d).

35 54 Fed. Reg. 40, 918 (Oct. 4, 1989).

36 55 Fed. Reg. 28, 694 (July 12, 1990).

37 Westbrook, *supra* note 11, at 497.

38 *See* Samuel Rubenfeld, *U.S. Chamber Cheers Upcoming DOJ Guidance on FCPA*, Wall St. J., Nov. 9, 2011, *available at* http://blogs.wsj.com/corruption-currents/2011/11/09/u-s-chamber-cheers-upcoming-doj-guidance-on-fcpa/.

39 To date, many have been skeptical. *See, e.g.*, Mike Koehler, *DOJ Guidance—Better Late Than Never, But Will It Matter?*, FCPA Professor (Nov. 10, 2011), http://www.fcpaprofessor.com/doj-guidance-better-late-than-never-but-will-it-matter (stating that he believes the guidance will "be little more than a compilation in one document of information that is already in the public domain for those who know where to look"); Mike Emmick, *Don't Expect Too Much From DOJ's Upcoming New FCPA Guidance*, Boardmember.com, http://www.boardmember.com/Article_Details.aspx?id=7189&ekfxmen_noscript=1&ekfxmensel=eeb11f83b_30_494 (arguing that DOJ's guidance will likely fall well short of that issued by the UK). Indeed, in response to DOJ's announcement of its plans to release a guidance statement, Senator Charles Grassley sent a letter to DOJ inquiring whether the guidance would address the following concerns:

> Will the guidance offer only the Department's interpretation of the Act's enforcement provisions or will the guidance set forth the Department's enforcement policies? i. Will the guidance include the Department's interpretations of ambiguous statutory terms such as "foreign official" and "government instrumentality"? ii. Will the guidance clarify when a company may be held liable for the actions of an independent subsidiary? iii. Will the guidance clarify the extent to which one company may be held liable the pre-acquisition or pre-merger conduct of another? iv. Will the guidance include an enforcement safe harbor for gifts and hospitality of a de minimis value provided to foreign officials?

Mike Koehler, *Senator Grassley Seeks Guidance as to DOJ's Upcoming FCPA Guidance*, FCPA Professor (Nov. 21, 2011), http://www.fcpaprofessor.com/senator-grassley-seeks-guidance-as-to-dojs-upcoming-fcpa-guidance.

40 *See* § 78dd-1(e)(1); *see also* Foreign Corrupt Practices Opinion Procedure, 28 C.F.R. §§ 80.1-80.16 (2012).

41 *Id.*

42 *See* Dep't of Justice, Opinion Procedure Release, *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/.

43 The SEC has never issued an advisory opinion on FCPA-related inquiries and has no procedure in place to do so.

44 *See, e.g.*, Dep't of Justice, FCPA Opinion Procedure Release No. 03-01 (Jan. 15, 2003), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf (advising a company that if it conducted due diligence on a target and self-reported any violations that it may escape FCPA liability, thereby implying that the DOJ and SEC view successor liability as a viable FCPA theory).

45 *See* Criminal Information, United States v. Snamprogetti Netherlands B.V., Crim. No. 10-CR-460, (S.D. Tex. July 7, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-info.pdf; *see also* Press Release, Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010), *available at* http://www.justice.gov/opa/pr/2010/July/10-crm-780.html.

46 *See* Deferred Prosecution Agreement, United States v. Snamprogetti Netherlands B.V., Crim. No. 10-CR-460 (S.D. Tex. Jul. 7, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-dpa.pdf ("*Snamprogetti DPA*").

47 Another example is the Alliance One prosecution. Alliance One was formed in 2005 by the merger of Dimon Incorporated ("Dimon") and Standard Commercial Corporation ("SCC"). *See* Press Release, Dep't of Justice, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials (Aug. 6, 2010), *available at* http://www.justice.gov/opa/pr/2010/August/10-crm-903.html. Employees and agents of two foreign subsidiaries of Dimon and SCC allegedly committed FCPA violations prior to the merger. In 2010, DOJ brought a criminal case against Alliance One based on successor liability, and ultimately entered into a non-prosecution agreement. Or in *Latin Node*, DOJ forced eLandia to pay for alleged FCPA violations committed by Latin Node, Inc. before eLandia took possession of Latin Node. *See* Press Release, Dep't of Justice, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-crm-318.html (*Latin Node*). The DOJ levied these fines even though eLandia self reported the incident once it took control of the company. Similarly, in *El Paso*, the SEC held El Paso liable for illegal payments made by its predecessor-in-interest, the Coastal Corporation, prior to the acquisition (though, in the SEC's defense, El Paso did allow the payments to continue post-acquisition). Complaint ¶¶ 1,8, 20, SEC v. El Paso Corp. (S.D.N.Y. 2007), *available at* http://www.sec.gov/litigation/complaints/2007/comp19991.pdf; *see also* Andrew Weissman & Alixandra Smith, U.S. Chamber Institute for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 17-18 (Oct. 2010), *available at* http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf (summarizing instances where the DOJ imposed criminal successor liability).

48 Grimm, *supra* note 5, at 286; *see also* F. Joseph Warin & Andrew S. Boutros, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 Va. L. Rev. in Brief 121, 131 n.34 (2007) ("To be sure, whether successor liability includes criminal liability is a matter of some dispute . . . ."); Brian R. Becker, *Notes*, *Corporate Successor Criminal Liability: The Real Crime*, 19 Am. J. Crim. L. 435, 469-70 (1992) (explaining why corporate successor criminal liability is inappropriate for Texas).

49 1 Joel M. Androphy, White Collar Crime § 3.18 (2011).

50 *See* Grimm, *supra* note 5, at 287 ("Where ownership structure is unchanged despite a morphing corporate structure, imposing criminal successor liability may be necessary to prevent business entities from escaping 'their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed but free of their formal liabilities.'") (quoting United States v. Mexico Feed & Seed Co., 980 F.2d 478, 487 (8th Cir. 1992)). For example, in *Melrose Distillers, Inc. v. United States*, two corporations indicted for Sherman Act violations merged with their parent and dissolved. 359 U.S. 271 (1959). The companies moved to dismiss the complaint on the ground that the corporations no longer existed. *Id.* at 272. The Court applied Maryland law to hold that the corporations still existed for purposes of the Sherman Act. *Id.* at 273-74. The Court explained: "Petitioners were wholly owned subsidiaries [of the parent]. After dissolution they simply became divisions of a new corporation under the same ultimate ownership. In this situation there is no more reason for allowing them to escape criminal penalties than damages in civil suits." *Id.* at 274.

In *United States v. Alamo Bank*, the Fifth Circuit upheld Alamo Bank's criminal conviction for Bank Secrecy Act violations committed by a bank that it had merged with. 880 F.2d 828, 829 (5th Cir. 1989). The violations had occurred three or four years prior to the merger. *Id.* In upholding the conviction, the court wrote that the predecessor "cannot escape punishment by merging with Alamo and taking Alamo's corporate persona. Neither the pre nor post merger Alamo as a separate legal entity is being forced to pay for the wrongs of CNB." *Id.* at 830.

51 *See, e.g.,* § 78dd-2(a).

52 For example, long-established Supreme Court precedent requires mens rea for felonies. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 500 (1951) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."); Staples v. United States, 511 U.S. 600, 616-19 (1994) (discussing the imposition of mens rea in felony offenses generally). For example, in *United States v. United States Gypsum Co.*, the Court held that although the Sherman Act makes no reference to intent or state of mind, 438 U.S. 422, 438 (1978), "intent is a necessary element of a criminal antitrust violation." *Id.* at 443-44. We note that the UKBA's strict liability approach is inconsistent with these bedrock principles of U.S. criminal law and constitutional law regarding due process in criminal cases.

53 *See, e.g.,* United States v. Cigarette Merchandisers Ass'n, Inc., 136 F. Supp. 214 (S.D.N.Y. 1955).

54 For example, a few years ago, Lockheed Martin backed away from a deal to acquire Titan Corporation after it discovered bribes paid by a Titan subsidiary in Africa during its pre-closing due diligence because it did not want to risk FCPA liability. *See* Margaret M. Ayres & Bethany K. Hipp, *FCPA Considerations in Mergers and Acquisitions*, 1619 PLI/CORP 241, 249 (Sept. 17, 2007); *see also* SEC Litig. Rel. No. 19107, 2005 WL 474238 (Mar. 1, 2005), *available at* http://www.sec.gov/litigation/litreleases/lr19107.htm.

55 What "reasonable due diligence" means is something that Congress should require DOJ to specify in regulations after holding a notice-and-comment period.

56 *See Latin Node*, *supra* note 47.

57 These circumstances are analogous to the long-standing practice of granting limited immunity to obtain information from a witness. Such grants shift the witness' incentive in favor of disclosing as much as possible to fit it within the immunity granted.

58 § 78dd-2(g)(2).

59 Bryan v. United States, 524 U.S. 184, 193 (1998).

60 *See* § 78dd-2(g)(1)(A).

61 § 78dd-3(a).

62 *See also* H.R. Rep. No. 105-802 (Oct. 8, 1998) ("[T]he offense created under this section requires that an act in furtherance of the bribe be taken within the territory of the United States."). The report went on to state: "[T]his section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the territory of the United States." *Id.*

63 *See also* Prohibited Foreign Corrupt Practices, Title 9, Chapter 9-1018, United States Attorneys' Manual, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01018.htm (emphasis original). A court has, in fact, ruled. In June 2011, in one of the *Shot Show* cases, Judge Richard Leon of the U.S. District Court for the District of Columbia granted a defendant's Rule 29 motion discussing an FCPA count that was based solely upon the sending of a DHL package from London to the U.S. as not satisfying the extraterritorial jurisdiction requirement of

the FCPA that the foreign person undertake an act within the territory of the United States. *Significant dd-3 Development in Africa Sting Case*, FCPA Professor (June 9, 2011), http://www.fcpaprofessor.com/significant-dd-3-development-in-africa-sting-case.

64 For example:

• In 2005, DOJ entered into a plea agreement with DPC Tianjin Co. Ltd. on the basis of illicit payments made by that company—a wholly-owned Chinese subsidiary of Diagnostic Products Corporation, a United States "issuer"—to various Chinese officials. Plea Agreement, United States v. DPC (Tianjin) Ltd., No. 05-CR-482 (C.D. Cal. May 20, 2005), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/dpc-tianjin/05-19-05dpc-tianjin-plea-agree.pdf (DPC Plea Agreement). The Information is unclear about the connection between the offending subsidiary's conduct and the United States, simply labeling the subsidiary as the United States parent's "agent." Criminal Information ¶1, United States v. DPC (Tianjin) Ltd., No. 05-CR-482, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/dpc-tianjin/05-20-05dpc-tianjin-info.pdf (C.D. Cal. May 20, 2005). The only United States conduct specified in the plea agreement is the subsidiary's mailing, e-mailing, and faxing of various reports and financial statements to the parent in the United States. *DPC Plea Agreement*, Exhibit 2, ¶¶4-6.

• In 2010, DOJ entered into a plea agreement with Alcatel and a variety of its foreign subsidiaries. While employees of some of those subsidiaries allegedly had meetings in the United States to discuss the payments, most subsidiaries' only connections to the United States were telephone, fax, or e-mail communications with United States-based employees of the United States entity. DOJ nonetheless charged everyone under section 78dd-3. *See* Plea Agreement, Exhibit 3, United States v. Alcatel Centroamerica, *S.A.*, No. 10-CR-20906 (S.D. Fla. Feb. 22, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal/02-22-11alcatel-centroamerica-plea-agmt.pdf.

• In 2010, DOJ entered into a deferred prosecution agreement with Snamprogetti Netherlands, a wholly-owned subsidiary of Snamprogetti S.p.A., an Italian engineering, procurement and construction ("EPC") company in which Snamprogetti agreed to pay a $240 million criminal penalty (it also paid $125 to resolve parallel charges filed by the SEC). Snamprogetti was part of a four-company joint venture formed for the purposes of bidding on and performing EPC contracts to design a liquefied natural gas plan in Nigeria. The Joint Venture operated through three Portuguese special-purpose corporations based in Madeira, one of which was 25%-owned by Snamprogetti. The only connection between Snamprogetti and the United States was that officers, employees, and agents of Snamprogetti caused wire transfers to be sent from the Madeira company's bank account in Amsterdam to bank accounts in New York and Japan for use in the bribes. *See Snamprogetti DPA*, *supra* note 46, at Attachment A.

• In 2010, DOJ secured a guilty plea and $4.4 million fine from Universal Brazil, a wholly-owned Brazilian subsidiary of the Universal Corporation, a United States issuer headquartered in Virginia. The only connection between Universal Brazil's conduct and the United States was that Universal Brazil caused United States-based employees of its United States parent to wire funds to a bank account in Thailand for what was described as a "commission payment" to an agent, although the account was not in the agent's name or associated with the agent's business, which funds were then used to bribe a Thai official. *See* Plea Agreement, Appendix B, United States v. Universal Leaf Tabacos LTDA., No. 10-CR-225 (E.D. Va. Apr. 6, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/universal-leaf/08-06-10universal-leaf-plea-agmt.pdf.

• In 2011, DOJ entered into a deferred prosecution agreement with Magyar Telekom, Plc., a Hungarian corporation and foreign issuer whose American Depository Receipts traded on the New York Stock Exchange during the relevant period. The sole alleged connection between the conduct at issue and the United States is that two e-mails sent from and to Macedonian individuals "passed through, [were] stored on, and [were] transmitted [from or to] servers located in the United States." *See* Deferred Prosecution Agreement, Attachment A, ¶¶ 23, 25(c), United States v. Magyar Telekom, Plc., No. 11-CR-597 (E.D. Va. Dec. 29, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-dpa-magyar.pdf.

65 At most, the drafters suggested that a parent could be liable if it consciously avoided learning about FCPA violations by a subsidiary. *See* S. Rep. No. 95-114, at 11 (1977) (explaining that such conduct "could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls").

66 Dep't of Justice, Laypersons Guide, *supra* note 29.

67 For example:

• Johnson & Johnson settled an enforcement action with the DOJ and SEC related to actions taken by domestic and foreign subsidiaries that violated the FCPA's anti-bribery and accounting provisions. *See* Press Release, Dep't of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations: Company to Pay Total Penalties of $70 Million in Resolutions with Justice Department and U.S. Securities and Exchange Commission (Apr. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-446.html. There were no allegations in the Information or the Deferred Prosecution Agreement asserting that Johnson & Johnson had any knowledge of the acts of their subsidiaries. *See* Criminal Information, United States v. DePuy, Inc., No. 11-CR-099 (D.D.C. Apr. 8, 2011), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-info.pdf; *Johnson & Johnson DPA*, *supra* note 14.

• The SEC charged United Industrial Corporation (UIC), an American aerospace and defense contractor, with violating the FCPA's anti-bribery provisions for actions taken by its subsidiary. *See* Sec. & Exch. Comm'n, United Industrial Corp., Exchange Act Release No. 60005 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf. There is no indication that UIC possessed any knowledge of these alleged acts.

• The SEC charged Diagnostics Product Company (DPC), an American company, with violating the FCPA's anti-bribery provisions for bribes paid by a Chinese subsidiary to doctors at foreign, state-owned hospitals. *See* Sec. & Exch. Comm'n, Diagnostics Products Corp., Exchange Act Release No. 51724 (May 20, 2005), *available at* http://www.sec.gov/litigation/admin/34-51724.pdf. Nothing in the release indicates that DPC had any knowledge of its subsidiary's bribery. Indeed, DPC halted such illegal payments once it uncovered them. *Id*. at 2.

68 §78dd-1(a)(3); § 78dd-2(a)(3); § 78dd-3(a)(3).

69 *See* H.R. Rep. No. 94-831, at 14 (1977) (Conf. Report) (implying that the company will be liable for the acts of a foreign subsidiary where the U.S. person or company directs such actions).

70 *See* § 78dd-2(a)(3); *see also, e.g.*, Kenneth Winer & Gregory Husisian, *The 'Knowledge' Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent?* White Collar Crime, Andrews Litig. Reporter, at 3-8 (October 2009), *available at* http://www.foley.com/files/Publication/a1d4aa39-1324-4018-bd8a-1cbddfc15e02/Presentation/PublicationAttachment/7e8b814e-446b-411d-8722-1e747b29b303/FCPAWinerHusisian2009.pdf.

71 *See, e.g.*, Nat'l Dairy Products Corp. v. United States, 350 F.2d 321, 327 (8th Cir. 1965) (a parent cannot be held responsible for the actions of its subsidiary unless the parent exerts such a level of control over the subsidiary that the difference between the two entities is only a matter of form); Robert W. Tarun, The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners 46 (2010) (stating that "a U.S. company may be held liable under the principles *of respondeat superior* where its corporate veil can be pierced").

72 *See, e.g.,* Phoenix Canada Oil Co., Ltd. v. Texaco, 842 F.2d 1466, 1477 (3d Cir. 1988) ("[A]n arrangement must exist between the [parent and subsidiary] so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing.").

Environmental Law & Property Rights

Does the Takings Clause Have an Expiration Date?

*By Michael James Barton & Brandon Simmons**

Overview

In the last Term, the United States Supreme Court declined to review two property rights cases: *Guggenheim v. City of Goleta*,[1] from the United States Court of Appeals for the Ninth Circuit, and *CRV Enterprises v. United States*,[2] from the United States Court of Appeals for the Federal Circuit. Some observers expected the Court to grant the petitions for certiorari for these cases because both appellate decisions appeared to depart from the Court's opinion in *Palazzolo v. Rhode Island,* which held that a claim brought under the Takings Clause of the Fifth Amendment could not be dismissed for lack of standing merely because the property owner had purchased the property after it became subject to the regulation effecting the alleged taking.[3] Observers may have had additional hope that the Court would grant certiorari in *Guggenheim* and *CRV Enterprises* because of the circuits that decided the two cases: the Federal Circuit and Ninth Circuit have been described as having the worst and second-worst reversal rates, respectively, among the federal courts of appeal.[4] Instead, the Court denied both petitions for certiorari, thus leaving unanswered the question: does the Takings Clause have an expiration date?

Background: *Palazzolo v. Rhode Island*

We begin with a discussion of *Palazzolo,* the precedent on which the petitioners' briefs in both *Guggenheim* and *CRV Enterprises* relied. In *Palazzolo*, the Court reviewed a decision by the Rhode Island State Supreme Court, in which that court decided that the plaintiff lacked standing to challenge a regulation because at the time the plaintiff acquired the property in question, it was already burdened by the challenged regulation.[5]

The regulation at issue in *Palazzolo* had been promulgated by the Rhode Island Costal Resources Management Council. The council, in an effort to protect the state's coastal properties, passed a number of regulations, including one that restricted development on a piece of land later purchased by Palazzolo. The state supreme court determined that because the property was subject to the regulation at the time of Palazzolo's purchase, the purchase price reflected whatever diminution in value the regulation caused and therefore Palazzolo paid, or should have paid, a lower purchase price, foreclosing any basis for a claim under the Takings Clause. The Supreme Court described the effect of the Rhode Island Supreme Court's decision in stark terms and struck it down: "[The Rhode Island Supreme Court would] put an expiration date on the Takings Clause . . . . *This ought not to be the rule*."[6]

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Guggenheim v. City of Goleta

In 1997, Daniel Guggenheim and others purchased property in an unincorporated part of Santa Barbara County, California. In 2002, the City of Goleta was incorporated, and Guggenheim's land fell within the borders of the incorporated city. At incorporation, Goleta adopted the county's laws, including an existing rent control ordinance to which Guggenheim's property had previously been subjected by the county. One month after incorporation, Guggenheim challenged Goleta's rent control ordinance, claiming that it violated the Takings Clause. The federal district court issued summary judgment for Goleta in 2006, but on appeal, a panel of the Ninth Circuit reversed and remanded. In a 2-1 opinion written by Judge Jay Bybee, the three-judge panel decided that although calculating the diminution in value of a taking under the *Penn Central*[7] test might prove problematic where the property was subject to the challenged regulation when the plaintiff purchased it, Guggenheim had standing to challenge the regulation under *Palazzolo*. Thus, Guggenheim's challenge would not be rejected merely because the challenged regulation was in effect at the time of his purchase.[8]

However, the Ninth Circuit granted en banc rehearing, and a divided en banc court overruled the earlier three-judge panel's holding. The en banc court found the challenged ordinance to be immune from Guggenheim's attack because the ordinance was in effect at the time of Guggenheim's purchase. The Ninth Circuit sidestepped the Supreme Court's decision in *Palazzolo* by cabining it to its specific factual and procedural setting. The Ninth Circuit's interpretation of *Palazzolo* is so narrow as to render it inoperative; as Judge Carlos Bea wrote in a dissent signed by Chief Judge Alex Kozinski and Judge Sandra Ikuta, the Ninth Circuit's ruling "flouts the Supreme Court's holding in *Palazzolo*."[9]

Under the Ninth Circuit's legal analysis, a government entity theoretically could impose unconstitutional regulatory power, and over time—as titles eventually transfer—fewer and fewer owners would have standing to challenge the regulation. This cannot be: a violation of the Fifth Amendment does not cease to be a violation merely because property changes hands. The Supreme Court establishes in *Palazzolo* that an unconstitutional regulation cannot be laundered into a constitutional regulation by the transfer of title of the regulated property.[10]

CRV Enterprises v. United States

CRV Enterprises owns land that includes a narrow strip of navigable water in Stockton, California. From World War II until 1990—prior to CRV's interest in the land—a wood-preserving plant operated on the land's southern shore. In 1992, the EPA found chemicals from the plant's operations on the land and added the property to its Superfund National Priorities List. In 1999, after seven years of review and several

draft reports, the EPA finally issued a final Record of Decision and ordered the waterway capped and access to it restricted. Three years later, CRV purchased the property, which under California state law included the *littoral rights.* In 2003, CRV filed an inverse condemnation claim against the United States alleging that the EPA's action was a taking. However, since the EPA had not begun its remediation, both sides agreed to a dismissal of the suit without prejudice on ripeness grounds.[11]

In 2006, the EPA installed a sand cap and log boom that physically obstructed CRV's access to the waterway. EPA employees posted "NO ENTRY" signs on the land. CRV Enterprises sued to challenge the federal government's interference with its private property, but the suit was dismissed by the United States Court of Federal Claims on the basis that the Record of Decision was in place at the time CRV purchased the property. The United States Court of Appeals for the Federal Circuit decided that CRV lacked standing to assert a claim under the Takings Clause because it did not own the subject property at the time of the alleged regulatory taking.[12]

The Federal Circuit focused considerable attention on the temporal ordering: that the EPA's Record of Decision preceded CRV's acquisition of the property. However, under *Palazzolo* such regulatory action does not escape constitutional review simply because the government's action occurred prior to the plaintiff's purchase of the land.

Briefs of Amicus Curiae

Both petitions of certiorari attracted the attention of a diverse group of property rights advocates, concerned academics, attorneys, and others. The Cato Institute, the Reason Foundation, the Claremont Institute's Center for Constitutional Jurisprudence, the National Federation of Independent Businesses, and notable law professors from George Mason University, Chapman University, and New York University signed or were amici to either one or both briefs. These briefs centered on the very question that the petitioners believed had been settled under *Palazzolo*: does the Takings Clause have an expiration date? Since the Supreme Court denied certiorari in both of these cases, it seems the answer to a question that had appeared well-settled is now less certain.[13]

The Implications of Not Heeding *Palazzolo*

The potential costs of abandoning *Palazzolo* extend beyond jurisprudential concerns. Under the law of the Federal Courts of Appeals for the Ninth and Federal Circuits, there would be two distinct and unequal classes of landowners: one who purchased property prior to a regulatory taking, and another who purchased property after a regulatory taking. The former class would not have the fundamental property right in question. But the latter class also might suffer because any potential buyer of their property would take into account the value of the right to challenge pre-existing regulations and demand that the sale price be discounted by that amount.

The law of the Ninth and Federal Circuits could lead to significant, uncompensated, and unrecognized takings from small investors, property owners, and retirees who lack the resources to employ sophisticated sales transactions to avoid losing the right to challenge regulations. Large corporations might be able to avoid suffering a similar fate because they could potentially retain their right to challenge regulations by transferring ownership via stock purchases and other types of transactional structures to avoid changing corporate ownership during a sale. Thus, like many property rights abuses, the potential property rights deprivations looming under the law of the Ninth and Federal Circuits would fall disproportionately on the less wealthy and less powerful.

Next Steps

Activists and policy makers should consider whether to improve state law protections against regulatory takings by using the same approach employed in many states after the *Kelo* decision: citizens might work through their legislatures to pass appropriate laws.[14,15] Lawyers who are concerned about property rights could publicize cases implicating *Palazzolo* and work with plaintiffs to continue to petition the Court to bring comfort to those that would rely on *Palazzolo*'s protections.

Endnotes

1 Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009).

2 CRV Enters. v. United States, 626 F.3d 1241 (Fed. Cir. 2010).

3 Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

4 Roy E. Hofer et al., *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, Landslide, Vol. 2, No. 3, Jan./Feb. 2010.

5 Palazzolo v. State, 746 A.2d 707 (R.I. 2000).

6 *Palazzolo,* 533 U.S. at 608 & 609 (emphasis added).

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

8 Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009).

9 *Id.* at 1133.

10 *Palazzolo,* 533 U.S. at 629.

11 CRV Enters. v. United States, 626 F.3d 1241 (Fed. Cir. 2010).

12 *Id.*

13 *See*, *e.g.*, Brief of the Cato Institute as Amicus Curiae in Support of Petitioner, Guggenheim v. City of Goleta, 582 F.3d 996 (9th Cir. 2009) (No. 10-1125); Brief of the Cato Institute et al. as Amici Curiae in Support of Petitioner, CRV Enters. v. United States, 626 F.3d 1241 (Fed. Cir. 2010) (No. 10-1151).

14 Kelo v. New London, 545 U.S. 469 (2005).

15 Inst. for Justice, 50 State Report Card: Tracking Eminent Domain Reform Legislation Since *Kelo*, *available at* http://www.castlecoalition.org/index.php?option=com_content&task=view&id=57 (In the wake of the *Kelo* decision, forty-three states have passed laws aimed at curbing eminent domain abuse laws).

An Assessment of the June 2012 Rio+20 UN Conference on Sustainable Development

*By Christopher C. Horner**

By its Resolution A/RES/64/236 of December 24, 2009,[1] the United Nations General Assembly blessed preparations for the United Nations Conference on Sustainable Development 2012.[2] The Resolution was titled "Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the [2002 Johannesburg] World Summit on Sustainable Development."

This third Earth Summit, now colloquially known as UNCSD 2012 or Rio+20,[3] is scheduled to occur in Rio de Janeiro, Brazil, from June 20 to 22, 2012. World political leaders are expected to attend, although progress and other events will dictate at what level. The UK's David Cameron had publicly indicated he will not attend, and the U.S. State Department privately says the same about President Obama.

According to its authorizing Resolution, the Conference's two themes are "institutional framework for sustainable development" and "green economy in the context of poverty eradication and sustainable development." These are truncated in documents such as a UN Environment Programme Background Paper as "theme I . . .international environmental governance," and "theme II . . . the green economy."[4]

The Road to Rio+20

"Rio+20" refers to the 20th anniversary of the 1992 United Nations Conference on Environment and Development (UNCED), also held in Rio, which became a flash point in that year's presidential campaign. To understand the upcoming Rio+20 Conference, it is helpful to recall this event, whose anniversary is nominally the focus of the June gathering and celebration.

In spring of 1992, then-Senator Al Gore achieved great media attention using the event as a platform for assailing the record of President George H.W. Bush, making Bush's vacillation over whether to attend politically costly. In the end, Bush attended and agreed to most but not all of the instruments presented. As such, many view UNCED as a significant victory of combining politics and process to force desired outcomes.

The agreed documents included three declarations of policy and two instruments alternately styled as "legally binding" or "voluntary," depending on the speaker and the audience.[5] Specifically, the first category included the Rio Declaration on Environment and Development, Agenda 21, and Forest Principles.

According to the UN, "Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment."[6] Rio+20 also seeks to assess the Johannesburg Plan of Implementation (JPOI), adopted at the 2002 World Summit on Sustainable Development (WSSD),[7] and fill "gaps in the[ir] implementation."

Rio also produced two treaties that were formalized and opened for signature: the Convention on Biological Diversity[8] and the UN Framework Convention on Climate Change (UNFCCC).[9] Controversially, President Bush refused to sign the former, which was signed by President Bill Clinton one year later, only to be withdrawn from the Senate floor twice by then-Majority Leader George Mitchell after having been reported out of the Senate Foreign Relations Committee.

UNFCCC set forth a commitment to reduce greenhouse gas emissions to 1990 levels by 2000. It was politically styled in the U.S. as "voluntary," though this word does not appear in its text ("shall" does, 118 times), and the agreement required ratification. The U.S. Senate, in an election rush with the environment a hot issue on the heels of Gore's best-selling book "Earth in the Balance," ratified UNFCCC with a remarkable gestation period from agreement to ratification of merely 150 days.

This rush was such that the Senate Foreign Relations Committee related the experience and its concerns over the process extensively in a January 2001 report *Treaties and Other International Agreements: The Role of the United States Senate*.[10] In it, the Committee cited with disapproval three contemporary instances of the Executive Branch accepting environmental treaties with "no reservations" clauses (an admonition ignored since), of which UNFCCC was one.

As the Committee also specifically noted, the continuing process established by UNFCCC led to annual talks toward a binding amendment requiring select countries to reduce greenhouse gas emissions, which is a proxy for requiring reduction of the use of traditional energy sources. Such an amendment was agreed to in principle in Berlin in 1995 and was manifested in the Kyoto Protocol, agreed to in December 1997 and signed by the U.S. in November 1998 (and, despite great media reportage to the contrary, never "unsigned").

Where Is Rio+20 Headed?

The UN Commission on Sustainable Development (CSD, not be be confused with the Conference, or the possible UN Convention on Sustainable Development also bearing the same acronym), was created after Rio to monitor and ensure effective follow-up of the UNCED commitments.

Through these various Rio and Johannesburg declarations and pacts, which Rio+20 is to build upon, CSD aims to "holistically address the three pillars of sustainable development: environmental, economic and social," in the words of one EU delegate's internal briefing paper. A UN document states, "The goal, and indeed the ultimate test, of

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sustainable development is the convergence among the three trajectories of economic growth, social development, and environmental protection."

To illustrate this sentiment further, that same internal EU analysis states:

> In order to increase the opportunities coming from different international and national experiences . . . an international platform could be established within the greater framework of the Green Economy Initiative . . . . The transition towards a new economic system, environmentally and socially sustainable, widely recognized as the best answer to the global crises of these latest years, may represent an opportunity to introduce advanced policy measures for sustainable development and innovative methods for measuring the progress of society.

In short, at Rio+20 "an ambitious outcome with agreed commitments and reforms can be sought . . . . There is the need for a strong, focused and mutually shared political commitment supported by an appropriate institutional framework for sustainable development."

Toward this end, and as articulated in "A Proposal from the Government of Colombia" distributed to Rio+20 negotiators, "build[ing] upon the Johannesburg WSSD Plan of Implementation as well as Agenda 21" entails adopting "Sustainable Development Goals (SDGs), equivalent to [Millennium Development Goals, or MDGs[11]]," although "[i]t is worth noting that while the MDGs applied only to developing countries, the SDGs would have universal application.

This is to say that Rio+20 seeks to prescribe for *all* nations a preferred course of development, in a non-binding agreement applying "green economy" and "sustainable development" goals but with an eye toward redistributing consumption and economic activity.

Vehicles for implementing this philosophy include:

- "capacity building," which means, in this context, an agreed system of wealth transfers to prepare recipient nations for future, larger transfers;[12]
- redefining economic progress, scrapping "the GDP concept as an indicator" due to the fact that it "has lost lost appeal because it does not adequately reflect social and environment costs associated with achieving economic growth." Instead, the goal is to replace GDP with the "human development index," which "needs to factored-in [sic] such externalities" (quoting an EU summary document from a July 2011 meeting); and
- following recommendations in "[a 'Global Green Deal'] paper commissioned by UNEP[13] argu[ing] that an investment of one percent of global GDP (i.e. approximately US$750 billion) in two years' time could provide the critical mass of green infrastructure needed to seed a significant greening of the global economy" (again quoting an internal EU member state analysis).

The latter would likely prove most politically challenging in the U.S., generally and for the specific problem that the seeming contribution of one percent of GDP from each country (GDP remaining a useful metric for certain purposes, apparently) is not the plan. Instead, wealthy countries are to contribute an amount equalling one percent of global GDP.

Also, this approach, according to an internal EU analysis, would "not only focus on financing strategies, but in the context of a differentiated approach between developed and developing economies"—that is, select Western nations are donor states, the rest are recipients—"could take an holistic look at what the right tools and instruments are for the implementation of the actions towards a new economic model, able to respond to environmental needs and to incorporate diversity, equity and inclusiveness in the concept of society."

Bear in mind that international and domestic attention is now drawn to "sustainability"[14] represents the failure of the previous leading vehicle, the "climate" agenda. Several annual conferences hailed as the "last chance" to agree to a binding Kyoto II have come and gone with no agreement on the horizon. And in March 2012 Senate Foreign Relations Committee Chairman John Kerry, lamented that "you can't talk about climate now. People just turn off. It's extraordinary. Only for national security and jobs will they open their minds."[15] He styled the agenda, consistent with rhetoric surrounding the Rio+20 runup, as one of "responsible capitalism." This rebranding should not obscure that the Kyoto plan was similarly about "re-engineering the global economy to a low-carbon model [with] the flow of billions of dollars redirected," in the words of the newspaper The Guardian.[16]

Possible Rio+20 Outcomes

It appears that the main outcome of Rio+20 will be "a focused political document." Early in the negotiations, a sustainability or "green jobs" treaty was discussed optimistically, or, arguably, opportunistically, to capitalize on the economic crisis and re-engineer economies toward the "green economy." Indeed, the environmental conference does appear to be viewed as more an economic one.

An internal EU briefing paper on Rio+20 states that "new development paths for the economies" should be posited "in order to be more in line with environmental and social requirements. Subsequently, the concept of a green economy has been explored in a number of Intergovernmental fora (other than in the UN system and within international organisations and programmes)."

This statement is consistent with remarks made by Ottmar Edenhofer, a senior UN official and co-chair of the UN's Intergovernmental Panel on Climate Change Working Group III ("mitigation of climate change," which also focuses on promoting "sustainable growth"), who described the December 2010 Cancun negotiation for a successor to the Kyoto Protocol in this way to Austrian newspaper *NZZ*: ""The climate summit in Cancun at the end of the month is not a climate conference, but one of the largest economic conferences since the Second World War."[17] He also stated: "But one must say clearly that we redistribute de facto the world's wealth by climate policy . . . . One has to free oneself from the illusion that international climate policy is environmental policy. This has almost nothing to do with environmental policy anymore . . . ."[18]

An EU member state's summary document notes an address to the 19th meeting of the CSD by UN Secretary General Ban Ki-Moon, which "stressed how [a successful effort means] changing consumption and production patterns—from squandering natural resources to the excessive life-styles of the rich—there can be no meaningful realization of the 'green economy' concept."

This same internal analysis of Rio+20 cited above puts matters in the following light:

> Since the multiple and interrelated crises have affected most of the world economies, global attention has been focused on the need to change the current economic patterns, so as to . . . ensure a proper balance of economic growth with social and environmental components. . . . This debate has certainly provided the opportunity to re-examine national and global governance structures and to identify measures to respond . . . . [T]his debate needs to be seen also as an unprecedented opportunity to harmonize the different paths traced over the past twenty years in the way to a more balanced and equitable future, as a way forward to a gradual global transition to an economic system in which the synergies among social, environmental and financial values are better optimized.

A binding instrument rising to the level of requiring Senate ratification, whether addressing Rio+20 Theme I or II, appears less likely now than when Rio+20 was first imagined.

An EU internal document summarizes the lack of present agreement:

> Institutional issues are one of the themes under the Rio+20 agenda but are still largely unknown: the clamor for a United Nations Environment Organization seems to have subsided and talk of a world umbrella sustainable development organization is still esoteric. Some say a new Sustainable Development Council is critically necessary, while others support a reformed CSD and strengthened [UN Environment Programme]. Others were quick to point out [that] a scenario absent an international framework to govern sustainable development is not acceptable. However, concrete proposals remain scarce.

Still, as recently as July 2011, Rio+20 Conference Secretary General Sha Zuhang of China was stating that "the world might need something more than a negotiated declaration of political commitment to advance the implementation of sustainable development agenda."[19]

This was later echoed in other quarters in 2012, if still citing the "climate" rationale for the same idea, when *Scientific American* published an editorial titled "Effective World Government Will Be Needed to Stave Off Climate Catastrophe." In it, Senior Editor Gary Stix called for creation of "a new set of institutions [which] would have to be imbued with heavy-handed, transnational enforcement powers," "capable of instilling a permanent crisis mentality lasting decades, if not centuries," begging the ultimate question, "How do we create new institutions with enforcement powers way beyond the current mandate of the U.N.?"[20]

The United States said the following about the planned "focused political document" in its statement on December 15, 2011 at the Second Rio+20 Intercessional negotiation:

> In lieu of a negotiated action plan, we propose that the short political document of five pages be accompanied by Compendium of Commitments that would be annexed to the document. This Compendium would be delivered as part of the overall Rio +20 outcome and include a list of voluntary, non-negotiated commitments and intended actions from governments, stakeholders and partnerships. The Compendium would represent pledges from actors at all levels to take action to achieve sustainable development. We propose this voluntary Compendium of Commitments as an alternative to the Bureau's proposed Action Plan; it would be a non-negotiated official meeting outcome that would send the clear message to the global community that Rio indeed represents a new approach—broad and inclusive—toward achieving sustainable development.

At a December 2011 preparatory meeting held in New York City, the EU suggested that the outcome document have three sections: a political declaration, a green economy roadmap, and the international framework on sustainable development ("IFSD"). Other countries favored a short political declaration with an annex containing a green economy roadmap comprising common goals and concrete targets and timelines for specific sectors. The G77 Group and China favored an outcome document which comprises the two themes of the Conference, a framework for action and a section dealing with means of implementation.

Final UNCSD declaration language is expected to be produced at "PrepCom3," to be held three weeks before the conference. As of this writing, there is still no general consensus on the format and structure of the zero draft of the outcome document. Regardless, it seems clear that the concept of another multilateral environmental agreement has been postponed, apparently until 2015.

One EU negotiator related to me discussions as part of the preparatory meetings about a fallback plan, a declaration of "corporate social responsibility" principles to supplant the "green jobs" instrument thereby avoiding schisms over "the green economy" (see below). As such, it is possible that President Obama will send a delegate in his stead to agree to various declarations, conscious of the context, including the political risk that a "green jobs" pledge would portend given the Solyndra scandal, not long before the political nominating conventions and as the U.S. presidential campaign is gearing up in earnest.

Difficulties on the Road to Rio+20

Internal documents indicate persistent disputes in related talks, including new twists on perennial troubles less directly related to the subject at hand. For example, Arab countries have expressed "outrage" over the lack of language referencing "the plight of people under foreign occupation."

More on-point is the definition of the "green economy," which G-77/China feel remains "undefined and ambiguous"

(quoting an internal EU assessment). Recent discussions "have shown that the green economy remains a hate object for some developing countries: Venezuela termed it as 'green capitalism,' and Bolivia urged that 'the green of nature prevails over the green of money and profit.'"

Seemingly picayune disputes have involved replacing "green economy" with "transition to a cleaner and more resource-efficient economy," reflecting competing visions of a "green economy" (fundamental transformation, the OECD's preferred course at the EU's urging) vs. "green growth" (G-77/China). This debate led to the EU expressing "deep sadness" over the equivalent of opening all language for renegotiation.

As one EU briefing document summarizing this 2011 meeting noted:

> The politicized debating format which has evolved over the years at the CSD has led to a well-known UN phenomenon where carefully crafted language acquires a life of its own. Divorced from reality on the ground, the formulations live in a virtual reality, passing from one UN document to another. Their rank is almost biblical, and any semantic infringement can make or break a conference. This is what happened at CSD 19, when differences over references to new financial resources or rights of peoples under foreign occupation robbed the international community of valuable groundbreaking decisions . . . .

An EU briefing document from mid-2011 references "signs that those who insisted on choosing the green economy as one of two themes of UNCSD were having second thoughts . . . . Thus, there is still time to correct the thrust of the UNCSD."

Conclusion

All of these discussions and hurdles leave Rio+20 on course to adopt, at most, a declaration committing to further environmental governance, with rumblings about new funding streams and technology transfer to facilitate a global "green economy."

Rio+20 Conference Secretary General Sha Zuhang of China stated, in his aforementioned July 2011 statement, as phrased by a UN summary document, "Major groups . . . should be mobilized and their voices should be properly heard during the preparatory process. Engagement with the private sector was considered especially critical to ensure transition towards the green economy."

Previously, some members in good standing with the environmental governance lobby also stepped up the public advocacy for the new economy as envisioned by Rio.[21] And in November 2011 the UN announced[22] its public relations and organizing push through various portals.[23]

Great efforts are being dedicated to obtaining some tangible results in Rio this June. Notwithstanding the absence of treaty-level commitments, the potential for political commitments indicates that the UN Conference on Sustainable Development in Rio should not be ignored. Recall also the popular lexicon adopted of late in this context, for example former head of the UNFCCC, Yvo de Boer, describing non-binding promises of aid as being "politically binding."

Therefore, Rio+20 is best publicly framed in its run-up as another step in the movement away from the failed "climate" agenda as the principal vehicle for a particular agenda of environmental and economic governance, toward "sustainability." This term, which is so ambiguous that it draws protests even from nations intended to benefit from wealth and technology transfers in its name, nonetheless has particular meaning in the eyes of the agenda's supporters. Comments such as those cited above should help the public gain at least some appreciation of what is intended by and at stake in these talks.

Endnotes

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EPA and U.S. Army Corps Seek to Expand Jurisdiction Under the Clean Water Act

*By Deidre G. Duncan & Kerry L. McGrath**

The U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA") (jointly, the "Agencies") are in the process of issuing a guidance that would expand the scope of their jurisdiction under the Clean Water Act ("CWA"). At the same time, the U.S. Supreme Court recently issued a decision in *Sackett v. Environmental Protection Agency*[1] that could cause the Agencies' assertions of CWA jurisdiction to be given greater scrutiny because it allows regulated parties to challenge compliance orders issued under the CWA and may provide support for challenging jurisdictional determinations made by the Agencies outside the context of a compliance order.

Expansion of Jurisdictional Waters Under the Clean Water Act

On May 2, 2011, the Corps and EPA issued their "Draft Guidance Regarding Identification of Waters Protected by the Clean Water Act" ("Draft Guidance"),[2] which purports to describe how the Agencies will identify waters subject to jurisdiction under the Clean Water Act ("CWA") and implement the U.S. Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"),[3] and *Rapanos v. United States*,[4] cases that are now eleven and six years old, respectively.

The CWA regulates the discharge of pollutants into "navigable waters," which the statute defines to mean "the waters of the United States."[5] The Draft Guidance expands the scope of waters subject to CWA jurisdiction by expanding the definition of "waters of the United States" to include all ephemeral waters; most agricultural, roadside, and irrigation ditches; and many other non-aquatic land features. Under the Draft Guidance, the Agencies are purporting to regulate, and thus require permits for, all linear features that contain "standing water" regardless of the frequency or the duration of the "flow." Never in the history of the CWA has federal regulation defined ditches and other upland drainage features as "waters of the United States." This broad view of the scope of federal authority would encompass many natural landscape features not readily recognizable as "waters."

Significantly, the Draft Guidance applies to the entire suite of CWA programs—section 303 water quality standards, section 401 water quality certifications, section 311 oil spill prevention control and countermeasures, the section 402 storm water program (including recently-issued pesticide permits and soon-to-be-issued post-construction stormwater regulations), and the section 404 dredge and fill permit program.

The Agencies published the Draft Guidance for public comment and received approximately 230,000 comments from groups representing a wide range of interests, including environmental groups; industry groups from the construction, housing, mining, agriculture, and energy sectors; and state and local officials, represented by organizations such as the National League of Cities and the National Association of Counties. The majority of commenters, industry and environmentalist interests alike, urged the Agencies to undertake a rulemaking to address the definition of "waters of the United States" in the context of the *SWANCC* and *Rapanos* decisions rather than proceed by guidance. Indeed, in *Rapanos*, the Supreme Court itself urged the Agencies to conduct a rulemaking to clarify the scope of their CWA jurisdiction.[6] But the Agencies are proceeding as they have in the past—by issuing yet more guidance. They have not included a "waters of the United States" rulemaking on their respective semiannual regulatory agendas. Instead, the Agencies are poised to issue the guidance without undergoing a rulemaking that complies with the various procedural requirements of Administrative Procedure Act ("APA").

On February 21, 2012, the Agencies sent a revised version of the Draft Guidance to the Office of Management and Budget ("OMB") for review. Although the OMB review process is supposed to be completed within ninety days, EPA has been pushing for a more expeditious review schedule. In any event, whenever the final guidance is issued, it is expected to follow closely the substance of the May Draft Guidance and to be immediately effective. As a result, it is quite possible that, within the next two to three months, EPA and the Corps will begin formally applying the new guidance to jurisdictional determinations for all CWA programs.

Implications of Expanding the Definition of "Waters of the United States"

A determination that an area is a "water of the United States" immediately subjects that area to a number of legally-binding requirements. Enlarging the universe of what is considered jurisdictional under the CWA, and thus what areas are subject to the myriad of programs, permits, and limitations associated with such designation will clearly have a broad and substantial impact on regulated entities and the public. The Agencies' proposed expansion of the federal regulatory footprint of the entire CWA will blur the distinction between regulating water and land use and have significant economic implications across the nation's entire economy.

For example, with more waters regulated by the federal government, more entities will be subject to the CWA permitting programs under sections 402 and 404. CWA section 404 requires a permit for projects and activities that involve the discharge of dredged or fill material into the navigable waters,[7] reaching a broad scope of projects, including pipeline and electric transmission and distribution lines; residential and commercial development; renewable energy projects like wind,

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solar, and biomass; transportation infrastructure, including roads and rail; and agriculture. Under the Draft Guidance, virtually all waters could be jurisdictional under the CWA and, as a result, even more projects and activities would be required to obtain section 404 permits. The section 404 permit process is lengthy and costly, often requiring the use of consultants and lawyers.[8] Failure to obtain permits can result in enforcement actions and potential civil or criminal penalties of up to $37,500 per day.[9] Such an expansion of the CWA's jurisdictional reach will add delays and costs to an already-overburdened Corps regulatory program. It will also erect significant economic barriers to important projects at a time when our country is facing the need for massive infrastructure improvements.

In addition, under section 402 of the CWA, dischargers must obtain a National Pollutant Discharge Elimination System ("NPDES") permit for any point-source discharge into "navigable waters."[10] With the proposed expansion of the scope of navigable waters to include waters such as remote waters and ditches that were not previously governed by the CWA, many more activities will become classified as discharges that are required to have NPDES permits. As the number of NPDES permits that must be issued increases, the cost of issuing, monitoring, and enforcing these permits will fall predominantly on the states, which administer the NPDES program in most cases.

Moreover, broadened CWA jurisdiction may lead to additional third-party litigation in instances in which the Corps or EPA determines that a water body is not jurisdictional. The expanded jurisdiction gives an additional jurisdictional hook to potential litigants and, in many cases, will authorize suits for activities with a tenuous connection to water quality by citizens seeking to delay or disrupt new construction or industrial activities.

Implications of *Sackett v. EPA* Decision for CWA Jurisdictional Determinations

On March 21, 2012, the U.S. Supreme Court issued a unanimous decision in *Sackett v. Environmental Protection Agency*,[11] finding that an administrative compliance order issued by EPA under the CWA was final agency action reviewable under the APA and that the CWA does not preclude pre-enforcement review of the compliance order. This decision has important implications for the Agencies' CWA jurisdictional determinations because it allows groups to challenge an agency assertion of jurisdiction in a compliance order issued under the CWA in federal court. The decision may also open the door for groups seeking judicial review of CWA jurisdictional determinations made outside the context of the compliance order.

After the Sacketts began earth-moving work on a plot of land in Priest Lake, Idaho, EPA claimed that the property was a jurisdictional wetland subject to CWA permitting requirements and that the landowners were in violation of the CWA after they placed fill material into the wetlands. The compliance order prevented further construction on the land and required the Sacketts to restore the wetlands. The Sacketts filed suit, seeking a hearing to contest the EPA compliance order. Both the district court and the U.S. Court of Appeals for the Ninth Circuit dismissed their request.[12]

In an opinion written by Justice Scalia, the Supreme Court reversed and held that the compliance order was final agency action subject to APA review and that the CWA does not preclude that review. The Court found that the compliance order was final agency action under the APA because it placed legal obligations on the Sacketts to restore their property, it was not subject to further agency review and therefore marked the "consummation" of the agency's decisionmaking process, and the Sacketts had no other adequate remedy in court. The Court noted that judicial review in CWA enforcement cases typically occurs when EPA brings a civil action. Because the Sacketts cannot initiate the process, they were essentially forced to "wait for the agency to drop the hammer," all the while accruing potential civil penalties. Moreover, the Court found that nothing in the CWA expressly precludes judicial review under the APA and that there is no suggestion that Congress sought to overcome the APA's presumption of judicial review or exclude compliance order recipients from CWA's review scheme. The Court further stated that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." Justice Ginsburg noted, in a concurring opinion, that the Sacketts "may immediately litigate their jurisdictional challenge in federal court."

Although the Court did not reach the merits of EPA's underlying assertion of CWA jurisdiction in the compliance order, it noted that the Sacketts' suit over the compliance order flows from an underlying dispute over the scope of "waters of the United States" subject to CWA jurisdiction. Justice Scalia referenced the Court's previous decisions in *United States v. Riverside Bayview Homes, Inc.*, *SWANCC*, and *Rapanos*, and noted that interested parties like the Sacketts lack clear guidance on the limits of the reach of the CWA. Similarly, in a concurring opinion, Justice Alito noted that the Court's decision provided *some* relief for property owners like the Sacketts because they have the right to challenge EPA's jurisdictional determinations under the EPA, but that solving the underlying problem of agency overreach requires Congress or the Agencies to provide a reasonably clear definition of "waters of the United States" subject to jurisdiction under the CWA. Justice Alito specifically called out the Agencies' reliance on informal guidance and noted that the Agencies' most recent Draft Guidance is "far from providing clarity and predictability" and instead relies on case-by-case determinations.

Prior to the *Sackett* decision, as Chief Justice Roberts noted during the *Sackett* oral arguments, when EPA made a jurisdictional determination that an area is a "water of the United States" subject to the permitting requirements of the CWA, the lack of pre-enforcement review essentially meant that the Agencies were "never going to be put to the test."[13] Because of this decision, the Agencies' overbroad assertions of CWA jurisdiction, such as those anticipated by the Draft Guidance, may be given greater scrutiny. Under *Sackett*, property owners subject to an assertion of CWA jurisdiction in a CWA compliance order may challenge that order in federal court prior to the Agencies issuing an enforcement action. Moreover, the *Sackett* decision also provides useful support for groups seeking to challenge CWA jurisdictional determinations

made by the Agencies outside the context of a compliance order. With the Agencies' attempts to expand the scope of CWA jurisdiction through guidance, the ability to bring pre-enforcement challenges to CWA jurisdictional determinations in federal court will be of paramount importance for regulated parties.

Endnotes

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2 76 Fed. Reg. 24,479 (May 2, 2011).

3 531 U.S. 159 (2001).

4 547 U.S. 715 (2006). The Office of Management and Budget began reviewing a revised version of the guidance on February 21, 2012. This version, which was leaked to the public on March 7, 2012, contains few changes from the Draft Guidance. It is unlikely that the Agencies' final version of the guidance will differ substantively from the 2011 Draft Guidance discussed in this article.

5 33 U.S.C. § 1251, 1344, 1362 (7).

6 *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (stating that the agencies could have potentially avoided "another defeat" if they had completed the rulemaking they began following *SWANCC*); *id.* at 782 (Kennedy, J., concurring) (providing that the agencies must make case-by-case determinations "[a]bsent more specific regulations"); *id.* at 812 (Breyer, J., dissenting) (calling on the Corps to "write new regulations, and speedily so").

7 33 U.S.C. § 1344.

8 One study found that obtaining a "nationwide" general permit under section 404 took, on average, 313 days at a cost of $28,915, and obtaining an individual permit took, on average, 788 days at a cost of $271,000. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources. J. 59, 73-82 (Winter 2002). And these were simply processing costs. They did not include the costs of land, mitigation, delay, and development opportunities foregone, which can be extreme.

9 33 U.S.C. § 1319.

10 33 U.S.C. § 1342(a).

11 566 U.S. __ (2012).

12 *See* Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010).

13 Transcript of Oral Argument at 52, Sackett v. EPA, No. 10-1062 (Jan. 9, 2012).

Federalism & Separation of Powers

Bounty Hunters and the Public Interest—A Study of California Proposition 65

*By Anthony T. Caso**

INTRODUCTION

Adopted by California voters in 1986, Proposition 65 was a revolutionary measure in a number of respects. Although titled "Safe Drinking Water and Toxic Enforcement Act," the scope of the law was much broader than water pollution. The goal of the law was to protect Californians from exposure to cancer-causing substances and reproductive toxins. In addition to prohibiting introduction of such chemicals into the water, the law also required warnings so people could choose to avoid areas where they might come in contact with chemicals known to cause cancer or reproductive harm. Immediately after passage, the new law required the state to compile a list of substances known to cause cancer and reproductive toxins. This list has now grown to nearly 900 different substances. Because the law mandates warnings that allow consumers to avoid exposure to these chemicals, backers of the measure argued that it would reduce the incidence of cancer and other health problems in California.

The law had a darker side, however. Instead of leaving enforcement to politically-accountable public officials like the District Attorney and Attorney General, Proposition 65 allowed enforcement by "bounty hunters."[1] These bounty hunters could be anyone from concerned citizens or environmental groups, to groups merely seeking to cash in on a quick payoff in attorney fees and civil penalties. Indeed, the law specifically provided that a portion of the civil penalties collected in bounty-hunter actions would be paid to the group bringing the lawsuit, rather than the public treasury. These provisions provided a powerful monetary incentive to file claims alleging California businesses have failed to provide appropriate warnings—whether or not those claims had any merit.

Private litigants have not been satisfied, however, with their share of the civil penalty. With the approval of former California Attorney General Bill Lockyer, organizations that bring this type of litigation have switched their focus to requiring payments directly to themselves or another organization "in lieu" of paying a civil penalty. Monies that would have gone to the public treasury to pay for public enforcement of Proposition 65 have instead been diverted to private organizations so that they could pursue their own aims—whether those be appropriate enforcement or pursuit of future payments (or both). What is missing from the debate on Prop 65 is a thorough and thoughtful examination of the bounty hunter provision and the legality of diverting civil penalties from the state treasury to the private accounts of environmental groups.

This paper will lay out a succinct argument focused on the purpose and intent of Proposition 65 as originally enacted. Given these purposes, the paper will then examine the record of settlements under the law—how much is collected from businesses and to whom it is paid. Next, this paper will analyze the legality of the move to divert civil penalties from the state treasury to the private accounts of the litigating organizations. Finally, this paper offers recommendations to reform Proposition 65 litigation.

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HISTORY AND PURPOSES OF PROPOSITION 65

Proposition 65 was adopted by California voters after it appeared on the ballot in the November 1986 election. As described in the voter pamphlet, the measure required warnings before exposing any person to a chemical "known to the State of California" to cause cancer or reproductive toxicity.[2] The proposition also prohibited discharging those dangerous chemicals into the drinking water supply.[3] Under the new law, the Governor was ordered to designate a lead agency to produce a list of chemicals "known to the State of California" to cause cancer or reproductive toxicity.[4] Although the Legislative Analyst could not provide an accurate estimate of the increased enforcement costs to state and local governments from the new measure, the Analyst expected that a portion of the increased costs would be offset by fines and civil penalties provided for in the new law.[5]

The proponents of Proposition 65 set out the purposes of the measure as follows:

- Keep known toxins out of the drinking water
- Require warnings to alert the public before they are exposed to the toxins
- Allow private citizens to enforce the measure in court
- Require government officials to notify the public when illegal discharges of toxic waste could pose a serious risk to public health.[6]

According to the proponents, all of this comes at a "negligible" cost because that cost would be offset by fines and civil penalties. The civil penalties were to be won in lawsuits brought by both public prosecutors and private citizens.[7] The measure provided for civil penalties of up to $2,500 per day for each violation.[8] Not all of the civil penalty went to the state treasury, however. To encourage suits by private citizens, a bounty reward was offered. One-quarter of the civil penalty that would ordinarily go to the public treasury was to be paid instead to the individual or organization that brought the suit.[9] This payment, in addition to other laws providing for payment of attorney fees, established a profit motive for bringing litigation.

Enforcement by Bounty Hunter

While Proposition 65 may have been well-intentioned, it has been overshadowed by the controversial "bounty hunter"

provisions. As all sides of the debate acknowledged, California already had significant regulations on the books governing toxic pollution, and many of those laws carried stiff criminal and civil penalties.[10] Further, a number of existing environmental laws had "citizen suit" provisions, authorizing ordinary citizens and environmental organizations to bring enforcement actions on their own.[11] The difference, however, lies with the near impossible task for businesses to defend themselves against private bounty hunters. Courts have noted that "bringing Proposition 65 litigation is . . . absurdly easy."[12] The bounty hunters are almost assured of getting an award of attorney fees at the end of litigation.[13] By contrast, the business is almost guaranteed that it will never recover its cost of defense even if it prevails.[14] In addition to the cost of the litigation (paying for the attorneys on both sides of the case), businesses face the possibility of ruinous civil penalties under the law.

In addition to authorizing citizen suits (and allowing the collection of attorney fees), the initiative diverted public monies to pay a further reward to the individuals and organizations bringing the suit to enforce the measure. Unlike attorney fees, which are at least theoretically tied to actual costs, the civil penalty does not pay for any cost incurred by the private organization. The payment is pure profit. There is no requirement under the law to show that the organization had costs in bringing the case. Nor is there any requirement to establish that the organization has been injured in any way by whatever violation of the law they are claiming. Anybody actually injured by environmental pollution already had the right to bring litigation for damages.[15]

These bounties are unique in the law. Civil penalties are public monies. Indeed, the initiative identified these monies as the source of revenue to pay for the costs of the new law. To give a portion of these penalties as a reward for bringing litigation, in addition to massive attorney fees, establishes a lucrative profit motive for litigation.

To be clear, these cases are not difficult for the bounty hunters to win. A business charged with exposing Californians to a chemical on the list of cancer-causing substances without warning cannot defend itself by showing a long history of safe use. In one case, for example, the business argued that there was a 150-year history of safe use with no scientific evidence of adverse health effects.[16] The court ruled that under the law the century and a half of safe use is irrelevant. Instead, under Proposition 65, the business bears the burden of proving that any exposure to a chemical on the list is *1000 times below the level of no observable effect*.[17] Faced with such an impossible burden of proof, many companies determined that the most prudent business decision is to pay any demanded attorney fees and penalties to the bounty hunter rather than contesting the case in court. As California soon learned, this was a recipe for abusive litigation tactics by the bounty hunters.

THE LEGISLATURE ADDRESSES LITIGATION ABUSES

The bounty hunter provision of Proposition 65 offered a profit incentive for lawsuits to enforce the measure. That profit was balanced against a very low risk. Other than paying for your own attorney, the cost of bringing a Proposition 65 enforcement action was very low and the risk of being assessed attorney fees incurred by a business that successfully defended the action was negligible.[18] The cost of sending out a threatening demand letter was even lower. With these demands, private groups could, and did, coerce settlements by playing on the fears of the business of a potentially ruinous civil penalty and attorney fee award.[19] The authors of the demand letters could price their settlement demands at or below the cost of what it would cost the business to defend the lawsuit. As noted above, however, the business owner could not win a case by showing the product at issue was safe, or even that nobody had been injured in the history of the product's use. To prevail against a failure-to-warn charge, the business must prove that any exposure to a listed chemical is 1000 times lower than the "no observable effect" level.[20]

Abuses soon followed. In one case (*Consumer Defense Group v. Rental Housing Industry Members*), a law firm created an "astroturf" environmental group to be a plaintiff in Proposition 65 litigation. As the court explained, the so-called environmental group consisted of partners from the law firm.[21] Using this front group, the law firm sent out hundreds of demand letters charging businesses with failure to provide warnings.[22] The firm would use these demand letters to, in the words of the court, "extort" payments of attorney fees or contributions to the front group.[23]

None of the purposes of Proposition 65 were served by these "bounty hunters."[24] The demand letters charged businesses with violating Proposition 65 *because they had parking lots* (thus inviting automobiles and their exhaust), *swimming pools* (thus using chemicals to keep the pools clean), *roofs* (the attorney claimed to be able to tell that the tar used on the roof was dangerous just by the smell), and *gardens* (fertilizers and insecticides might be used).[25] The most astounding demand letters sought damages from businesses on the grounds that they had *furniture and painted walls*.[26] The letters claimed that furniture potentially exposed customers to toxic chemicals used in paint or seat cushions.[27]

Only a few of these cases actually went to court, and prior to changes in the law, these demand letters were not filed with any public agencies. Therefore, there was no way to know if the abuses cited above were the norm or were simply an extreme example of one law firm seeking to maximize its profits. Nonetheless, Proposition 65 did provide a profit motive for bringing litigation and imposed no cost for bringing cases like those described above. Clearly a change in the law was needed.

Because it was enacted as an initiative measure, the California State Legislature is not entirely free to amend the law. Under California's Constitution, initiative measures may only be amended by another initiative—unless the proposition provides a different method.[28] Proposition 65 does permit legislative amendment, but imposes significant restrictions on the power of the Legislature to change the law. Any amendment must "further the purpose" of the initiative and must be approved by a two-thirds super majority vote.[29]

Even with this restriction, the Legislature was convinced of the need to address the abuses of the law by the bounty hunters. Thus, in 1999 the Legislature amended the measure to require the bounty hunters to file copies of their settlements with the Attorney General.[30] Because of this amendment, neither the

organization bringing the suit or the business defending it could hide the settlement. If a business was engaged in a practice that endangered public health, the terms of the settlement ending those practices was now available to the public. By the same token, however, private organizations could not use the threat of publicity or promise of a quick settlement in exchange for a quick, confidential payment. The payments to the bounty hunter are now also subject to public disclosure.[31] These settlements are posted on the Attorney General's website and provide an important source of information for the public today.[32]

These changes to the law only required disclosure, however. The amendments did nothing to address the charge that unscrupulous groups were extorting settlements from businesses on the basis of frivolous claims.

In 2001, the measure was amended again, this time to require the bounty hunters to provide a "certificate of merit" before proceeding with their action.[33] This gave the Attorney General the authority to demand the underlying information behind the certificate in order to investigate the merit of the action.[34] The 2001 amendments also attempted to impose some restrictions on the bounty hunters' ability to settle cases. Under the amendments, courts are now required to make specific findings that the warnings required under the settlement comply with the law and that any imposed civil penalty meets specific standards.[35] The Attorney General is given special authority to participate in settlements of bounty hunter litigation to help enforce these provisions.[36]

One would have expected these changes to lead to fewer questionable lawsuits and a well-supervised process for the assessment and collection of civil penalties. While the requirements for a certificate of merit have led the Attorney General to oppose some claims, the Attorney General has done little to ensure that any civil penalties assessed are related to any actual danger that Californians are subjected to an increased risk of cancer based on the failure to post a warning sign. Indeed, former California Attorney General Bill Lockyer enacted regulations that gave permission to private groups to accept a higher, private payoff in exchange for having no civil penalty assessed against the alleged violator.[37] Any money that would have gone to the public treasury to help pay for enforcement of the law can now be diverted to the organizations that bring the legal challenges.

WHERE HAS THE MONEY GONE?

Between 2000 and 2010, more than $142 million has changed hands as a result of settlements in lawsuits brought pursuant to Proposition 65. That is just the amount of money that businesses have paid to settle cases. It does not include legal or other costs imposed on business. Nor does it include the costs of cases that actually went to trial.

As shown in the chart below, the vast majority of those payments have gone to pay the attorney fees of groups filing challenges. Nearly $90 million of the total, or 68 percent, is listed as payments for attorney fees. Civil penalties, by contrast, account for only 14 percent of the total. The remaining 24 percent—nearly a quarter of all the money collected—is listed as "other" payments—that is, payments that are made directly to the organization that brought the suit or some other organization designated by the filing organization.

Actions brought by the Attorney General are included in these statistics and provide a good point of comparison. How do the private bounty hunters compare in terms of efficiency (the ratio of attorney fees to civil penalties) and in terms of diverting civil penalties meant for the state treasury to private organizations?

As shown in the chart at the top of the next page, during the 11-year period of 2000 to 2010, the Attorney General accounted for total collections of more than $21 million—a little less than 15 percent of the total amount of money collected from Proposition 65 litigation settlements in this time frame. Of that $21 million, only 26 percent was collected as attorney fees. Nearly half of all money collected by the Attorney General was designated as civil penalties. The remainder of the money, about $6 million, was categorized as "other," presumably payments directed to private organizations that helped identify the problem that led to the litigation.

One private organization that accounted for nearly the same amount in Proposition 65 settlements as the Attorney General was the Center for Environmental Health. Between

Summary Chart[38]:

Year	Penalty	Other	Penalty %	Attorney Fees	Atty Fees %	Total
2000	$ 868,620.50	$ 3,047,555.41	22%	$ 7,341,115.78	65%	$ 11,257,271.36
2001	$ 817,175.00	$ 3,976,291.09	17%	$ 6,188,567.00	56%	$ 10,982,034.00
2002	$ 1,213,130.00	$ 2,548,890.66	32%	$ 4,326,003.84	53%	$ 8,087,344.50
2003	$ 926,942.00	$ 2,258,978.99	29%	$ 5,546,273.12	65%	$ 8,482,194.11
2004	$ 1,857,507.50	$ 871,460.91	68%	$ 12,656,669.09	82%	$ 15,367,637.50
2005	$ 1,547,086.98	$ 2,464,707.98	39%	$ 6,276,267.97	61%	$ 10,288,062.95
2006	$ 3,081,850.00	$ 2,300,756.00	57%	$ 8,230,459.00	63%	$ 13,163,065.00
2007	$ 2,337,500.00	$ 2,768,381.00	46%	$ 6,740,856.00	57%	$ 11,846,737.00
2008	$ 4,632,700.00	$ 5,298,665.50	47%	$ 14,607,964.94	60%	$ 24,537,330.44
2009	$ 1,684,890.00	$ 3,869,614.80	30%	$ 9,035,122.90	62%	$ 14,608,177.70
2010	$ 1,622,679.00	$ 4,167,543.00	28%	$ 7,806,539.00	57%	$ 13,620,981.00
TOTALS	$ 20,590,080.98	$ 33,572,845.34	38%	$ 88,755,838.64	62%	$ 142,240,835.56

Attorney General Chart[39]:

Year	Penalty	Other		Attorney Fees		Total
2000	$ 220,000.00	$ 310,000.00	42%	$ 130,000.00	20%	$ 660,000.00
2001	$ 257,300.00	$ 30,000.00	90%	$ 360,700.00	56%	$ 648,000.00
2002	$ 872,488.00	$ 106,553.00	89%	$ 582,215.00	37%	$ 1,561,846.00
2003	$ 360,642.00	$ 25,791.66	93%	$ 255,333.34	40%	$ 641,767.00
2004	$ 256,557.50	$ 15,057.50	94%	$ 100,250.00	27%	$ 371,865.00
2005	$ 132,286.98	$ 132,286.96	50%	$ 133,000.00	33%	$ 397,573.96
2006	$ 1,200,000.00	$ 1,379,900.00	47%	$ 2,499,100.00	49%	$ 5,079,000.00
2007	$ 1,433,000.00	$ 200,000.00	88%	$ 700,000.00	24%	$ 2,874,000.00
2008	$ 3,772,250.00	$ 2,530,250.00	60%	$ 430,726.00	6%	$ 6,766,226.00
2009	$ 755,500.00	$ 1,301,500.00	37%	$ 280,226.00	12%	$ 2,337,226.00
2010	$ 25,160.00	$ 48,590.00	34%	$ -	0%	$ 73,750.00
Totals	$ 9,285,184.48	$ 6,079,929.12	60%	$ 5,471,550.34	26%	$ 21,411,253.96

2000 and 2010 this group accounted for nearly $21 million in payments. However, the Center for Environmental Health's attorney fees collections were more than double those of the Attorney General. Although it collected nearly the same amount of money as the Attorney General, the Center for Environmental Health only took in a little more than 10 percent of the civil penalties collected by the Attorney General. A full 35 percent of the money collected by the Center for Environmental Health—about $7.5 million—was designated as "other" payments. Combining the categories of civil penalty and "other" should have resulted in a bounty of about $2.1 million and a civil penalty paid to the state treasury of nearly $6.4 million. Instead, the state treasury received only $1 million, and the "other" payments totaled more than $7.5 million. Nearly all of this $7.5 million went to the Center for Environmental Health (see chart below).

The contrast is even more stark when other groups are compared to the Attorney General. Mateel Environmental Justice Foundation collected $16.6 million in settlements from Prop 65 litigation between 2000 and 2010. Of that, 57 percent, or $9.4 million, were designated as attorney fees. Only $380,950 were designated as civil penalties, however. The remaining nearly $7 million went toward "other" payments. These "other" payments were generally directed to other organizations that performed the research necessary for future Proposition 65 litigation. As written, Proposition 65 would have allowed only $1.8 million to be diverted to these other organizations as Mateel's "bounty" payment. The remaining $5.3 million would have been paid to the state treasury to fund the cost of the law (see chart at top of next page).

These organizations are not singled out because of the merits of their settlement demands. No analysis has been made of the types of challenges they made or the value to public health of their actions. Instead, this analysis shows the vastly increased costs due to bounty hunter enforcement when compared with enforcement actions brought by the Attorney General. The analysis also shows the massive diversion of civil penalties from the public treasury to private organizations. It bears emphasis that these diversions of civil penalty payments to private organizations were approved—and even encouraged—by the regulations put in place by former California Attorney General Lockyer. Those regulations, however, are themselves illegal.

Center for Environmental Health Chart[40]:

Year	Penalty	Other		Attorney Fees		Total
2000	$ 11,950.00	$ 210,099.91	5%	$ 366,500.09	62%	$ 588,550.00
2001	$ 4,500.00	$ 126,905.67	3%	$ 304,094.33	70%	$ 435,500.00
2002	$ 36,550.00	$ 192,126.29	16%	$ 312,123.71	58%	$ 539,300.00
2003	$ 222,200.00	$ 442,866.34	33%	$ 1,790,633.66	73%	$ 2,455,700.00
2004	$ 2,000.00	$ 52,931.34	4%	$ 694,818.66	93%	$ 749,750.00
2005	$ -	$ 24,500.00	0%	$ 91,250.00	79%	$ 115,750.00
2006	$ 5,000.00	$ 209,881.00	2%	$ 169,119.00	25%	$ 684,000.00
2007	$ 28,000.00	$ 547,644.00	5%	$ 1,115,606.00	66%	$ 1,691,250.00
2008	$ 119,800.00	$ 1,456,950.00	8%	$ 3,117,900.00	66%	$ 4,692,650.00
2009	$ 37,800.00	$ 664,300.00	5%	$ 1,366,100.00	66%	$ 2,068,250.00
2010	$ 614,460.00	$ 3,595,934.00	15%	$ 2,723,156.00	39%	$ 6,933,300.00
Totals	$ 1,082,260.00	$ 7,524,138.55	13%	$ 12,051,301.45	58%	$ 20,954,000.00

Summary Chart[41]**:**

Year	Penalty	Other		Attorney Fees		Total
2000	$ 46,000.00	$ 509,750.00	8%	$ 652,750.00	54%	$ 1,208,500.00
2001	$ 59,000.00	$ 882,500.00	6%	$ 1,203,000.00	56%	$ 2,144,500.00
2002	$ 121,500.00	$ 1,192,000.00	9%	$ 1,549,000.00	54%	$ 2,862,500.00
2003	$ 11,000.00	$ 264,000.00	4%	$ 366,500.00	57%	$ 641,500.00
2004	$ 10,500.00	$ 580,250.00	2%	$ 771,000.00	57%	$ 1,361,750.00
2005	$ -	$ 538,500.00	0%	$ 611,000.00	53%	$ 1,149,500.00
2006	$ -	$ 438,750.00	0%	$ 513,750.00	54%	$ 952,500.00
2007	$ 15,000.00	$ 865,637.00	2%	$ 1,190,000.00	57%	$ 2,070,637.00
2008	$ 95,450.00	$ 619,850.00	13%	$ 1,060,000.00	60%	$ 1,775,300.00
2009	$ 22,500.00	$ 515,000.00	4%	$ 945,000.00	64%	$ 1,482,500.00
2010	$ -	$ 393,000.00	0%	$ 601,000.00	61%	$ 993,000.00
Totals	$ 380,950.00	$ 6,799,237.00	5%	$ 9,463,000.00	57%	$ 16,642,187.00

DIVERSION OF CIVIL PENALTIES TO PRIVATE ORGANIZATIONS IS ILLEGAL

Neither Proposition 65 nor any of its legislative amendments permit reducing the civil penalty in order to make a direct payment to the organization bringing the case or some other organization. Nonetheless, former Attorney General Lockyer issued guidelines expressly stating that no objection will be lodged against proposed settlements that include such a private payment. Apparently this has become the preferred style of settlement, as civil penalties continue to shrink and the "other" category of payments has grown larger. Notwithstanding the popularity of redirecting public funds from the state treasury to private organizations without involvement of the Legislature, these "payments in lieu of civil penalty" settlements are illegal. Redirecting public funds to private purposes is contrary to the language of the measure, and it is doubtful that even the Legislature would have the authority to amend Proposition 65 to authorize such payments.

As already noted, the Legislature does not have a free hand to amend initiative measures. Proposition 65 specified that any amendments must be approved by a super-majority vote of the Legislature and must promote the purposes of the measure. The ballot arguments sent to California voters emphasized that one of the purposes of Proposition 65 was for the measure to pay for itself. Civil penalties that would be collected under the law would be used to offset the cost of enforcement and would be available for other environmental enforcement purposes.[42] As shown above, however, collection of civil penalties has dwindled to a small percentage of the total settlements collected. The money intended to pay for public enforcement and other public purposes has been diverted to private organizations.

The idea that private litigants might be able to bargain away payments to the state treasury in favor of payments directly to themselves appears nowhere in Proposition 65. In fact, any such action is in stark contrast to what voters originally enacted. Proposition 65 states that any person who violates its provisions "shall be liable for a civil penalty not to exceed $2,500 per day for each such violation in addition to any other penalty established by law." Section 5 of the initiative apportioned the civil penalty between various funds and noted that 25 percent of the penalty was to be paid to a private individual that brought the action. The measure thus sets clear limits on the financial liability of businesses violating the law (civil penalties of up to $2,500 per day in addition to other legally-established penalties) and sets a clear limit on how much the organization bringing the action can receive (25 percent of the penalty). There is no room in this language to permit a system of allowing environmental organizations to bargain with an alleged violator for the imposition of a lower penalty in exchange for direct payment to the environmental organization.

As noted earlier, the Legislature may only make changes that further the purposes of the initiative, and then can only do so by a two-thirds super-majority vote.[43] Any change to allow private organizations to determine, on their own, whether to keep some or all of the civil penalty for themselves is not such a change furthering the initiative's purpose. One of the purposes of the act was to lessen the fiscal impact on state and local government through the assessment of fines and penalties. This point was mentioned in both the Legislative Analyst's and the Attorney General's analysis of the measure. That purpose cannot be met if a non-governmental entity has the discretion to divert civil penalties to their own private purposes. The trend toward substituting direct payments to non-governmental entities instead of civil penalty payments to the state treasury violates the provisions of Proposition 65. The Legislature has never authorized this diversion of public funds, and it has no power to do so.

Former Attorney General Lockyer's regulations authorizing diversion of public funds to private organizations do not purport to be binding legal requirements. Instead, the regulations are characterized as "guidelines" for private litigants and courts. In point of fact, however, these regulations serve as a "green light" for private organizations who wish to divert civil penalties from the public treasury to private uses. They are an announced policy that the Attorney General will not enforce the law. Attorney General Lockyer did not have the authority to issue such regulations because he only has authority as delegated by the initiative. Any regulation in excess of that authority is void.[44]

The Attorney General has the legal duty under Proposition 65 to police the legal actions brought by bounty hunters, and to oppose in court those proposed settlements that violate the law. Far from having authority to authorize diversion of civil penalties to private organizations, the Attorney General has the legal duty to oppose any settlements with such a provision.

Even in the absence of an objection from the Attorney General, the courts also have a duty to reject settlements that do not comply with the terms of the initiative. Judicial approval of settlements is only available for those agreements that comply with the law. Settlements that divert civil penalties to private organizations cannot meet that simple test.

Even if these settlements do not comply with the terms of the initiative, the Attorney General has said that they are an appropriate form of "cy pres" relief. But such use of the cy pres doctrine is improper. Cy pres is a legal doctrine whose purpose is to prevent the failure of a charitable trust. Sometimes after a charitable trust has been created, the activity that trust was formed to fund becomes impossible.[45] For example, if a trust was established to pay for the upkeep of a park, that purpose becomes impossible to fulfill if the park is converted to a different use. Instead of allowing the trust to fail, the courts have ruled that the money should instead be devoted to a charitable purpose as close as possible to the original purpose of the trust. This alteration of the trust preserves the donor's charitable intent and allows the funds that were set aside to continue to fund charitable activities.

In modern times, the cy pres doctrine has also been applied to damage awards collected in class action litigation that cannot be paid to members of the class. This happens most often when it is impossible to identify all of the injured parties or the amount of recovery for each class member is too small for individual payments to be practical.[46] Instead of allowing the money to go back to the wrongdoer, the courts have used a version of the cy pres doctrine to allow the damages award to be paid to private organizations whose activities will, in some manner, provide a benefit to members of the class. Both the original charitable trust and the modern class action version of the cy pres doctrine share one critical feature—the payments are diverted to a new purpose because something has happened to make it impossible to use the money for the originally-designated purpose.

In the case of Proposition 65 settlements, however, it is not at all impossible to pay the civil penalties to the California State Treasury. The State of California is more than willing to accept any and all payments to the treasury—especially payments that are meant to offset the cost of a regulatory program to protect the health and safety of California residents.

No matter how the question is analyzed, the answer is the same. Diversion of civil penalties to private organizations is not authorized by Proposition 65. The Attorney General has a legal duty to oppose any settlements that include such a diversion. Courts have a legal duty to reject any such settlements whether or not the Attorney General has filed an opposition.

THE BOUNTY HUNTER VERSUS THE PUBLIC INTEREST

It is no surprise that there have been abuses by bounty hunters under Proposition 65. Threats of litigation have been served without adequate justification. Civil penalties intended to help with the cost of the law have been diverted to private organizations. The law encourages that behavior, however, by offering a cash reward with little or no countervailing risk of loss. Individuals and organizations have every incentive to threaten and file litigation. Even with meritorious litigation, environmental organizations have the incentive to trade civil penalties that would be paid to the state treasury for payments to themselves or allied organizations that will be used to set up the next case.

There is a reason that bounty hunter provisions are so rare in the law. In California, the Attorney General is the top law enforcement official and the only one with the *constitutional* duty to enforce laws like Proposition 65. When the Attorney General brings an enforcement action, it is brought in the name of the "people of the State of California" indicating that it is an "exercise of the sovereign power" of the California. Such cases are not brought lightly. The Attorney General is expected to exercise sound judgment in choosing cases to prosecute in order to focus on the most serious violations and those cases where the public health and safety is truly at risk. The public interest, not profit, is the motivation for public enforcement actions. While individual public officials may make bad or even illegal decisions, there is a public expectation that officials will act, by and large, for the good of the public rather than for their own private profit.

This is the reason that government officials generally cannot be sued for failure to enforce a particular law in a particular situation. As the United States Supreme Court has noted:

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. *See United States v. Batchelder*, 442 U. S. 114, 123-124 (1979); *United States v. Nixon*, 418 U. S. 683, 693 (1974); *Vaca v. Sipes*, 386 U. S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.
>
> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.[47]

These same considerations have convinced the Supreme Court to outlaw criminal prosecutions by attorneys with a financial interest in the case. The Attorney General or the

District Attorney is not the attorney

> of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.[48]

It is the job of the public prosecutor to seek justice—not a private bounty payment.[49]

When the decision to prosecute is handed over to the bounty hunter, however, there is no consideration of what is in the public interest or what priorities should be pursued. There is no "complicated balancing of a number of factors which are peculiarly within [the] expertise" of government regulators. Instead, "enforcement" actions are open to those motivated by private profit rather than the public interest. These are critical considerations because businesses are likely to settle cases even if there is no clear liability or violation of law. It is far better to settle an action for a payment of a certain sum to the organization bringing the suit than to risk financial ruin of costly litigation. It may even be that the cost of the settlement will be less than the cost of hiring attorneys to defend the case.

Finally, the bounty hunter does not play by the same rules as government officials like public prosecutors. The District Attorney and the Attorney General have a duty to represent the public interest and are, at least in theory, answerable to the voters for their behavior. The bounty hunter is under no such duty. The bounty hunter is motivated by its own private concerns, which may or may not be similar to the public interest. In the main, however, the bounty hunter operates in pursuit of the bounty. This can lead to actions inimical to the public interest, such as unwarranted claims (as documented by the court in *Consumer Defense Group v. Rental Housing Industry Members*[50]) and diversion of civil penalties from the state treasury to private organizations.

These considerations make it especially important that the Attorney General take a proactive stance to ensure proper enforcement and implementation of Proposition 65.

CONCLUSION

Enforcement by bounty hunters is subject to abuse—especially when the chief law enforcement officer of the state authorizes those bounty hunters to divert resources intended for the State Treasury to private organizations. The Legislature has recognized this flaw in Proposition 65 and has attempted to address those abuses. In 2001, the Legislature acted to address "abusive actions brought by private persons with little or no supporting evidence." The 2001 amendments required bounty hunters to file a certificate of merit with the Attorney General attesting that they had consulted appropriate experts before filing their claims. The amendments also set out specific guidelines for determining an appropriate civil penalty. In approving any civil penalty, the court must consider the extent of the violation, its severity, the impact of the penalty on the violator, the good-faith actions taken by the violator, whether the violation was willful, what deterrent effect the penalty will have on other members of the regulated community, and other factors that justice may require. A central purpose of these amendments was to place the public interest in control of setting the amount of the penalty—not the profit motive of the bounty hunter.

The 2001 amendments also established an increased role for the Attorney General. Under the amendments, any proposed settlements must be served on the Attorney General so that a public officer serving the public interest can ensure that the purposes of Proposition 65 are being met. The law now authorizes the Attorney General to participate in any settlement to ensure that the civil penalty meets the legislative guidelines and that any proposed attorney fee award is not excessive.

The tools are in place for the Attorney General to reform Proposition 65 litigation in California. A first step could be for the Attorney General to repeal the regulatory guidance permitting civil penalties to be diverted from the public treasury to a private organization. As outlined above, this diversion of public moneys to private organizations violates Proposition 65. There are enough problems with the bounty hunter provision of the original measure. There is no need to increase the potential profit to the bounty hunter by the illegal diversion of public funds.

A second step would be for the Attorney General to actively oppose any proposed settlements that include a diversion of the civil penalty toward private organizations. Money designated by law for the state treasury should be paid to the state treasury for appropriation by the State Legislature.

Third, the Attorney General could reduce misuse of the bounty hunter provision by scrutinizing proposed settlements to determine whether the civil penalty meets the guidelines set out in the law. Low penalties that are traded for higher attorney fees violate the law, but so do high penalties traded for a quick settlement. The Attorney General must be active in this arena to ensure that the litigation and the penalty serve the public, not the profit motive of the bounty hunter and its attorneys.

Finally, the courts are bound to give closer scrutiny to proposed settlements. Court approval is already required for all settlements under the law.[51] To be effective, however, these provisions require parties to justify the complaint and the settlement award. Special vigilance against the diversion of civil penalties to private organizations is warranted. But local superior courts need the assistance and leadership of California's top law enforcement official. The worst abuses of the bounty hunter provision can be controlled only with active oversight by the Attorney General and strict supervision of settlements by the courts.

Endnotes

1 The term "bounty hunter" is technically incorrect. A true bounty hunter only pursues targets selected by law enforcement or judicial officers. As noted below, this law allows private citizens to select the targets of prosecution and gives a financial incentive for that incentive. There is no public oversight in the selection of businesses targeted for litigation.

2 State of California, Ballot Pamphlet, General Election, Nov. 4, 1986, at 52.

3 *Id.*

4 *Id*. at 53 (proposed Health & Safety Code §25249.8).

5 *Id*. at 52 ("A portion of these costs could be offset by increased civil penalties and fines collected under the measure.").

6 *Id*. at 54.

7 *Id*. at 52, 54.

8 *Id*. at 53 (proposed Health & Safety Code §25249.7).

9 *Id*. at 63 (proposed amendments to Health & Safety Code §25192).

10 *Id*. at 54.

11 *E.g.*, Clean Water Act, 33 U.S.C. §1365; Clean Air Act, 42 U.S.C. §7604. In California, citizens and taxpayers generally have the right to bring actions to force public agencies to enforce environmental statutes. *See* Cal. Code Civ. Proc. §1085.

12 Consumer Def. Group v. Rental Hous. Indus. Members, 137 Cal. App. 4th 1185, 1217 (2006).

13 *See id*. at 1220 (noting appropriate award of fees in one case in spite of 150-year history of safe use of the product).

14 DiPirro v. Bondo Corp., 153 Cal. App. 4th 150, 199 (2007) (defending business is not entitled to fees because it is defending its own personal interest rather than the public interest).

15 *See* Orange County Water Dist. v. Arnold Eng'g Co., 196 Cal. App. 4th 1110, 1126 (2011).

16 Consumer Cause v. SmileCare, 91 Cal. App. 4th 454, 466 (2001).

17 *Id*. at 467.

18 *See Consumer Def. Group*, 137 Cal. App. 4th at 1217; *DiPirro*, 153 Cal. App. 4th at 199.

19 *See Consumer Def. Group*, 137 Cal. App. 4th at 1216 & n.22.

20 *Consumer Cause*, 91 Cal. App. 4th at 467

21 *Consumer Def. Group*, 137 Cal. App. 4th at 1190.

22 *Id*.

23 *Id*. at 1210.

24 In oral argument before the court, the attorney proudly proclaimed that he was, indeed, a "bounty hunter." *Id*. at 1189 n.1.

25 *Id*. at 1189.

26 *Id*. at 1194.

27 *Id*.

28 Cal. Const. art. II, §10.

29 Proposition 65, §7.

30 1999 Cal. Stats., ch. 599.

31 *Id*.

32 *See* Proposition 65 Enforcement Reporting, http://ag.ca.gov/prop65/index.php (last visited Feb. 27, 2012).

33 2001 Cal. Stats., ch. 578.

34 *Id*.

35 *Id*.

36 *Id*.

37 11 Cal. Code of Regs. §3203

38 *See* Proposition 65 Enforcement Reporting, http://ag.ca.gov/prop65/index.php (last visited Feb. 27, 2012).

39 *See id.*

40 *See id.*

41 *See id.*

42 Ballot Pamphlet at 52.

43 Proposition 65, §7; *see* People v. Kelly, 47 Cal. 4th 1008, 1025 (2010).

44 Cal. Gov't Code §11342.2; Morris v. Williams, 67 Cal. 2d 733, 748 (1967).

45 Cundiff v. Verizon Cal., Inc., 167 Cal. App. 4th 718, 729 (2008).

46 *Id*.

47 Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

48 Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 802-805 (1987) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

49 *Young*, 481 U.S. at 804 (citing Model Code of Prof'l Responsibility EC 7-13 (1982)).

50 137 Cal. App. 4th 1185, 1217 (2006).

51 Cal. Health & Safety Code §25249(f)(4).

Are the Recent Recess Appointments Constitutional?

*Charles J. Cooper, Michael B. Rappaport, Peter M. Shane, William R. Yeomans, and Dean A. Reuter**

Mr. Reuter: Welcome to the Federalist Society's practice group podcast. The following podcast, hosted by the Federalist Society's Federalism and Separation of Powers Practice Group, was recorded on February 24, 2012, during a live telephone conference call held exclusively for Federalist Society members. My name is Dean Reuter, Vice President and Director of Practice Groups at the Federalist Society.

Before we begin, please note that the Federalist Society takes no position on particular legal or public policy issues. All expressions of opinion are those of the speakers. Also, this call is being recorded for use as a podcast in the future.

We have assembled four experts for today's call, two in support of the recent recess appointments made by President Obama to the NLRB and the CFPB, and two opposed. I will introduce them only very briefly in the order in which they will speak. Each will speak for five to six minutes, after which we will have a general discussion, after which we will return to the audience for your questions.

Leading off will be two speakers critical of the recess appointment authority. Michael Rappaport is a professor of law at University of San Diego School of Law, where he teaches advanced constitutional law and advanced constitutional history and legislation. His research focuses on originalism, super-majority rules, and the separation of powers and federalism.

He will be followed by Mr. Charles "Chuck" Cooper, Principal and Founder of the Washington, D.C. law firm Cooper & Kirk. Mr. Cooper has been named one of the ten best litigators in D.C. by the *National Law Journal*—no small feat in a city where it seems like nearly everyone is a litigator.

We then will turn to the other side of the equation, hearing next from Professor William Yeomans of American University College of Law. Prior to being a professor there, he served as Chief Counsel on the Senate Judiciary Committee for Senator Kennedy after a decades-long career in the Department of Justice.

Fourth will be Professor Peter Shane of Ohio State University Moritz College of Law, where he specializes in, among other things, separation of powers law.

Professor Rappaport, please go right ahead with your opening remarks.

Professor Rappaport[1]: I'd like to focus my remarks on the original meaning of the Recess Appointments Clause. In my view, the modern interpretation of the Clause under both Democratic and Republican Presidents has departed from the original meaning as clearly and as badly as any Warren Court opinion. In my view, President Obama's recent recess appointments assume that modern view of the Recess Appointments Clause. But then they take a step beyond that view, a step in the opposite direction of the original meaning.

The first step to getting back to the original meaning is to identify what that meaning is. And there are two issues here. One could be described as when does the vacancy have to occur for a recess appointment to be allowed? And the other is what type of recess allows a recess appointment, an inter-session recess, or an intra-session recess?

Before getting to this question, I want to make an argument based on the structure of the Constitution for why the original meaning of the Recess Appointments Clause should not be read broadly. The Constitution does not give the President the power to appoint officers. Instead, he shares that power with the Senate. The Constitution does recognize that sometimes it makes sense to allow the appointments without Senate confirmation, but it allows that to occur only when the Congress consents, and only for inferior officers. The Constitution says that the Congress can pass a law vesting the appointment in the President alone, but only for inferior officers. Thus, the overall structure of the Appointments Clause in the Constitution itself makes clear that Senate confirmation is centrally important for the appointment of superior officers. The modern interpretation of the Recess Appointments Clause, which allows the President freely to circumvent Senate confirmation, is inconsistent with that view.

Now let me move to each of these two particular issues. The first one is when must a vacancy occur for there to be a recess appointment? The Recess Appointments Clause says that the President has the power to fill up all vacancies that may happen during the recess of the Senate. So the question here is when does the vacancy have to occur? And I think the text pretty clearly indicates that the vacancy must occur during the recess of the Senate. This strongly implies that the Recess Appointments Clause has the following meaning: If a vacancy arises during a recess, then the President can make a recess appointment to fill that vacancy during that recess; once that recess ends, the President's recess appointment power ends for that vacancy.

The Constitution assumes here that the President and the Senate can make an appointment during the session. Once they come back into session, they're assumed to be able to make an appointment. This interpretation also makes good sense. It gives a strong purpose to the Recess Appointments Clause; after all, it allows temporary appointments to be made if a vacancy arises. And at the time of the Constitution, these recesses would typically be for six to nine months, so you would want to be able to make a recess appointment during that period. But this interpretation prevents the President from circumventing Senate confirmation. Once the President can recess-appoint a person to a position that was vacant during the session (as it is under the modern interpretation), the way is open for the President to circumvent senatorial consent. If a Senate won't confirm his nominee, he can simply wait until the recess and recess-appoint a person at that time, which is what President Obama did.

Now the second issue, very briefly, is what type of recess counts, an inter-session recess or an intra-session recess? An inter-session recess is a recess between the two annual sessions of Congress. An intra-session recess is a recess that occurs during the session. Now it might seem that the Constitution

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** These edited remarks were made during a Federalist Society Practice Groups Podcast recorded on February 24, 2012.*

answered this by using the simple term "recess," and so applies the Recess Appointments Clause to both inter-session and intra-session recesses. But this is mistaken. The Constitution uses the term "adjournment" to refer to both inter-session and intra-session recesses. When it uses the term "recess", it refers only to inter-session recess. Well, what's the evidence for this? First, at the time of the Constitution, "recess" had a meaning that referred to breaks between sessions. You can see this in the influential Massachusetts Constitution. By contrast, one meaning of "adjournment" at the time of the Constitution was "any break during or between sessions." This understanding of "recess" and "adjournment" also makes sense of all the seven or eight clauses that use this term in the Constitution. By contrast, other definitions of "recess" are problematic. Allowing recess appointments for all recesses would allow the President to recess-appoint for a one-day recess or a one-hour recess.

Now, the modern understanding limits the intra-session recesses to those of at least three or ten days, depending on whom you ask. But this is problematic for at least two reasons. First, three or ten days is just too short a time to justify a recess appointment. Secondly, there is no basis for either period in the Constitution; it's made up.

There is other evidence. For one, intra-session adjournments were very short and very rare at the time of the framing, thus, unlikely to be thought to have justified recess appointments. Moreover, if one allows intra-session recess appointments, the result is that recess appointments for intra-session recesses are longer, possibly twice as long, as they are for inter-session recess appointments, which doesn't make any sense at all. While, on this issue, I don't think any piece of evidence is conclusive, overall, the weight of this evidence strongly suggests that only intra-session recesses are covered.

Those are my remarks on the original meaning. I will end right there.

Mr. Reuter: Thank you, Professor Rappaport. Now we will hear the opening remarks of Mr. Chuck Cooper.

Mr. Cooper: Thank you very much, Dean. I want to thank you and the Federalist Society first for organizing this call on this important and interesting subject, and for inviting me to participate.

I want to bring the focus specifically to the issue that is at the heart of the constitutional question raised by President Obama's recess appointments on January 4, and that issue is whether the Senate was continuously in recess from December 17 to January 23, when the Senate and the Congress took its holiday break. The Administration, in an opinion by the Office of Legal Counsel, takes the position that the Senate was in an unbroken inter-session recess during this period, despite the fact that the Senate repeatedly gaveled itself into *pro forma* sessions, and in one of those sessions, actually passed legislation.

In my view, the Senate was not in continuous recess during that period, and the January 4 recess appointments exceeded the President's constitutional authority under the Recess Appointments Clause.

I come to this view rather reluctantly because, as some of you—certainly, those of you on the panel here—know, I am an Article II man. I served in the Office of Legal Counsel for many years, as did three of the other participants on this call.

But the first and threshold reason to conclude, in my opinion, that the Senate's *pro forma* sessions interrupted the holiday adjournment is that the Senate says so. The Constitution's Rulemaking Clause vests in each House of Congress the power to determine the rules of its proceedings, and rules governing how and when the Senate meets and adjourns are quintessentially rules of its proceedings. Because the Rulemaking Clause commits to the Senate judgments about the meaning of its own rules, the Senate's holding of repeated *pro forma* sessions between December 17 and January 23, in my opinion, should end the matter.

The second important point is that there is a firmly-established practice of using *pro forma* sessions to satisfy the requirements of other constitutional provisions. For example, since at least 1949, the Senate has repeatedly held *pro forma* sessions to comply with Article I, Section 5's requirement that it not adjourn for more than three days without the consent of the House of Representatives in the absence of statutes to the contrary. The Congress also uses *pro forma* sessions frequently to satisfy the 20th Amendment's requirement that it meet at noon on January 3 of every year to start a new session of Congress unless a different time is specified by statute.

The January 3 *pro forma* session this past year really brings into sharp focus what I think is the reason that OLC's analysis simply cannot be sustained. By holding that *pro forma* session, the Senate was satisfying two constitutional provisions—one, the 20th Amendment requirement that it meet on that day, and two, the requirement that the Senate not unilaterally adjourn for more than three days. The purpose of the January 3 session was to be in compliance with those constitutional requirements. Now, OLC has implicitly acknowledged that January 3 was the start of the new session of Congress because, it argues, the January appointments were intra-session appointments, and therefore, these appointees get two years instead of one year on their terms. But, even as OLC accepts the *pro forma* session on January 3 as beginning a new session of Congress under the Recess Appointments Clause, it denies that the very same January 3 session concluded a "recess," as that word is used under the Recess Appointments Clause.

Now OLC rejects these arguments that I've outlined, relying instead on what it says is the purpose of the Recess Appointments Clause, which is to provide a method of appointment when the Senate is unavailable to provide advice and consent. OLC says that the *pro forma* sessions were essentially a sham and the President has the discretion to ignore them because, as a practical matter, the Senate was unavailable to consider his nominees. But in my view, that factual predicate for the Administration's analysis collapses under the weight of a single inconvenient truth, which is that on December 23, 2011, during a *pro forma* session, the Senate actually passed legislation, as had the House of Representatives, also in a *pro forma* session, to extend for two months the payroll tax cut. And they did that by unanimous consent, which is the very same procedure that the Senate uses to conduct most of its business, including the vast majority of its advice-and-consent function. If the Senate is available to pass legislation by unanimous consent during

a *pro forma* session, then it just seems to me untenable to say that it is unavailable to confirm the President's nominee in the same manner at the same session.

The final point I'll make very quickly here is that OLC says that the President was entitled to rely on the scheduling order that established these *pro forma* sessions, where the Senate stated that it will not conduct any business at the *pro forma* sessions. There are two quick points to make on that—actually, there are several, but two that I'll make now. One is that by the time the President made the recess appointments on January 4, the Senate had already repudiated its no-business pronouncement by passing a statute, again, during that December 23 *pro forma* session. The President surely isn't entitled to rely on an order that was not binding on the Senate in the first place and that has been repudiated by the Senate itself.

The second point is this: The President in fact did not rely on the Senate's no-business pronouncement because it was the President who urged the Senate to pass the two-month payroll tax cut extension and promptly signed it into law, notwithstanding the fact that it was passed at a *pro forma* session, an allegedly sham session. The President surely isn't entitled both to rely on the Senate's no-business public pronouncement and to ignore it, as he pleases.

With that, Dean, I'll subside until our question period.

Mr. Reuter: Thank you very much. We were just listening to Chuck Cooper. Now, Professor Bill Yeomans, for his opening remarks—go ahead, Professor Yeomans.

Professor Yeomans: Thank you, Dean. I want to thank you and the Federalist Society for pulling together this teleforum and inviting me to participate.

Chuck said that he was an Article II man. I think I'm an Article II and an Article I man. So I am very ecumenical in this process. And I obviously come to a different conclusion from Chuck about the constitutionality of the President's recess appointments. At this point, I think it might be helpful to provide a little bit of context, just so we have some flavor of what we are discussing here.

It is important not to forget that these appointments followed an unprecedented period of obstruction of the President's nominees, both executive nominations and judicial nominations. During this period, the minority in the Senate cast aside the traditional presumption in favor of letting the President get his team in place, with occasional exceptions, and made slow-walking nominees the usual course. So, even three years into his presidency, the President still has executive vacancies to fill. So it seems to me, in the face of this record, the President has shown admirable restraint. He didn't engage in a sweeping exercise of the recess appointment power. He didn't recess-appoint judges as his predecessor did, despite the fact that virtually every one of his judicial nominees that has been voted out of committee has been held on the Senate floor, the requirement of 60 votes has become the norm, and there are roughly, at this point, 100 judicial vacancies. So, rather than engage in a sweeping course of appointments, the President filled these four positions that were essential to allow agencies of government to function. I think that's important.

These appointments are particularly justified because the Senate's obstruction of the nominees directly interfered with the President's ability to take care that the laws are faithfully executed. So the NLRB would have gone out of business with only two members. The Consumer Financial Protection Bureau, which had only recently been created by Congress, would have been unable to exercise a significant part of its authority, the regulation of various non-bank entities, without a Director. So these appointments were very limited in scope, and only in response to determined obstruction did he make them. And it is worth noting that the obstruction, certainly with regard to Richard Cordray, was not based on any objection to him personally. Rather, the forty-four members of the minority signed a statement that they would oppose any head of the consumer bureau. In other words, they would prevent the President from executing the law by refusing to confirm a head. Likewise, a number of members made statements suggesting that they were not that upset about seeing the NLRB go out of business.

Now, turning to the argument that the President was disabled from making recess appointments by the Senate's *pro forma* sessions every three days, I think it's fairly clear that in fact the Senate was in recess. The Senate went out pursuant to a unanimous consent agreement that stated that it would adjourn and convene for *pro forma* sessions only, with no business conducted. And it did that. Senators were not in their offices. They were widely dispersed, many of them on CODELs, going around the world. Staffers were showing up in jeans and flip-flops. So the Senate was not sitting as a deliberative body. It wasn't ready; it wasn't able to receive the President's nominations and to act on them. Rather, it was engaging in a sham effort to thwart the President's recess appointment power. That was the entire purpose of the *pro forma* sessions. Surely, the Senate can't strip the President of his recess appointment power by pretending to be in session.

Obviously, the Democrats initiated this process, and their successful use of these *pro forma* sessions to prevent the President from making recess appointments beginning in November 2007, I think, did a little more than to demonstrate that Harry Reid may have been a better poker player than George W. Bush because it was a bluff. It was a bluff that worked. Part of the reason it worked, of course, was a political calculation, which has always been the principal check on recess appointments. Recess appointments that rankle will be met with a political response if the minority finds it in its interest to do so. So the President may have concluded that, at this point, he didn't have that much to lose. But certainly, he understood that check.

So, in response to the argument that the Senate has absolute power to determine whether or not it's in recess, the argument has to be that it cannot use its internal process to thwart the legitimate exercise of power by another branch. For example, the Senate could not simply adopt a standing rule or a unanimous consent agreement that it's never in recess for purposes of the President's appointment power and that, regardless of whether all its members were gone for extended periods and no business would be conducted, the President is still required simply to accept that the Senate is not in recess. The

Senate can't strip the President of his constitutional authority in that fashion.

It is interesting to note that many people, including Steven Bradbury, for instance, who presided over the Office of Legal Counsel under President Bush when the Democrats launched the *pro forma* session gambit, and whose possible recess appointment was a target of the gambit, subsequently said that the Senate can't constitutionally thwart the President's recess appointment power through *pro forma* sessions. He and others, of course, rely on a definition of "recess" that the Senate Judiciary Committee adopted over a century ago and that is still cited as authoritative by Riddick and others, that says a recess of the Senate occurs whenever the Senate is not sitting for the discharge of its functions and when it cannot participate as a body in the making of appointments. This practical, common-sense view of the meaning of "recess" has been employed consistently in the modern era by the Department of Justice. As Attorney General Daugherty said, to give the word "recess" a technical and not a practical construction is to disregard substance for form.

And to the contention, quickly, that the Senate was not actually in recess because they are only in the recess and conducted some business by unanimous consent. I think, to be sure, the President has to be entitled to rely on the Senate's unanimously-adopted representation that it is not going to conduct business. It did pass the extension of the payroll tax by unanimous consent on December 23. It conducted no further business after that, and as Chuck just said, the actual session during which these recess appointments were made started on January 3 and ran through January 23. So, because the Senate said it wasn't going to do any business, the President had every reason to believe it wouldn't, and it didn't.

The originalist view that Professor Rappaport lays out is very interesting, but we have come a long way since then. Modern Presidents have used the recess appointment power very robustly. Reagan made 240. George H. W. Bush made 74 in his one term. Bill Clinton, 139. George W. Bush upped that to 171, even though he was shut down for the last year of his presidency. In the face of that, it seems to me that President Obama has shown considerable restraint. He has now made only 33, and I'd like to think that his restraint is a reflection of his understanding that our government works best when the political branches don't unnecessarily push their assertions of constitutional authority with regard to the other branch to the extreme. The health of our democracy and the continuing functioning of our government depends on that sense of moderation.

I will stop there and pass the baton.

Mr. Reuter: Thank you. That was Professor Bill Yeomans, and now let's turn to Professor Peter Shane for his opening remarks.

Professor Shane: Thanks, Dean. Let me also say that I'm grateful to the Federalist Society for organizing this debate and including me on the panel. The recess appointments issue is an important one, and I do want to say to people that if they're looking for two beautifully written legal opinions, they should see both the Office of Legal Counsel opinion on this matter from January 6 and Chuck Cooper's February 7 statement to the House Committee on Education and the Workforce. They're both terrific, and I've thanked Chuck before—I now thank him again—for providing me, as a con law teacher, with excellent teaching materials.

Bill Yeomans just explained in eloquent terms why the OLC opinion was sound in rejecting the theory that the Senate's *pro forma* sessions interrupted what was effectively a month-long recess, a recess long enough under numerous institutional precedents to support recess appointments. And despite arguments that Chuck made in his statement to the House, I would like to add that I persist in thinking that, whatever your position on Bill's issue, I actually regard the three-day recess as long enough to permit recess appointments. Let me explain why.

I should start at the outset by expressing some sympathy for Mike Rappaport's position, but like Bill, I think it's too late in the day for originalism. As Justice Frankfurter wrote in his *Youngstown* concurrence, "It is an impermissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss that life has written upon them." The executive branch repudiated half of Mike's view of the Recess Appointments Clause in 1823, the part about a vacancy first having to occur during the recess. And Presidents of both political parties over the last ninety years have consistently disregarded the other half, all of this pretty much with Congress's effective acquiescence. There really is no possibility, I think, that any court will invalidate a recess appointment at this stage either because the relevant vacancy occurred prior to the recess or because the recess fell within, rather than between, congressional sessions.

I should also say, just as a side point, if we're going to look at Article II, Section 2 through a 1789 lens, I'd like to do that as well for Article I, Section 5, under which the House purported to prevent the Senate from going into adjournment. I assume that the purpose of that provision is to enable either house of Congress to keep the other house in town while pressing business is at hand that requires the interaction of both houses. For one house to object to the long-term adjournment of the other house when the obstructionist house itself is in recess, seems like an obvious abuse of power and a likely departure from original intent also.

But in place of original intent, for which I think we have seen too much water under the bridge, I would argue that the soundest view of the word "recess" now is to give that word what people would regard as its ordinary, non-technical meaning. Bill referred to the opinion of Attorney General Daugherty, but that opinion actually adopted its wording from a 1905 Senate Judiciary Committee report that was written to object to Teddy Roosevelt's appointments that occurred during a kind of infinitesimal break between two sessions of Congress. That is, the Senate said that "'recess" means "the period of time when members owe no duty of attendance, when its chamber is empty, when, because of its absence, it cannot participate as a body in making appointments." That certainly describes the three days between January 3 and January 6.

The main objection to this reading, and the one that Mike's remarks anticipate, is that my reading has no obvious

stopping point. A lunch break could be as much the occasion for a recess appointment as a three-week vacation. But if I may quote Justice Scalia's dissent in *Morrison v Olson*, "A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused." Or, to quote a yet earlier opinion of the Supreme Court, "The possible abuse of power is not really an argument against its existence." The President may, of course, use his recess appointments power, or his veto power, or his pardon power, or his power to convene Congress on extraordinary occasions, or, to mention the power he could have used here, his authority to adjourn Congress when the houses are in disagreement as to the date of adjournment. Again, quoting Justice Scalia, "The checks against any branch's abuse of its exclusive powers are two-fold: first, retaliation by one of the other branch's use of its exclusive powers; and second, and ultimately, the political check that the people will replace those in the political branches who are guilty of abuse." That, I think, describes the current situation. There is no other legally-enforceable limit here.

In this case, the President's use of his recess appointments power was his deployment of an exclusive presidential authority to respond to the Senate's abuse, or, more accurately, the congressional Republicans' abuse, of their excusive power. Echoing Bill here, I'd like to say that congressional Republicans have been engaged in what has been called and can really only be called a campaign of nullification, whether to nullify the 2008 presidential election or to nullify statutes enacted by the prior Congress with which they disagree. They haven't voted down the President's nominees; they frequently have not even objected to them. They have simply blocked votes on grounds unrelated to the merits of the nominee—in Richard Cordray's case, over their ostensible preference for a multi-member independent agency over a single-headed agency that Congress actually created.

If members of Congress want to amend the Dodd- Frank Act and create a multi-member CFPB, that's their privilege. Under Article I, Section 7, the two houses need only agree on a common text enacted by a majority vote, and send it to the President for his signature. Under *Chadha*, however, that's the only way they can legislate. Legislating an agency into inaction by exercising textually-unconstrained power to withhold a vote on nominations is an abuse of the Constitution. Chief Justice Hughes once wrote that "[b]ehind the words of the constitutional provisions are postulates that limit and control." And I thought one of those postulates was a requirement that all three branches interact in a way that enables government to move forward.

I'll just conclude by saying that those who object to the January recess appointments have criticized the alleged denigration of the Senate's intended role in the appointments process. But that role is no loftier than the President's nominating power or his obligation to take care that the laws be faithfully executed. What President Obama did was to fill vacancies that had to be filled in order for the agencies involved to function lawfully, and what he did was consistent with the text of the Constitution, whatever the status of the *pro forma* sessions.

Thank you.

Mr. Reuter: Thank you. That was Peter Shane.

In a moment, we're going to open the floor to questions from the audience. First, I want to give Professor Mike Rappaport and Chuck Cooper 60 seconds to respond to anything they heard in the later presentations.

Professor Rappaport: Just very briefly, I think the two presentations defending President Obama's appointments here really just don't take into account the fact that the Constitution gives the Senate advice and consent power here. You see it over and over again. I'll mention just one example. They talk about how the Senate was thwarting the power of the President to make appointments. But of course, the appointments power is shared between the Senate and the President. One can just as easily say that the President, by refusing to compromise with the Senate and, for example, make appointments that they found acceptable, or work out other deals that were acceptable, was thwarting their power. So there's nothing that gives the President a preeminent power here. The Constitution requires both of them.

And very quickly, the other point that I'd like to make is that I don't think it's too late in the day to go back to originalism. We are not in an area, let's say, like the New Deal enumerated powers questions, where overturning bad precedents would lead to a large number of programs becoming unconstitutional. The Supreme Court has never decided this question. If it were to decide tomorrow that the original meaning was the correct meaning for the Recess Appointments Clause, things would go on. There would be no significant disruption. There would be a lot of negotiating between the Senate and the Executive that might have to occur. There would be a couple of changes in statute that needed to go on, but no significant disruption. We are not too late in the day. The Supreme Court can do this. Whether they will, that's another story.

Mr. Reuter: Chuck Cooper, 60 seconds.

Mr. Cooper: Yes. Thank you, Dean.

Just one point—I want to emphasize what Mike has just said. I certainly don't agree that it is too late in the day for an originalist interpretation by the Supreme Court of the Recess Appointments Clause. I think Mike Rappaport makes a very strong argument in support of his conclusion. And I think that issue is very much on the table when the Recess Appointments Clause powers are tested.

The other point I want to make very quickly is that Bill Yeomans did acknowledge, to his credit, that it was Senator Reid who invented the *pro forma* session of the Senate in order to frustrate President Bush's recess appointment power for some period of many, many months. I don't think it was a bluff in the sense that George Bush simply caved to a bluff. I rather think instead that the President respected the prerogatives of the Senate to determine for itself when it adjourns and when it is in session, and I think that decision was the admirable restraint that was shown, not the recess appointments made in the face of *pro forma* sessions that the President Obama undertook.

Mr. Reuter: Professor Shane, what about that? What about the notion that both Mike Rappaport and Chuck Cooper

mentioned, that there hasn't been a lot of reliance on anything other than the originalist interpretation that Professor Rappaport argues for?

Professor Shane: Well, I can only say that, first, five votes on the Supreme Court can do whatever five Justices on the Supreme Court want to do. But it would be, I think, dramatically inconsistent with the Supreme Court's separation of powers jurisprudence to ignore ninety years of history on the inter-session appointments point and nearly 200 years of history on the question whether the vacancy actually has to occur during the recess. In fact, Congress has enacted a statute that permits the pay of recess appointees if they are filling a vacancy that occurred even within, I think, thirty days of the recess. So Congress, by its own enactments, has acknowledged that the vacancies don't have to originate during a recess.

I also have to say, I think it's sort of funny to think about this as President Obama declining to respect the prerogative of the Senate to remain in session. The Senate had no prerogative here. The Senate had to do something consistent with internal congressional procedures to satisfy the requirement that it not adjourn in a way that offended the House's determination that it remain in at least *pro forma* session. And there is no requirement in the Constitution with regard to appointments that the President defer to the House of Representatives on anything.

Mr. Reuter: Professor Yeomans, let me give you just a brief chance to respond to anything you heard and then we'll turn to the audience for questions.

Professor Yeomans: Okay. Well, I don't have very much to add. I'll be very brief.

In response to Chuck's point, certainly, it was Harry Reid who initiated the *pro forma* session to try to frustrate recess appointments. I was working in the Senate at the time, and many of us were quite surprised that there were no further recess appointments. Perhaps, that was because of an admirable sense of restraint, or it may well have been a political calculation. Certainly, I will never know. But there were many people at the time who viewed it as a bluff and were somewhat surprised at its success.

Mr. Reuter: Thank you. That was Professor Yeomans. Now let's turn to the audience for questions.

Audience Participant: It seems the issue comes down to whether or not there was a recess. And although neither the Senate nor Congress may change the meaning of words in the Constitution, there is still some ambiguity as to what constitutes a "recess."

Historically, that has meant the theory of following an adjournment. And if there is no adjournment—that is, a de facto recess occurs—then an ambiguity arises as to whether or not the interim period is a de facto recess or a formal recess. It seems like there is a need for clarification of that in the statute or in a constitutional amendment. So how might that be worded, and what method would be needed to define and clarify the issue?

Professor Shane: I would say that it is quite unlikely that the Constitution is going to be amended on this point. It also seems to me fairly doubtful that the two branches will agree on a common text to enact into statute.

Bill referred in his remarks to what, for decades upon decades, has been an operating presumption in the Senate, a presumption in favor of confirming presidential appointees, particularly within the executive branch. There probably has been an even stronger presumption that those nominees are entitled to a vote. That highlights the importance—the importance in implementing the Recess Appointments Clause—of informal norms that enable the branches to move forward, even in the face of different parties in control of the different ends of Pennsylvania Avenue and the competing prerogatives with which they've been vested by Article I and Article II.

Again, I want to say here, it's not that the President was refusing to listen to objections that were being made to his nominees. There were no objections made to Richard Cordray. The objections were being made to the structure of the agency that he was appointed to head. If the Senate could simply go back to the informal norms, then you would find the President continuing to exercise restraint in the exercise of his powers, which may not be very much limited by the text, but which are certainly limited by institutional prudence.

Mr. Cooper: If I could just add here, Dean, that I think that the inter-branch conflict we've seen over presidential nominees has proceeded now for many decades as a very bipartisan phenomenon. And it's, in my view, no more likely that the executive branch and the legislative branch are going to go back to those informal norms than it is that the Constitution is going be amended over this subject matter.

I would also add that I agree with our questioner here that there is some ambiguity on the meaning of "recess," and whether or not the Senate is genuinely in session during *pro forma* sessions. I actually don't think it's a close question, but to whatever extent there is an ambiguity, I submit that it's the Senate's view that should resolve that ambiguity under the rulemaking power. The Senate has the authority to determine whether it was in session or was in recess during those *pro forma* sessions.

Professor Rappaport: And I might add, with respect to Chuck's point, I think the Supreme Court has said that. In *United States v Ballin*, it said that each house can adopt any reasonable mechanism. That was in the case of a quorum, but the same would hold true, presumably, for a recess. So it's not just the Clause, but it is a Supreme Court opinion.

Professor Shane: And let me just jump in quickly. I would say, in response to that, it's fairly clear that the Senate cannot have absolute authority to define what a recess would be. The President is entitled to some discretion in determining whether or not the Senate is actually in recess when he is exercising his own power to make recess appointments. So there has to be some practical basis for analyzing whether or not the Senate is actually in recess. It can't simply be the Senate's say-so.

Mr. Cooper: Well, let me just jump in quickly and say that I agree that the Senate doesn't have absolute power, as you put it now for the second time, to decree that it's in recess if, in fact, it is meeting around the clock. But if there is any genuine factual predicate for its judgment that it is in session—such as, I think, the *pro forma* sessions amply support, particularly in light of the December 23 *pro forma* session passage of legislation—then I think any idea that there is an ambiguity over that issue would have to be resolved in favor of the Senate's own judgment in terms of the application of its rules and proceedings.

Professor Shane: Well, we disagree on that. We probably shouldn't extend this; we probably should let somebody else ask a question. But I think we have a fundamental disagreement about when the Senate is in *pro forma* session and says it's not available for the conduct of business, whether that doesn't lay a fairly firm predicate for the President to exercise his discretion to decide if the Senate, for purposes of recess appointments, is in recess.

Mr. Reuter: All right. Let's go to the next question from the next caller.

Audience Participant: I wanted to ask a question that goes to a point that Chuck Cooper made. If the President had exercised his recess appointment authority the week before he did, it would have been clear that the appointment would expire at the end of the current session that we're in. But he waited until the first week of the current session. And, as a consequence of that, the appointment will last, the commission will expire, at the end of 2014. But in doing that, the basis for that is that the President and the OLC are relying on the very same *pro forma* session that they're ignoring for other purposes. Right? The fact, as Chuck pointed out, that there was a *pro forma* session on January 3 that started this new session of the current Congress.

What is the response to that? The executive branch generally has done this, but how is it that we can consider the formalities for one purpose and ignore them for other purposes?

Mr. Reuter: I think that's a question for Professor Yeomans or Professor Shane. Do you want to go first?

Professor Shane: Do you want to start, or should I?

Professor Yeomans: Go ahead, Peter.

Professor Shane: Well, I think I'm just putting into different words something you've already said, which is, the exercise by Congress of its own rulemaking powers is undoubtedly conclusive with regard to the internal affairs of Congress. Congress may not, however, exercise those powers in a way that derogates from the powers of the other branches or the rights of individuals.

Congress argued in *Buckley v. Valeo* that the Necessary and Proper Clause gave it the authority to invent a new way of authorizing the appointment of officers, and the Supreme Court said, no, that the Necessary and Proper Clause can't be used—even though it's obviously a comprehensive textual statement of Congress's implied powers—to circumvent the constitutional design. And that was similarly the Court's reasoning in *Chadha*.

So the design here involves the President nominating and the Senate advising and consenting. They can certainly vote no. But simply to refuse to act is not consistent with the constitutional design, and it seems to me, in that case, the President is entirely consistent in saying, look, for Congress's own purposes, you have determined that a *pro forma* session complies with the constitutional starting date. That doesn't affect the executive branch adversely, so that's fine. But you cannot use your rulemaking power to oust me of the recess appointments power. That seems to me to be perfectly consistent.

Professor Rappaport: I find it very odd to talk about the constitutional design when the assumption is we're departing from the constitutional design. We're not looking to the original meaning here. I don't really understand what that means. It may be the constitutional design of an attorney general in 1901, but it's not what we normally mean by "constitutional design." I'll just leave it at that.

Mr. Cooper: Can I just jump in real quickly here? I think that Peter's answer really brings into sharp focus what I think is the single biggest problem with the constitutionality of these recess appointments. It's that the President and OLC are seizing upon the language of the Recess Appointments Clause both to claim the benefits and avoid the disadvantages of *pro forma* sessions. On the one hand, they say the January 3 *pro forma* session didn't exist and therefore didn't interrupt or end a recess, as the word "recess" appears in the Recess Appointments Clause. But the Recess Appointments Clause also says that the term of the recess appointee will extend to the end of the next session of Congress. They then accept the proposition that the January 3 *pro forma* session did exist as a valid session for purposes of them defining that word "session" within the Recess Appointments Clause because they claim that these appointees will hold their appointments to the end of 2013.

So this is an instance when the President is really schizophrenic in his assessment of the validity of the *pro forma* sessions, accepting it when it advantages him and rejecting it when it doesn't.

Professor Shane: Well, I think the point that I made was that he accepted it when it was irrelevant to the exercise of presidential power and he rejected it when it derogated from the exercise of presidential power, which seems to me to be exactly the way the executive branch should operate. The President may well feel it was inappropriate for Congress to rely on a *pro forma* session to comply with the Constitution. But he has no stake in that. So it would disrespect the prerogatives of Congress to say that was improper.

The point I want to reiterate is we can multiply the ways in which the exercise of power could be accelerated here. Mike says, how can we talk about the constitutional design when we're not going back to 1789? Yes, if you go back to 1789, people thought about a Congress that probably would be around for only a few months, and everybody would disperse to their farms

and businesses, and the recess appointments power was intended to accommodate the many months in which they'd be out. But, if you ask the same Framers, when Congress is in session for that few months, can the Senate just ignore the President's nominees and leave those offices vacant, I have no reason to think that the founding generation would have said that's okay. I think that is a departure from the original design.

All the President has done here is to exercise the recess appointments power to the minimum extent necessary to keep these agencies going. He didn't try to adjourn Congress, which might have been interesting. I hope Congress doesn't try to adjourn and then reconvene and adjourn and reconvene to create 48-hour sessions to shorten the Cordray appointment. One can imagine all kinds of separation of powers nightmares. There has to be some kind of return to common-sensical norms.

Professor Rappaport: I just don't understand the basic point being made here, which is that the President is entitled to discretion when it comes to the definition of his powers. And I don't really understand why that would be. I mean, in fact, it seems to me that if he's got a really exceptional power like the recess appointments power, we wouldn't want to give him discretion to do exactly what he's done, which is to exercise his discretion when it helps him and then to exercise a different kind of discretion to avoid hurting him. Instead, we just want to look at what the right answer is. Now, on the other hand, when we talk about the Congress, the rules power is a bookkeeping kind of power or an internal operation power. It does make sense to give discretion in that area.

So I just don't understand why we would want to give the President discretion here. That's not necessarily the normal assumption.

Mr. Cooper: The notion that the President has discretion to determine when the Senate is in recess flows directly from that 1921 opinion by Attorney General Daugherty. There was never any hint of that before 1921. And this executive branch jurisprudence that Peter and Bill cling to, as they say it's too late for originalism and too much water has passed over the dam, is Presidents interpreting the extent of their own power. Believe me, that will not, in my opinion anyway, dissuade a Supreme Court from trying to answer what the correct intendment and original meaning of the Recess Appointments Clause was in applying it to today's world.

Professor Shane: Well, let me just say quickly, I do think that it will be somewhat persuasive that the President is not completely constrained to rely on the Senate's definition of "recess" and does have the ability to make some judgment as to whether or not he thinks the Senate is in recess for purposes of exercising a power that is the President's, the power to make a recess appointment.

Mr. Reuter: Gentlemen, we are up on the hour. Let me give each of you 30 seconds for final thoughts. And let's do this in the order in which we opened. Mike Rappaport, your final thoughts?

Professor Rappaport: Well, I guess I'm hopeful that the Supreme Court will eventually decide this question sooner rather than later. And I really don't think that there's any reason to think that they can't decide this in accordance with the original meaning. A couple of Beltway practices would change. We would have to have compromises on different kind of questions. But basically, the public wouldn't experience any disruption at all, and we would move closer to a situation where there would be, then, fewer recess appointments.

We're in a modern world of airplanes and communications. You would think there would be fewer recess appointments in this world, not a greater number of recess appointments as compared to the horse-and-buggy days of the Constitution. Instead, it's been exactly the reverse. Why? Not because of any legitimate circumstances, but because of power-grabs by Presidents, I would say of both parties, but the most recent one and most aggressive one from President Obama.

Mr. Reuter: Chuck Cooper, a final thought?

Mr. Cooper: I would only add to that very fine summation by Mike Rappaport that I really think the President's January 4 recess appointments have now pushed all of the presidential chips in the middle of the table, on his recess appointment power anyway, because when these appointments are challenged and litigated—and it's just a matter of time before they are—before someone, or some corporate entity or union or something, is disadvantaged by an order of the now-sitting NLRB, or some bank or financial institution is disadvantaged by an action of Mr. Cordray's agency. And when that case comes forward, any litigator worth his or her salt is going to put on the table the points that Mike Rappaport has made about the original meaning of the Recess Appointments Clause and the really extraordinary limitations that, if you follow the text of that clause and the apparent understanding of it from the Framers, really would limit recess appointments to very narrow circumstances.

Mr. Reuter: Professor Yeomans, a final thought?

Professor Yeomans: Very briefly. Certainly, Chuck is right; this is going to be litigated. But it's not at all clear that this ultimate issue will be decided, it seems to me.

I think that, contrary to what some have said, these appointments were very much an exercise of restraint by President Obama in the face of the resistance that his nominees have received in Congress, and not because of any complaints about the nominees but for completely extraneous reasons. I would hope that his restraint in not going on and making a passel of recess appointments would be reciprocated, and that maybe we could enter into a time when there could be restraint both by the Executive and Congress, and we could achieve some constructive result.

Now I'm not overly optimistic that that's going to happen, but that would be the ideal.

Mr. Reuter: Thank you. Professor Peter Shane, a final thought?

Professor Shane: Sure. I guess I would add to Bill's eloquent statement my point again that the Constitution does not authorize a minority in the Senate to effectively legislate by blocking all presidential appointees in order to prevent a previously authorized agency from doing what is statutorily authorized business.

Any interpretation of this is going to go with the ordinary, non-technical meaning of the word "recess." It's going to be the pragmatic reading that Attorney General Daugherty adopted from the Senate Judiciary Report of 1905. If this does go to the Supreme Court, and if a Justice other than Justice Thomas adopts Mike Rappaport's theory, I would be delighted to buy him dinner.

Professor Rappaport: I'll remember it.

Mr. Reuter: It's on tape. It's recorded.

Mr. Cooper: What about me, Peter?

Professor Shane: I'll buy you all dinner.

Mr. Reuter: That's also on tape, and I'm including myself in that group. Let me thank our call-in audience for their attention and for their questions today. But especially, let me thank our experts for your remarks and your insights today. We certainly appreciate your participating in the call. We are adjourned. Thank you very much.

Endnotes

1 Professor Rappaport's thoughts are based on his article *The Original Meaning of the Recess Appointments Clause*, available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=775169&download=yes.

Financial Services & E-Commerce

The Economics and Regulation of Bank Overdraft Protection

*By Todd J. Zywicki and Nick Tuszynski**

Consumer use of bank overdraft protection has risen rapidly over the past decade. In 2010, 13 million consumers used overdraft protection, and banks generated $35 billion in revenue, an important and growing part of total bank revenue. Bank regulators have raised concerns about the increased use of overdraft protection by consumers and have issued regulatory guidance regarding the product under a safety and soundness rationale. In 2009, the Federal Reserve imposed new limits on overdraft protection that made it more difficult for banks to provide the service to consumers.[1] The Federal Deposit Insurance Corporation (FDIC)[2] and the Office of the Comptroller of the Currency have also issued guidance on overdraft protection and pricing.[3]

Public and political debate regarding overdraft protection has highlighted anecdotal stories about irresponsible college students who overdraw their accounts to buy a cup of coffee, thereby triggering substantial overdraft fees.[4] More important, although this subset of overdraft users might view the availability of overdraft as unnecessary or even a nuisance, for millions of others, overdraft can be a valuable tool to deal with short-term liquidity issues.

To date, regulation has been promulgated despite an almost complete lack of knowledge about consumer demand for overdraft protection and any rigorous analysis of safety and soundness or consumer protection questions. But this first look at consumer use of overdraft protection suggests that those who use overdraft protection generally do so because the real-world alternatives that are available are more expensive or less flexible and convenient than overdraft protection, especially when the full cost of alternatives is taken into account, including time, travel, and convenience.

While regulators have imposed regulations and proposed still further interventions, they have provided no tangible evidence of safety and soundness risk, consumer harm, or other market failure from overdraft protection. Most importantly, regulators have provided no evidence that curtailing access to overdraft protection would help those consumers intended to be assisted by the limitations.

This article explores the economics of overdraft usage by consumers and banks to understand the economic logic of the product. It then examines the recent regulatory initiatives by the Federal Reserve, FDIC, and OCC governing overdraft protection issued under the rubric of safety and soundness protection as well as purported consumer protection rationales that might prompt regulatory action by the CFPB. The case for regulation in this area under traditional safety and soundness is exceedingly weak, and the evidence of harm that would justify action under a consumer protection rationale, such as evidence of a lack of consumer understanding of the product's terms or prices, is nearly nonexistent.

There is no reason to believe that this regulatory-induced equilibrium outcome would be economically superior to that chosen voluntarily in a competitive market, especially once these other offsetting price and quality adjustments occur.

I. Overdraft Protection: Background

A. The History of Overdraft Protection

Traditionally, American consumers had three primary forms of payment available to them: cash, checks, and, more recently, credit cards. The advent and rapid spread of debit cards has added an additional payment system, one which has highlighted the question of overdraft fees because of the perception that debit cards and ATM machines are unusually prone to triggering "unfair" overdraft charges.

When using cash, a consumer bears no risk of overdrawing his account because he is limited to the cash he has on hand. Moreover, cash can only be used for face-to-face transactions and cannot be used to pay bills by mail. Accessing large amounts of cash, however, may arouse suspicion with law enforcement authorities. And while ATMs make it easier to obtain and use cash than in prior eras, there is still a substantial cost in terms of time and inconvenience from ATM visits.

Checks solve many of the problems inherent in cash transactions by enabling parties to transfer funds among themselves through bank drafts, rather than face-to-face transactions. But checks create problems of their own because the payment order is separated in time from the actual payment. Even if there were sufficient funds in the account at the time the check was written, there might not be at the time the check clears. This gives rise to the well-known danger that a check might "bounce" and be returned for insufficient funds.[5]

Bounced checks can be very costly to consumers. For example, a bounced check may lead to fees imposed by both the payee as well as the financial institution that may exceed $60 total per transaction, an implied APR far higher than for high-cost loans such as payday loans.[6] Bouncing a check is also very damaging to one's credit score, making subsequent access to credit even more difficult.

B. The Growth of Overdraft Protection Programs

Instead of bouncing checks, many banks have instead offered overdraft protection, in which a bank advances funds to clear the check so that it is not returned.

Over time, access to overdraft protection has grown as automated overdraft protection has reduced its cost and risk and increased its scale. The FDIC found in its 2006 survey of 1171 FDIC-supervised banks that 86% of banks "operated at least one formal overdraft program" and that 40.5% of all banks offered automated overdraft programs.[7] Among larger banks with over $1 billion in assets, 76.0% offered automated overdraft programs.

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Bank revenues from overdraft fees rose from $30 billion in 2005 to $37 billion in 2009 before slipping back to $35 billion in 2010 as a result of new Federal Reserve regulations that reduced the number of consumers using overdraft protection.[8] Overdraft fees constitute a substantial portion of bank revenues, and an even larger percentage for credit unions.[9] According to the FDIC's 2006 survey, overdraft fees on average represent 6% of total net operating revenues of FDIC-insured banks.[10]

This growth in the availability and usage of overdraft protection is consistent with consumer preferences. According to a 2009 survey by the American Bankers Association, of those consumers who had paid an overdraft fee in the past twelve months, 96% wanted the payment covered.[11] Therefore, the vast majority of overdraft customers self-report that they are happy that overdraft protection was available to cover their payments.

II. The Regulatory Framework

A. Federal Reserve Regulation

In 2009, the Federal Reserve promulgated amendments to Regulation E, governing electronic transfers, to place new regulations on overdraft fees.[12] Under those rules, consumers must affirmatively choose to opt-in to overdraft protection for ATM and point-of-sale debit transactions. The Federal Reserve's justification for its action was its conclusion, based on the responses of participants in a survey of just six people, that "participants generally indicated that they would want their checks paid into overdraft" but that the "majority of participants [four of six] also indicated that they would prefer an opt-in over an opt-out even if they would choose to have ATM and one-time debit card transactions paid."[13] Even if the responses of this six-person study are generalizable, however, the Fed made no determination of the relative cost of opt-in versus opt-out options on the system as a whole.

For example, one regional bank solicited opt-in for overdraft protection for debit card transactions from its largest overdraft users.[14] The bank sought permission from 499 customers that had 25 or more overdraft transactions in 2010. Of the 499 customers, 466 (93%) opted in for debit card transactions and 33 (7%) opted out.[15] This willingness of the heaviest users to opt-in to overdraft protection suggests that they value access to overdraft protection notwithstanding its seemingly high cumulative cost. Overall, 73% of the bank's customers chose to opt-in to debit card overdraft protection. Furthermore, market surveys have suggested similar results. According to a survey by Moebs, at various large banks 60%-80% of customers opted-in to debit card overdraft protection, with a median opt-in rate of 75%.[16]

As the analysts at Moebs Services put it, "The consumer no longer views overdrafts as a penalty like a parking ticket, but as a safety net."[17] Standard economic analysis provides a straightforward explanation for this observation: regular users of overdraft protection are those who are most likely to be aware of its costs and to choose to use overdraft protection because they believe it to be superior to their available alternatives.

B. FDIC Guidance

On November 24, 2010, the FDIC issued guidance regarding overdraft fees.[18] Under the FDIC guidance, financial institutions must take several steps regarding their overdraft accounts. Among its requirements, banks must "monitor [customer] accounts" and "take meaningful and effective action to limit use by customers" of overdraft protection. For example, the guidance provides that with respect to "excessive or chronic" users of overdraft protection—defined as those who overdraw their accounts on more than six occasions in a rolling twelve-month period—the bank must take affirmative steps to provide the customer with reasonable opportunity to choose a less costly alternative, such as linked savings account overdraft protection or a line of credit.[19]

C. OCC Guidance

In June 2011, the Office of the Comptroller of the Currency also issued proposed "Guidance on Deposit-Related Credit Products."[20] The OCC's guidance imposes several different requirements. First, it requires disclosure not only of the terms of the overdraft protection program offered but also of any alternative deposit-related credit products offered by the bank (such as tied savings protection). Second, the OCC rules urge banks to adopt an opt-in approach for all overdraft protection products, including checks, ACH, and recurring debit card transactions.[21] Third, the OCC guidance requires the bank to conduct sufficient analysis to ensure that the customer will be able to manage and repay the credit obligations arising from the product. Fourth, the OCC requires banks to adopt "prudent programmatic limitations" on the usage of overdraft protection in terms of the number of overdrafts and the total amount of fees that may be imposed per day and per month and any *de minimis* levels.

D. Rationales for Regulation

To date, regulation of overdraft protection has been grounded in purported safety and soundness concerns. Regulators have claimed that there is an undefined "reputation risk" from overdraft protection, a completely unsubstantiated assertion and hard to square with the market trend toward greater availability of overdraft protection for customers. Those who use overdraft protection most often—who regularly borrow and repay overdraft loans—provide the *smallest* safety and soundness risk, as they are the customers most likely to generate revenues from overdraft loans that exceed the costs or risk of loss to the bank. Thus, although safety and soundness regulation has focused on heavier users of overdraft protection as presenting particular risk, this focus is obviously nonsensical from a traditional safety and soundness perspective.

III. Consumer Protection and Overdraft Regulation

A. Who Uses Overdraft Protection?

The overwhelming majority of bank customers in the United States never use overdraft protection. According to the FDIC, in 2006, 75% of bank customers never overdrew their bank accounts and 12% overdrew only one to four times.

It is often asserted without evidence that overdraft protection is used predominantly by low-income consumers. A study by Moebs research firm, however, concludes that the only accurate predictor of the propensity to overdraft is credit score—those with lower credit scores are more likely to use overdraft protection.[22]

Thus, according to available research, the significant distinguishing feature of heavy overdraft users appears to be their credit score, not their income or other demographic status. After all, overdraft fees can be entirely avoided through responsible financial management: one regional bank found, for example, that 71% of its free checking accounts with average balances of less than $250 incurred no overdraft fees in the one year period between October 2009 and October 2010 (a total of 105,000 accounts).[23]

B. Why Consumers Use Overdraft Protection

Overdraft protection usually serves as a short-term source of small-dollar credit in order to meet a pressing need for funds and to prevent important payments such as utilities, rent, or other bills from being denied for insufficient funds. Moreover, those who use overdraft protection do so because it is better than available alternatives. For many, the closest real-world alternative to overdraft protection is payday lending. According to research by Moebs Services, about 19 million Americans use payday lenders and 13 million use overdraft protection every year.[24]

For most consumers, both payday lending and overdraft protection are fairly expensive compared to mainstream credit offerings such as credit cards.[25] This is to be expected: fundamentally it is and always has been the case that the cost of making small loans to consumers is high relative to the size of the loan. For example, even if a consumer could shop around and find a slightly lower rate for a payday loan than an overdraft loan, doing so would incur time and shoe leather costs of searching around, the risk of being rejected for the loan, etc. Many of these costs are incurred regardless of the size of the loan and thus are especially costly if the loan is small. Payday and overdraft loans share these fundamental economic characteristics that explain why their prices seem high. But payday loans and overdraft protection also differ in several significant ways. First, payday loans are less convenient and flexible than traditional overdraft loans. In fact, payday loans might not even be realistically available in some situations, such as when traveling or in an emergency. Overdraft protection, by contrast, is processed automatically and immediately, twenty-four hours a day, from anywhere in the world, and can be directly triggered by retail or online transactions.

Although payday loans often are less expensive than overdraft fees, this is not always the case. Leaving aside the benefits of overdraft protection in terms of convenience, privacy, and time and shoe-leather costs, there are important differences in the pricing scheme that are relevant to understanding consumer behavior. Payday loans typically charge $15 for every $100 borrowed. Overdraft loans, by contrast, typically charge a fee of $26-$35 *regardless* of the amount advanced. For loans to cover a single small expense of $100 or less, therefore, payday loans are typically less expensive than overdraft loans.[26] For loans of about $200, the price is about equal, and for loans of $300 or above, a single overdraft loan typically will be less expensive. This calculation will vary, of course, depending on whether the consumer is making one overdraft or more. But that is precisely the point—freedom of contract is most likely to be more efficient than regulation when consumer preferences are heterogeneous and knowledge of one's needs is highly personal.

A survey conducted by the Raddon Financial Group of customers of a large regional bank asked customers who used overdraft services where they would turn for emergency funds if they no longer had access to overdraft protection.[27] 53% of "elevated users" of overdraft protection reported that if overdraft protection was not available they would "[n]ot be able to get money," as opposed to only 16% of non-users.[28] Regular users of overdraft protection have low credit quality and limited credit alternatives.[29] According to the Raddon survey, for example, only 7% of elevated users of overdraft protection describe their personal assessment of their credit rating as "excellent," while 70% describe their credit rating as "fair" (38%) or "poor" (32%). By contrast, 74% of non-users of overdraft protection describe their credit rating as "excellent" or "good," and only 9% consider their credit rating to be "poor." Thus, reducing access to overdraft protection would simply exacerbate the plight of those who rely upon it because of a lack of better alternatives.

Fusaro and Ericson conclude that overdraft protection is generally welfare-improving for middle-class bank consumers and neutral for low-income consumers.[30] They conclude that eliminating overdraft protection "through excess regulation would hurt the most vulnerable population most, as they have the fewest alternatives to maintain necessary liquidity."[31]

C. Do Consumers Understand the Cost of Overdraft Protection?

Evidence that consumers generally trade off usage of overdraft protection and payday loans in a manner consistent with the predictions of economic theory also suggests that consumers are generally aware of the costs of overdraft protection compared to various alternative forms of credit and tend to use those which are most efficient in light of the limited options that are available to them.

The pricing of overdraft protection is simple and seemingly transparent. As can be readily seen in the "Overdraft Courtesy Customer Disclosure" form, the costs of overdraft protection are clearly disclosed and easily understood, and the criteria for available line of credit are plain (such as whether one has an overdraft account linked to a direct deposit account or not). The fees are clear: $29 per overdraft, up to a maximum of six charged overdrafts per day, and an 18% APR for any overdraft loan. The bank will not charge any overdraft fees for *de minimis* balances of less than $3. The bank also clearly discloses its clearing order from highest to lowest for various types of charges.

Research on payday loans also confirms that payday-loan customers are generally aware of the cost of payday loans. According to Elliehausen, only two percent of payday-loan customers reported that they did not know the finance charge for their most recent new payday loan; 94.5 percent reported finance charges consistent with prevailing market prices.[32]

IV. Overdraft Protection and Free Checking

A. Overdraft Protection and the Economics of Retail Banking

The expansion in the availability of overdraft protection has also helped to transform the consumer banking system over the past decade, especially by spurring rapid growth in the availability of free checking and other bank services,

increased innovation, and expanding access to bank services for previously-excluded consumers. The link between overdraft fees and free checking is a tight one: overdraft protection is essential for free checking to exist for low-balance consumers. Low-balance customers have little margin for error in managing their affairs—absent overdraft protection, these consumers might bounce checks and other payments with great regularity. For low-income consumers, overdraft protection essentially serves as a substitute for higher required minimum balances or other fees that would be necessary to cover the cost and risk of serving these customers. Overdraft protection, which provides a line of credit to insure payment of obligations after the fact, is a substitute for requiring higher precautionary balances as insurance ahead of time that payments will be honored.

Although banks began mainstreaming free checking in the late-1990s, between 2001 and 2009 the percentage of accounts at large banks that qualified for free checking rose dramatically from 7.5% to 76%.[33] This growth in access to free checking appears to have arisen from two sources: the simultaneous growth in the availability of overdraft protection and the rapid increase in the use of debit cards and the interchange fee revenues that they generate.

The reduction in the availability of free checking in the immediate period after the Federal Reserve's amendments to Regulation E took effect illustrates the competitive nature of the market. According to Evans, Litan, and Schmalensee, "within days" of the Fed's announcement of its new rules, banks starting scaling back access to free checking, imposing new fees, and eliminating services for consumers. The number of accounts eligible for free checking fell eleven percentage points—from 76% in 2009 to 65% in 2010—a figure that translates to approximately 20 million accounts.[34]

Consumers have tended to migrate to banks that offer overdraft protection (and thus lower required monthly fees), which has increased the market share of those banks and put pressure on competitors to respond.[35] Moreover, an obvious but often-ignored point is that consumers can easily avoid paying overdraft fees simply by not spending more money than they have in their account and by better financial management or larger precautionary balances.

B. The "Fairness" of Overdraft Fees

Critics of overdraft protection might argue that even though there are no demonstrable economic rents generated by overdraft fees, overdraft fees should nonetheless be regulated because they are "unfair." "Fairness," of course, is an entirely subjective and arbitrary concept. To the extent that the term has any meaning in this context, it appears to express a concern that the actual operation of overdraft fees results in a cross-subsidization of some consumers by others, as the minority of bank customers who pay overdraft fees sustain the system and provision of free services, innovation, and expanded service for the larger number of those who do not.

Today, banks offer a wide variety of services (many of them provided for free), but all of those are funded by a relatively small number of revenue streams. For example, some consumers physically go into branches to conduct transactions, thereby using the rent, heat, and employee time that others do not. Yet no banks of which we are aware charge a fee for those who use a teller window, even though those who do not use tellers are forced to subsidize those who do. Nor have bank regulators sought to prohibit this "unfair" cross-subsidization of those who use tellers. Banks offer all of these "free" services as a bundle—debit cards, tellers, heat, free parking, drive-through windows, online banking, and myriad other services—even though they result in cross-subsidies because of competition and customer demand. There is simply no sound policy justification for the arbitrary assertion that the only appropriate pricing scheme for banking services is one that is *a la carte* and that bundling services or cross-subsidizing consumers as competitive circumstances demand is a fundamentally flawed pricing scheme.

Replacing the outcomes of market competition and consumer free choice with those preferred by bureaucratic design of prices and products will reverse all of these beneficial trends. Regulatory policies that result in the elimination of free checking and the imposition of higher fees will drive many consumers out of mainstream financial services and force them to rely on alternative financial products, such as check cashers, prepaid card issuers, and rent-to-own companies. Yet this is the predictable unintended consequence of the cascade of government regulation since the financial crisis. Fewer customers are now eligible for free checking, new fees have been imposed on existing services, quality and convenience have declined, and banks have begun closing branches. It is hard to see how these trends will benefit consumers.

V. Competition and Overdraft Protection

If overdraft fees were simply a novel tool for banks to rip off consumers, then the growth of revenue from overdraft protection would be correlated with an increase in banks' bottom line profitability overall. But, in fact, there is no evidence that risk-adjusted bank profitability has increased substantially during the period that overdraft protection has spread and overdraft revenues have risen. Instead, profitability of depository institutions has remained relatively constant over time, even though overdraft revenues have risen substantially. This absence of any systematic evidence of major economic profits linked to the provision of overdraft protection suggests that the increased use of overdraft fees has been driven by the competitive need to meet growing consumer demand, not oppressive or unfair behavior by banks.

Further evidence that overdraft protection does not generate economic rents is the rapid spread of the product and general satisfaction of those who use overdraft protection regularly. The banking industry is highly competitive.[36] This high degree of competition suggests that if any economic profits are earned from overdraft protection they are dissipated in the competitive process of extending banking services to more consumers or reducing other banking fees, such as monthly account maintenance fees. Circumstantial evidence is provided by the absence of economic rents in the payday lending industry once risk and cost are considered [37] and the beneficial effect of competition on payday loan prices.[38]

Finally, the cost of retail banking has risen during the past decade as banks have increased the quality of bank services

through innovation and expanded services, thereby competing away increased revenues from overdraft protection and debit card fees. Of course, the opposite is true as well: if revenues from these are forcibly reduced, then banks will be forced to cut costs and services, closing branches and charging for services that were formerly free.

VI. Unintended Effects of Regulation of Overdraft Protection

Regulation of the terms of overdraft loans may also have negative unintended consequences. As noted, the Federal Reserve's amendments to Regulation E, which adopted an opt-in regime for debit card overdraft protection, had the severe effect of reversing a decade-long increase in the percentage of free checking accounts at banks, and subsequent regulation has accelerated this trend.[39] Moreover, most of the regulations are patently absurd from a safety and soundness perspective: banking regulators have singled out for special concern the most profitable customers and terms of overdraft protection products without any empirical evidence or even plausible economic theory about how reducing revenues could improve safety and soundness.[40] In fact, most of these purported safety and soundness concerns are actually consumer protection concerns in disguise. An awareness of the incoherent nature of the safety and soundness concerns expressed by bank regulators may explain the tentative nature of many of these regulations.

A. Regulating the Posting Order of Transactions

The FDIC guidance requires that banks not process transactions in a manner designed to maximize overdraft fees. As an example, the FDIC has suggested clearing items in the order received or by check number. Although the formal guidance does not speak further to the issue, the FDIC has stated that the practice of many banks of re-ordering transactions to clear payments from the largest to smallest value items is impermissible under the FDIC's guidance because this will "tend to increase the number of overdraft fees."[41]

Although it is plausible that requiring smaller payments to be posted first will reduce the total amount of overdraft fees, the FDIC's narrow focus on minimizing the total *cost* of overdraft protection ignores the potential *benefit* of overdraft protection to consumers. Requiring clearance from lowest to highest dollar value is contrary to the practice of many institutions, which has been to clear larger items first—usually checks and ACH payments—under the assumption that larger items tend to be more important items such as payments for mortgage, rent, utilities, or other high-priority payments that consumers would want to be sure would be paid. Although a requirement that smaller payments be cleared first would likely reduce the cost of overdraft fees, it ignores that the *benefit* of paying larger items is usually greater because the consequences of dishonoring larger payments are more severe. In fact, a report by the Raddon Financial Group of one bank's overdraft program found that 58% of its customers preferred that larger items be posted *first*, even though that might result in more overdraft charges in total.[42] Among "elevated users" of overdraft protection, the percentage preferring larger items to be posted first rose to 60%. Thus, the FDIC guidance contradicts the expressed preferences of a majority of the bank's customers, especially those who use overdraft protection most frequently, making consumers worse off.

VII. Conclusion

Regulation by anecdote is always dangerous, and regulation of overdraft protection based on unrepresentative anecdote presents the risk of injuring consumers and the safety and soundness of the banking system. Safety and soundness regulators are targeting those borrowers who provide no safety and soundness risk (regular users who generate a net profit for banks). Moreover, it is these very same heavy users who report that they are the least likely to have easy, low-cost alternatives to overdraft protection and thus are the most likely to be diligent in maintaining their access to overdraft loans in good standing. Lacking any identifiable safety and soundness threat or identifiable market failure or evidence of consumer ignorance, regulation can be supported by only bald paternalism. And as the lessons of history indicate, paternalistic regulation of consumer credit products tends to injure precisely those it is intended to help, by driving them to use less-preferred credit or reducing their access to credit generally, with all of the ancillary consequences.

The Federal Reserve's amendments to Regulation E implemented last year dealt a major blow to the availability and usefulness of overdraft protection for many consumers. The FDIC's regulatory guidance threatens overdraft protection further; the OCC has raised concerns in its guidance as well. Undoubtedly, some consumers misuse overdraft protection. But as recent years have amply demonstrated, every type of consumer credit is potentially subject to misuse—even traditional mortgages. For millions of consumers, overdraft protection provides a short-term lifeline that enables them to avoid more expensive problems, such as bounced checks, eviction, late fees on credit cards, or utility shutoffs.

Regulators cannot wish away consumers' need for credit, and eliminating access to overdraft protection will not correspondingly eliminate this need. History teaches the hard but undeniable lesson that well-intentioned paternalistic regulations that make it more difficult for consumers to obtain certain products cannot magically make them more financially responsible or make other less-expensive products magically appear. Everyone makes errors when it comes to many things, including personal finances. Yet it remains the case that most of us most of the time know better than central planners what is right for ourselves and our families. Access to overdraft protection is no exception. According to the Raddon survey, 94% of one bank's customers reported that use of overdraft protection should be their personal choice (including 92% of non-users and 96% of elevated users), and 89% reported their view that government should have *no* voice in how many overdrafts are allowed on one's account.[43] Government intervention into a competitive market is typically justified only by demonstrable evidence of a market failure and confidence that interventions will ameliorate, not exacerbate, market failures. To date, such evidence is lacking for overdraft protection.

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36 Evans, Litan, & Schmalensee, *supra* note 33.

37 *See* Paige Skiba & Jeremy Tobacman, The Profitability of Payday Loans (Working Paper, 2006).

38 Donald P. Morgan, Defining and Detecting Predatory Lending (Fed. Res. Bank of New York, Staff Report No. 273, 2007); Robert DeYoung & Ronnie J. Phillips, Payday Loan Pricing (Fed. Res. Bank of Kansas City, Working Paper No. 09-07, 2009); *see also* Philip Bond, David K. Musto, & Bilge Yilmaz, Predatory Lending in a Rational World (Fed. Res. Bank of Philadelphia, Working Paper No. 06-2, 2006).

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40 Note the obvious point which actually must be stated in this context: simply because a customer or term is highly profitable (and thus beneficial from a safety and soundness perspective) does not mean that it is adverse to the interests of consumers. Profits in a free market economy generally are earned by providing a service that consumers desire and value.

41 *See* FDIC Overdraft Payment Program Supervisory Guidance Frequently Asked Questions, No. III.4, *supra* note 19. According to a 2009 survey, approximately 20 percent of financial institutions reportedly used the practice of clearing transactions from larger to smaller obligations. Moebs Services, Consumer Overdraft Fees, *supra* note 24.

42 Raddon Survey, *supra* note 27.

43 *Id.*

Changing Landscape: Thrift Holding Companies and Their New Regulator

*By Julius L. Loeser**

The Dodd-Frank Act, effective July 21, 2011, eliminated the Office of Thrift Supervision ("OTS") and transferred its regulatory authority to the Office of the Comptroller of the Currency, the Federal Reserve Board ("FRB"), and the Federal Deposit Insurance Corporation. Regulatory authority over 430 thrift holding companies ("Thrift HCs") shifted from the OTS to the FRB. All OTS regulations, guidelines, and other advisories dealing with Thrift HCs remain in effect; those regulations are re-codified in new Federal Reserve Regulation LL and MM.

Last April, the FRB expressed its intention to assess the condition, performance, and activities of Thrift HCs on a consolidated risk-based basis in a manner consistent with its established approach regarding bank holding company supervision. In particular, the FRB intends to gain information, insight, and experience with its new crop of regulated institutions through a series of "Discovery Reviews." These reviews will form the basis of the approach the FRB will use to establish ratings for the new institutions under its jurisdiction.

Bank Holding Company Supervision and Regulation

The Board has supervised and regulated bank holding companies for sixty-five years and, over that time, has developed some strong regulatory policies.

These strong policies include applying bank capital requirements to bank holding companies,[1] an approach that other countries do not take under the Basel capital regimen and an approach that the OTS never took.

The Board also has long required that a bank holding company be a source of financial and managerial strength to its subsidiary banks, which means that, if a subsidiary bank needs capital, it is a legal duty of the parent holding company to raise and infuse that capital even if that is at the expense of the bank holding company's other creditors or investors. This is a policy that has never been applied to Thrift HCs.

All of these regulatory changes occur at a time of increasing regulatory scrutiny over the effect incentive compensation has on risk-taking.

Differences Between Bank Holding Company Regulation and Thrift HC Regulation

While it might appear that regulation of bank holding companies and Thrift HCs raise similar issues, there are significant differences between the two.

By way of illustration, grandfathered unitary holding companies historically were permitted to engage in a variety of diverse, non-depository businesses. These non-depository businesses, viewed from the prism of the FRB, might appear to be activities akin to fitting the proverbial elephant through the eye of the needle. For example, one activity, insurance, has a totally different accounting standard. GAAP accounting is not the norm, and capital levels are set by state insurance regulators. Applying standard GAAP-based bank capital requirements to such holding companies is not as easy a fit and raises more questions than it answers.

Also, many Thrift HCs are in mutual form; being a source of strength to a subsidiary depository institution by raising equity capital is not as simple a proposition for a mutual as it is for a stock bank holding company.

Further, in the case of a thrift holding company that is an insurance company, applying the "source of strength" requirement to a thrift holding company might even create tension both between regulators and between the regulators and the company, with its obligations to its policy-holders.

Finally, the concentration in real estate-related assets that is the essence of the mission of a thrift is highly unusual for the FRB to reconcile in the context of consolidated bank holding company supervision.

There also are a myriad of other bank holding company regulatory requirements that the FRB will eventually need to decide whether to apply to Thrift HCs. Examples of differing requirements for holding companies include the duty of bank holding companies, under Federal Reserve Regulation Y, to file suspicious activity reports. Bank holding companies with more than $10 billion in assets also are subject to Federal Reserve stress testing requirements, independent of those to be imposed under the Dodd-Frank Act on all financial companies of that size. Another difference is the limits on bank holding companies of repurchases of their own shares,[2] and large bank holding companies will soon be subject to a rigorous annual capital planning process. Bank holding companies are also subject to a policy limiting the payment of dividends to current earnings.[3] Each of these requirements will need to be reviewed by the FRB and a determination made as to how it will be applied to Thrift HCs.

Bank Holding Company Regulation Already Determined to Be Applicable to Thrift HCs

For the time being, however, the FRB has identified three elements of its bank holding company supervision program that it will apply to Thrift HCs: (1) its consolidated supervision program for large and regional holding companies, (2) its supervisory program for small, noncomplex holding companies, and (3) its holding company rating system.

The Board has also explained how it expects to approach the regulation of Thrift HCs, and some clients have already experienced Federal Reserve examinations that may offer some lessons here. It appears that the Federal Reserve recognizes the unusual issues that Thrift HCs raise and respects those issues. For example, in establishing bank holding company-like reporting obligations on Thrift HCs, the FRB has temporarily exempted Thrift HCs that are insurance companies. The FRB has indicated that it may place Thrift HCs with significant insurance activities in a separate supervisory portfolio.[4]

In order to learn more about the wide diversity of firms that are Thrift HCs, the FRB will communicate with the

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subsidiary thrift's regulators and state insurance commissioners in the case of Thrift HCs that are insurance companies.

The Board also is initially conducting "discovery reviews"[5] to enable it to learn about these non-bank firms and develop plans to supervise them and also to enable such firms to discern the FRB's expectations. The first cycle of these reviews is expected to be completed by July 2012. The reviews focus on structure, intercompany financial transactions, overall financial condition, corporate governance, risk management, and internal audit.

In the case of Thrift HCs focused on insurance and broker-dealer lines of business, examiners will review key financial activities and associated risk management.

The Board's supervisory staff will communicate with a Thrift HC's and its subsidiaries' other regulators, develop an initial supervisory profile (including potential consumer compliance risks outside of the thrift subsidiary), and also develop an initial financial assessment of the Thrift HC. That information will be used to develop supervisory plans, conduct targeted discovery reviews, and compile financial data to support horizontal and peer reviews.

And, of course, these initial assessments will also cast the initial regulatory assessment of the institutions within a formal ratings system—which itself has long-term implications for each institution.

The purpose essentially is to determine whether the thrift holding company conducts operations in a safe and sound manner.

Consolidated Enterprise-wide Supervision

The basis of consolidated enterprise-wide supervision is that large holding companies tend to manage risks on a consolidated basis, and risks across legal entities. Thus, risk cannot be monitored properly through supervision directed at a single legal entity in the organization.

The Board's consolidated supervision program has some similarities to the supervisory program formerly employed by the OTS. However, the FRB has suggested that its consolidated supervision program may entail more intensive supervisory activities than under the OTS practice. For example, the FRB's supervision of Thrift HCs may entail more rigorous review of internal control functions and consolidated liquidity, as well as discovery reviews of specific activities. In addition, the FRB's program may entail heightened review of all nonbank activities (that are greater than those that BHCs can engage in) and greater continuous monitoring of larger Thrift HCs.

Small, Non-complex Holding Companies Supervision

The Board, like the OTS, employs a special program for small non-complex[6] holding companies; in those cases, the FRB assigns a rating based on the rating of the lead depository institution and, typically, no on-site work is undertaken.

Larger ($1 billion to $10 billion in total assets) non-complex holding companies rated satisfactory are inspected on-site every two years. Complex holding companies are inspected annually.

Holding Company Ratings

The FRB will rely on reports filed with and issued by other regulators, publicly-available information, and externally-audited financial statements. It currently rates bank holding companies and will likely eventually rate Thrift HCs based on their risk management (R), financial condition (F), and the "impact" of nonbank entities on subsidiary depository institutions (I), using continuous monitoring,[7] discovery reviews, and testing. For nontraditional bank holding companies, i.e. those in which the significant non-depository affiliates are regulated by a functional regulator and the subsidiary depository institutions are small in relation to the nondepository entities, the FRB will look to the functional regulator for assessment of risk management and financial condition, reserving to itself assessment of the impact of the nonbank activities on the depository institution. The "R," "F," and "I" components together make up a bank holding company's RFI rating.

In order to inform the Thrift HCs how well they conform to the FRB's supervisory expectations, the FRB will issue each thrift holding company an "indicative rating," rather than a final RFI rating. The "indicative rating" will indicate to the Thrift HC how the Thrift HC would have been rated if the RFI rating system was formally applied.

In communicating inspection findings, Federal Reserve examiners will use traditional bank examination terminology, differentiating criticisms among those matters requiring immediate attention ("MRIAs"), matters requiring attention ("MRAs"), and observations.

The Board is aware that Thrift HCs traditionally have been given confidential so-called "CORE"[8] ratings by the OTS, but the FRB is considering transitioning Thrift HCs to the confidential RFI rating system that the FRB uses for bank holding companies after initial reviews of Thrift HCs are conducted. A primary difference between the OTS's CORE rating system and the FRB's RFI rating system is that the latter explicitly takes into account asset quality; however, this may not affect many Thrift HCs to the extent that asset quality might have been subsumed in the capital and earnings components of CORE. Similarly, while the FRB imposes bank-like capital requirements on bank holding companies and bases its RFI rating on compliance with those requirements, it recognizes that Thrift HCs are not subject to such capital standards. Until it imposes such standards on Thrift HCs, the FRB will, like the OTS, assess capital based on qualitative judgment, like that employed by the OTS. The FRB has also suggested that, when it eventually proposes regulations to implement the Basel Committee on Banking Supervision's Basel III framework, these regulations may apply to Thrift HCs.

Attorney-Client Privilege

At one time, there was considerable concern whether providing bank regulators access to material that was subject to the attorney-client privilege might somehow constitute a waiver of this privilege. Normally, the privilege is not waived when a holder of the material discloses it under compulsion of law, and many believed that complying with requests of bank examiners is, in effect, done ultimately under compulsion of law.

However, all ambiguity on this subject was eliminated in 2006 when Congress amended the Federal Deposit Insurance Act to provide that the submission by any person of any information to a federal banking agency for any purpose in the course of any supervisory or regulatory process of such agency shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under federal or state law as to any person other than such agency.

This statutory language is broad enough to protect against waiver any attorney-client privileged information provided by a Thrift HC to the FRB in any inspection or discovery review conducted by the FRB.

Conclusion

The change in responsibility for Thrift HC supervision and regulation from the OTS to the FRB likely will have substantive consequences for all Thrift HCs. It is therefore important for Thrift Holding Companies to pay particular attention to the potential for new interpretations of regulations that pertain and to retain experienced counsel for guidance in compliance activities.

Endnotes

1 SR 11-11 directs the FRB's supervisory personnel to apply in their initial inspection of Thrift HCs principles set forth in SR 99-18 on assessing capital adequacy in relation to risk at large bank holding companies. However, that is to support an evaluation of the Thrift HC's capital planning process and a qualitative assessment of the sufficiency of the Thrift HC's capital.

2 The FRB has, in SR 11-11, directed its supervisory personnel in their first cycle of supervising Thrift HCs to apply principles set forth in SR 09-4, which sets forth supervisory guidance on stock redemptions and repurchases by bank holding companies.

3 SR 09-4, which the FRB has directed its supervisory personnel to apply in their first cycle of examinations of Thrift HCs, covers payments of dividends by bank holding companies.

4 The FRB is also contemplating including Thrift HCs with significant commercial activities in a separate supervisory portfolio, and Thrift HCs with significant broker-dealer activities in yet another separate supervisory portfolio. Currently, large complex bank holding companies and regional bank holding companies, as well as bank holding companies with total consolidated assets of $5 billion or less are each in separate supervisory portfolios.

5 A "discovery review" is an inspection activity designed to improve the understanding of a particular business activity or control process to address a knowledge gap previously identified.

6 Complexity is reviewed annually and is based on size, structure, intercompany transactions, nature and scale of nonbank activities, whether such activities are reviewed by another regulator, whether they are traditional closely related to banking activities or those permitted under the Gramm-Leach-Bliley Act (e.g. insurance, securities, merchant banking), whether risk management is consolidated, and whether the holding company has material debt outstanding to the public.

7 "Continuous monitoring" includes meetings with management, analysis of MIS, review of audit findings, and coordinating with functional regulators.

8 The "CORE" rating system had individual component ratings for capital, organizational structure, risk management, and earnings, but includes a composite rating of consolidated risk management and consolidated strength.

Intellectual Property

Local Patent Rules—Certainty and Efficiency or a Crazy Quilt of Substantive Law?

*By Arthur Gollwitzer III**

More than a decade ago, the United States District Court for the Northern District of California broke new ground by adopting the first local patent rules. Since 2001, at least twenty other district courts have adopted local patent rules, including some of the most prominent districts for litigating patent cases—the Eastern District of Texas, the Northern District of Illinois, and the District of New Jersey. Notably, however, the two well-known patent litigation "rocket dockets" have not adopted such rules—the Eastern District of Virginia and the Western District of Wisconsin.

Districts adopting local patent rules expect those rules to bring predictability and efficiency to patent cases. At the same time, however, federal district courts have interpreted their respective local patent rules in different ways leading to substantive differences in how patent cases are handled across the federal courts.

Statistical and anecdotal evidence suggest that local patent rules achieve their stated goals of providing predictability and efficiency. Predictable case schedules help in-house and outside attorneys develop and stick to case budgets. Defined due dates for exchanging infringement and invalidity contentions avoid gamesmanship and motion practice surrounding contention interrogatories on the same topics. Rules also regulate and bring predictability to expert discovery and disclosing attorney opinions. Finally, rules typically provide standard procedures for claim construction.

These benefits, however, have a price. The Constitution grants Congress exclusive authority over patents. Consistent with that grant, Congress enacted the Patent Act of 1952 and its predecessors, establishing a uniform body of patent law to be applied exclusively in the federal courts. Congress also gave the Supreme Court authority to enact a uniform set of civil procedure rules for the federal courts. Today, however, courts are interpreting their local patent rules in ways that are not uniform and ways that dictate case outcomes. That is, cases filed in San Francisco are taking a very different path and reaching different outcomes than cases filed in east Texas or even Chicago or New York, contrary to constitutional and congressional goals of having a uniform body of patent law and a uniform code of civil procedure.

I. A Uniform Body of Patent Law

The United States Constitution expressly dedicates patent law to the federal government.[1] To that end, the federal government enacted its first patent act in 1790. Since that time, the federal government has maintained its exclusive authority over patent law, enacting the current patent laws in 1952 and subsequent amendments, including the recently-enacted America Invents Act. To ensure that federal patent law was uniformly interpreted, in 1982, Congress also established the United States Court of Appeals for the Federal Circuit so that a single appellate court would hear patent cases and issue a single body of controlling precedents.[2]

II. The Rules Enabling Act, a Uniform Code of Civil Procedure, and Local Rules

In 1934, the federal government empowered the Supreme Court to prepare a uniform code of civil procedure for the federal courts. In the Rules Enabling Act, Congress granted the Supreme Court authority "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts and courts of appeals."[3] Congress believed it was limiting the Court's rule-making power to issues that did not affect substantive rights by providing that "such rules shall not abridge, enlarge or modify any substantive right."[4]

Opponents of the Rules Enabling Act warned that Congress was improperly delegating authority to the courts that ultimately would usurp Congress's legislative power.[5] In response to these concerns, the Senate Judiciary Committee emphasized that the Rules Enabling Act would not grant the judiciary the power to affect substantive rights.[6]

Pursuant to the Rules Enabling Act, the Supreme Court approved Rule 83, which allows district courts to adopt local rules.[7] Rule 83, however, limits the district courts' rule-making authority consistent with the Rules Enabling Act's prohibition against rules that affect substantive rights. "A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075."[8] In 1995, Rule 83 was amended to clarify that local rules must be consistent with Acts of Congress.[9]

The Chairman of the Advisory Committee on the Federal Rules of Civil Procedure at the time of their enactment, William Mitchell, warned against district courts overusing Rule 83. Mr. Mitchell stated that if the district courts use Rule 83 "to address meticulous details that they think improve the Supreme Court rules, simplicity and flexibility will be impaired, and uniformity will be destroyed . . . ."[10] The Supreme Court also appointed a committee to study then-existing local rules, the Knox Committee, and it concluded that the district courts are best served with few local rules. The Knox Committee believed that superfluous local rules should be avoided as they are inimical to the goals of uniformity and flexibility built into the new Federal Rules of Civil Procedure.[11]

Nevertheless, within thirty years, the federal district courts had adopted more than two thousand local rules, leading one commentator to refer to them as a procedural Tower of Babel.[12]

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By 2002, there were more than 5575 local rules across the country.[13] In 2004, the Judicial Conference issued a report on local rules that repeated many of the Knox Committee's findings sixty-four years earlier. The Judicial Conference stated that district courts should not enact local rules that (i) conflict with national law, (ii) duplicate national law, (iii) are outmoded or no longer needed, or (iv) do not conform to the uniform number system.[14]

Judicial guidance regarding the permissible scope of local rules is limited. In *Miner v. Atlas*,[15] the Supreme Court struck down local rules in the Northern District of Illinois that provided for depositions in admiralty cases contrary to the federal rules. In *Colgrove v. Battin*,[16] however, the Court upheld a District of Montana local rule providing for six-person juries in contrast with the federal rule requiring twelve-person juries.

The Federal Circuit has held that its precedents govern appellate review of local patent rules.[17] The Federal Circuit acknowledged that, to be valid, local rules must be consistent with both acts of Congress and the Federal Rules of Civil Procedure.[18] Moreover, the court held that a local rule does not need to be directly contradictory to a federal rule to be invalid; a local rule that is inconsistent with the purposes of a federal rule is also invalid.[19]

III. Local Patent Rules

The districts adopting local patent rules have based those rules on the district courts' authority to adopt local rules under Federal Rule of Civil Procedure 83.[20] Since 2001, at least twenty district courts have used Rule 83 to adopt local patent rules, including some of the districts with the heaviest patent case dockets such as Chicago, New Jersey, San Francisco, and East Texas. At present, however, there are no local patent rules in two other big cities— New York City, i.e., the Southern District of New York, and Los Angeles, i.e., the Central District of California.

Those responsible for enacting the local patent rules believe that the rules enhance uniformity in patent cases. For example, the Preamble to the Northern District of Illinois's local patent rules states:

> These Local Patent Rules provide a standard structure for patent cases that will permit greater predictability and planning for the court and the litigants. These Rules also anticipate and address many of the procedural issues that commonly arise in patent cases. The Court's intention is to eliminate the need for litigants and judges to address separately in each case procedural issues that tend to recur in the vast majority of patent cases.[21]

Likewise, the District of New Jersey stated, "The consensus of the Committee was that a recommended standard protocol for patent cases would likely be helpful to the Court and the parties."[22]

In support of adopting local rules in Los Angeles, Judge Andrew Guilford stated, "Patent local rules would provide a level of standardization so that each judge would administer patent cases in the same way and would help litigants know what to expect."[23] Judge Guilford, however, also recognized that the rules should be outcome-neutral. "I don't want rules that are favoring one side or the other."[24]

Statistical research suggests that districts with local patent rules process patent cases faster than districts lacking such rules. According to LegalMetric, in districts adopting local patent rules, the average time patent cases were pending decreased by 2 ½ months when compared to the average time pending prior to adopting the rules.[25] Moreover, at the time of adoption, local lawyers seemed to agree that the rules would streamline patent cases by increasing the courts' efficiency and certainty in handling patent cases.[26]

Other evidence, however, suggests that local patent rules are not the sole way to achieve an efficient district court docket. The two most notable patent "rocket-dockets," the Eastern District of Virginia and the Western District of Wisconsin, have not adopted local patent rules.[27] Indeed, the Western District of Wisconsin remains true to the Knox Committee's vision, with just five local rules of any kind.[28]

IV. Regardless of Efficiency, Do the Local Patent Rules Conform to Rule 83 and the Rules Enabling Act?

In discussing pleading standards in patent cases, one district court judge recently observed that "using local patent rules to alter a defendant's pleading obligations, while perhaps practical given the very unique nature of federal patent litigation, offends the trans-substantive nature of federal procedure."[29] Indeed, Judge Roberno questioned the entire notion that district courts may enact procedural rules concerning a specific subject matter as the Rules Enabling Act only authorizes general, uniform rules of practice and local rules must be consistent with the national rules.[30]

True to Judge Roberno's concern, the local patent rules adopted by at least twenty districts across the country create two categories of substantive differences or conflicts in how different federal courts handle patent cases. First, districts with local rules handle patent cases in a substantively different manner than cases that do not have local rules. Second, even among the districts with local patent rules, those courts' rules give rise to substantive differences in how cases proceed.

In the first category, local patent rules may substantively affect a patent holder's or an alleged infringer's rights when compared to litigating in a district without local patent rules. For instance, most local patent rules require the parties to provide early infringement and invalidity contentions.[31] Indeed, in some courts, a patent holder must provide infringement contentions within days of the initial case status conference.[32] Most of those rules also state that the parties' contentions cannot be modified without demonstrating good cause to the district court.[33] These requirements, however, seem contrary to the spirit of the Federal Rules of Civil Procedure, which allow for notice pleading and liberal discovery.[34] Indeed, numerous decisions from courts without local patent rules curtail the use of "contention interrogatories" early in a case, calling them "premature."[35]

In another example, as Judge Roberno observed, some courts have applied the Supreme Court's recent *Twombly* and *Iqbal* decisions governing minimum pleading and Rule 12(b)(6) leniently in patent cases because those courts have local rules which require early identification of infringement and invalidity contentions anyway.[36] As Judge Roberno explained,

the existence of local patent rules should not govern or alter the Federal Rules' basic pleading requirements for all cases.[37]

Finally, some courts limit the number of claim terms the court will construe.[38] Typically, courts with such rules limit the parties to ten disputed terms.[39] Therefore, these courts force litigants to make choices about key areas of a dispute before they know how the court will construe any patent claims—including the independent claims. As a result, the parties likely will be forced to select their ten claim terms from the independent claims and forego disputes over terms that only appear in dependent claims even though the court's eventual claim construction could shift the case's focus from the independent claims to those initially-ignored dependent claims.

Turning to the second category, local patent rules that have been adopted around the country are not consistent with each other. For example, in the Northern District of Illinois, the parties are allowed to serve a second or "final" set of contentions after twenty-three weeks of discovery, while other districts require final contentions within days of the initial status conference.[40] Moreover, even districts with facially-similar requirements for contentions at the outset of the case vary greatly in how they enforce those requirements.

The contrast between the Northern District of California and other districts best exemplifies these issues. The Northern District of California requires parties to provide final infringement and invalidity contentions early in the case. Local Patent Rule 3-1 requires the patent holder to provide infringement contentions within ten days of the initial status conference, and Rule 3-3 requires the accused infringer to provide its corresponding invalidity contentions only forty-five days later.[41] Other districts, however, allow more time or allow the parties to amend their initial contentions.

This rule "dramatically heightens the level of specificity required of a patent claimant asserting infringement (and an accused infringer asserting invalidity), and it does so early in the case."[42] Indeed, judges in the Northern District of California have interpreted their court's rules strictly. For example, in *Network Caching Tech., LLC v. Novell, Inc*., the court required the patent holder to provide facts supporting its contentions even though it had not yet received discovery from the accused infringer.[43] The court stayed discovery until the patent-holder could provide satisfactory infringement contentions.[44] In, *Intertrust Tech Corp. v. Microsoft Corp*., the Northern District of California described its own rules as "nit picky," requiring the patent holder to "crystalize" its case theory shortly after filing and before discovery.[45] That court has even held that a party must disclose its infringement theories under the doctrine of equivalents even though the court has not yet construed the claims of the patent-in-suit.[46]

The Northern District of California enforces its strict infringement contention requirements even in complex cases where the patent holder may have a difficult time analyzing the accused infringer's product before filing suit. In *Bender v. Maxim Integrated Prods., Inc*., the court strictly applied its contention requirements in a case relating to semiconductors.[47] The court derided the patent holder's contentions as "based on assumptions," even though the patent holder argued that any electrical engineer would accept its assumptions.[48] Therefore, the court stayed all discovery, effectively ending the patent holder's case if he has no way to obtain needed information from the defendant without formal discovery under the Federal Rules.[49]

In contrast, in the Northern District of Illinois, there appears to be little chance that a party's infringement claims or invalidity counterclaims will be indefinitely stayed or dismissed at the beginning of a case before any discovery as the rules specifically contemplate conducting twenty-three weeks of discovery before "final" contentions are due. Likewise, in the Eastern District of Texas, the judges have been more lenient when judging the sufficiency of the parties' contentions. For example, in *American Video Graphics, L.P. v. Electronic Arts, Inc.*, Judge Ward found that there are times when a patent-holder's preparation is restricted by the defendants' sole possession of needed information.[50] In particular, software cases present unique challenges.[51] Therefore, the local patent rules recognize the preliminary nature of the patent-holder's infringement contentions.[52] In addition, Judge Ward adopted a special standing order governing software cases, allowing the patent holder to provide its contentions thirty days after the accused infringer produces its source code.[53] Of course, a single judge adopting his own amendment to his district's local patent rules—even when sensible—further balkanizes substantive patent law and procedure contrary to Congress's desire to create a uniform body of national patent law, the Rules Enabling Act, and Rule 83.

These are case-dispositive differences. The Northern District of California rules, as applied, are decidedly pro-defendant. Indeed, any court that requires a patent-holder to provide its final contentions before taking discovery favors the accused infringer without any mandate to do so in the Patent Act or Federal Rules of Civil Procedure. Imagine a party that brings suit, asserting patents relating to semiconductors, in the Northern District of Illinois, Eastern District of Texas, or a court without any patent rules as compared to a party bringing the same suit in the Northern District of California. The patent holder likely needs discovery of the microscopic circuitry or source code relating to the accused's chips to prove its case because reverse engineering such information can cost hundreds of thousands or even millions of dollars. Sometimes reverse engineering is not even possible. Therefore, the patent holder may have satisfied its Rule 11 pre-filing obligations based on limited publicly-available information. In the Northern District of California, the courts may indefinitely stay and eventually dismiss this hypothetical patent holder's case because he is unable to satisfy that court's stringent standards for infringement contentions without discovery from the defendant. On the other hand, in the Northern District of Illinois, the patent holder will be able to conduct discovery before providing final contentions. In the Eastern District of Texas, the patent holder will be able to amend or delay his contentions until he receives discovery of the defendants' circuitry or code. And in districts without rules, the patent holder may not have to provide any contentions via interrogatory answers until late in the fact-discovery process.

These outcome-altering differences are highlighted by the scenario in which a case is transferred from one district to

another pursuant to 28 U.S.C. § 1404, unless the transferee court applies the transferor court's rules (or lack thereof) in line with *Olcott v. Delaware Flood, Co*.[54] Transfer pursuant to section 1404 is only supposed to move a case to a forum more convenient for the parties; it is not supposed to alter the case's outcome.[55] District courts transferring patent cases, however, do not abide by or even cite this body of law, apparently assuming that their own local rules are just procedural as such rules are supposed to be.

Therefore, moving a case pursuant to section 1404 can have case-altering consequences when the case is transferred from a district that allows liberal discovery in line with Rule 26 to a district that requires detailed final contentions before taking any discovery. Indeed, accused infringers strategically use section 1404 to transfer cases to defendant-friendly forums that limit pre-infringement contention discovery such as the Northern District of California. The potentially case-dispositive implications of transfer demonstrate that local patent rules are flouting the limitations imposed by the Rules Enabling Act and Rule 83. Winning or losing a transfer motion should not decide the outcome of a case arising out of a supposedly uniform body of federal patent law.

The Northern District of California's desire to save accused infringers from expensive discovery in frivolous cases may be laudable, but that court is fundamentally altering the Patent Act and Federal Rules of Civil Procedure. The Patent Act only requires proof of infringement by a preponderance of the evidence at the end of the case; it leaves the conduct of the case to the Federal Rules of Civil Procedure.[56] The Federal Rules do not require a patent holder to prove its claims at or shortly after the time it brings suit. Instead, a patent holder only needs to plead a plausible case at the outset.[57] The patent-holder does not need proof of its claims until it has to respond to a Rule 56 summary judgment motion or trial. Therefore, local rules that alter the basic pleading or proof requirements for patent cases seem inconsistent with Rule 83 and the Rules Enabling Act.

In spite of these concerns, the Federal Circuit has implicitly approved of the Northern District of California rules. In *Genentech, Inc. v. Amgen, Inc*., the Federal Circuit approved the rule requiring disclosure of infringement theories under the doctrine of equivalents.[58] The Federal Circuit also stated that it would defer to local attempts to manage patent cases according to prescribed guidelines.[59] In *SanDisk Corp. v. Memorex Prods, Inc*., the Federal Circuit affirmed the district court's refusal to consider an untimely claim construction argument.[60] The Federal Circuit stated that it "gives broad deference to the trial court's application of local procedural rules in view of the trial court's need to control the parties and the flow of litigation before it."[61] In *Safeclick, LLC v. Visa Int'l Service Ass'n*,, the court upheld the district court's rejection of an untimely non-infringement theory, stating that it was "very deferential" to the court's application of its local rules.[62] Finally, in *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc*., the Federal Circuit found nothing in the Federal Rules of Civil Procedure inconsistent with requiring early disclosure of contentions and accepted the district court's emphasis on diligence when deciding if there is good cause to amend those contentions.[63] The Federal Circuit, however, also cautioned against using local rules to require final identification of contentions too early in the case and well before the end of discovery. Such rules "might well conflict with the spirit, if not the letter, of the notice pleading and broad discovery regime created by the Federal Rules."[64]

In the end, handling cases efficiently, including disposing of frivolous cases quickly, is a worthwhile goal. But the "rocket docket" courts in Virginia and Wisconsin demonstrate that local rules that alter the Patent Act, alter the Federal Rules of Civil Procedure, or otherwise put their thumb on the scales of justice are not the only way to run an efficient court. The federal courts are supposed to apply a uniform body of patent law and use a uniform code of civil procedure. Local rules that alter either of those uniform, national bodies of law are out of place.

V. Conclusion

With nearly 6000 or more local rules, and the recent spread of local patent rules to at least twenty districts, courts apparently have brushed aside the Knox Committee's concern about proliferating local rules undermining the Federal Rules of Civil Procedure's goal of national uniformity. Instead, in the name of efficiency, even more courts are considering local patent rules, sacrificing the uniform and case-neutral nature of the Federal Rules of Civil Procedure. Indeed, even the Rules Enabling Act's dichotomy between procedural and substantive rules is much less clear in hindsight than at the time of enactment as its opponents feared. In reality, procedural choices and rules inevitably—and often intentionally—impact substantive political choices. Here, local patent rules that are labeled "procedural" appear designed instead to alter the outcome of patent cases, contrary to the constitutionally-mandated uniform body of federal patent law, the Rules Enabling Act, and the Federal Rules of Civil Procedure.

Local patent rules may increase case management efficiency, but courts like the Western District of Wisconsin and the Eastern District of Virginia demonstrate that efficiency is obtainable without such local patent rules. Therefore, district courts should proceed with caution before adopting more non-uniform, substantive, and outcome-determinative local patent rules. In fact, in light of these concerns, courts have several choices—reject local patent rules altogether; interpret those rules more flexibly, consistent with the notice pleading and liberal discovery rules contained in the Federal Rules of Civil Procedure; increase appellate court scrutiny of local patent rules; or seek a national body of patent rules.[65]

Endnotes

1 U.S. Const. art. I, § 8, cl. 8 (granting Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

2 *See, e.g.*, Pfizer, Inc. v. Apotex, Inc., 488 F.3d 1377, 1380-81 (Fed. Cir. 2007) (Newman, J., dissenting) (elaborating on the purpose of the Federal Circuit).

3 28 U.S.C. § 2072(a).

4 28 U.S.C. § 2072(b).

5 Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1063-65 (1982); Sen. Thomas J. Walsh, Address at Meeting of the

Tri-State Bar Association: Reform of Federal Procedure (Apr. 23, 1926), in S. Rep. No. 69-1174 at 20, 33 (1926); Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 Minn. L. Rev. 1303, 1311-14 (2006).

6 Burbank, *supra* note 5, at 1085-89; Redish & Amuluru, *supra* note 5, at 1312.

7 Fed. R. Civ. P. 83.

8 Fed. R. Civ. P. 83(a)(1).

9 Fed. R. Civ. P. 83 (Notes of Advisory Committee on Rules—1995 Amendment).

10 A.B.A., Federal Rules of Civil Procedure, Proceedings of the Institute at Washington and of the Symposium at New York City 28, 232 (1938), *cited in Rule 83 and the Local Federal Rules*, 67 Colum. L. Rev. 1251, 1256 (1967).

11 Rule 83 and the Local Federal Rules, 67 Colum. L. Rev. 1251, 1258-59 (1967).

12 *Id.* at 1259.

13 Nathaniel S. Boyer, *The Tail Wagging the Dog, Local Summary Judgment Rules that Deem Facts Admitted*, 30:5 Cardozo L. Rev. 2223, 2234 (2009).

14 Standing Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., Report on Local Rules (Feb. 1, 2004), *cited in* Nathaniel S. Boyer, *The Tail Wagging the Dog, Local Summary Judgment Rules that Deem Facts Admitted*, 30:5 Cardozo L. Rev. 2223, 2235 (2009).

15 363 U.S. 641 (1960).

16 413 U.S. 149 (1973).

17 O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc., 467 F.3d 1355, 1364 (Fed. Cir. 2006).

18 *Id.* at 1365.

19 *Id.*

20 *See, e.g.*, District of New Jersey Order, *In re* Amendment of Local Civil Rules, Dec. 23, 2008.

21 U.S. Dist. Court for the N. Dist. of Ill., Local Patent Rules, Preamble, *available at* http://www.ilnd.uscourts.gov/home/LocalRules.aspx?rtab=patentrules.

22 U.S. Dist. Court for the Dist. of N.J., Report of the Local Patent Rules Committee, Explanatory Notes to the Proposed Local Patent Rules, *available at* http://www.njd.uscourts.gov/rules/completeRulesOctober2011.pdf.

23 Erin Coe, *Calif. Judge Sets Sights on Patent Local Rules*, Law360, Mar. 23, 2011, http://www.law360.com/articles/226768/calif-judge-sets-sights-on-patent-local-rules.

24 *Id.*

25 *Id.*

26 Jesse Greenspan, *Ill. District Court Pushes Local Patent Rules*, Law360, Mar. 27, 2009, http://www.law360.com/articles/94205/ill-district-court-pushes-local-patent-rules-; Erin Coe, *Calif. Judge Sets Sights on Patent Local Rules*, Law360, Mar. 23, 2011, http://www.law360.com/articles/226768/calif-judge-sets-sights-on-patent-local-rules.

27 *The Tundra Docket, Western District of Wisconsin*, Law360, Mar. 12, 2008, http://www.law360.com/articles/49923/the-tundra-docket-western-district-of-wisconsin.

28 U.S. Dist. Court for the W. Dist. of Wisc., Local Rules, *available at* http://www.wiwd.uscourts.gov/local-rules.

29 Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 904 (E.D. Pa. 2011).

30 *Id.* at 904 n.10 (emphasis in original) (citing Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Boy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2067, 2079 (1989)). *But see* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1934-35 (1989).

31 N.D. of Ill. L.P.R. §§ 2.2, 2.3; N.D. of CA Patent L.R. 3-1, 3-3; E.D. of Tex. P.R. 3-1, 3-3.

32 N.D. of CA Patent L.R. 3-1; E.D. of Tex. P.R. 3-1.

33 N.D. of CA Patent L.R. 3-6; E.D. of Tex. P.R. 3-6.

34 Fed. R. Civ. P. 8 & 26; *see also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007) (holding that federal notice pleading requires a short plain statement of a plausible claim for relief); Hickman v. Taylor, 329 U.S. 495, 501 (1947) (given federal notice pleading, discovery allows the parties to develop facts in support of their theories and pin down the other side's theory of the case).

35 *See, e.g.*, Vishay Dale Elecs., Inc. v. Cyntec Co., No. 07-cv-191, 2008 WL 4868772, at *5-6 (D. Neb. Nov. 6, 2008) (collecting cases deferring answers to premature contention interrogatories); Fed. R. Civ. P. 33(a)(2) (stating that a court may allow a party to delay answering a contention interrogatory until needed discovery is completed); O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc., 467 F.3d 1355, 1365 (Fed. Cir. 2006) (observing that answers to contention interrogatories in patent cases are often postponed until discovery closes).

36 Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 904 (E.D. Pa. 2011); *see, e.g.*, Pfizer, Inc. v. Apotex, Inc., 726 F. Supp. 2d 921, 937-38 (N.D. Ill. 2010).

37 *Tyco Fire Prods.*, 777 F. Supp. 2d at 904.

38 N.D. of Ill. L.P.R. § 4.1(b); N.D. of CA Patent L.R. 4-1(b).

39 *Id.*

40 N.D. of Ill. L.P.R. §§ 3.1, 3.2.

41 N.D. of CA Patent L.R. 3-3.

42 James Ware & Brian Davy, *The History, Content, Application, and Influence of the Northern District of California's Patent Local Rules*, 25 Santa Clara Computer & High Tech. L.J. 965, 984 (2009).

43 Network Caching Tech., LLC v. Novell, Inc., 2002 WL 32126128, at *4 (N.D. Cal. Aug. 13, 2002).

44 *Id.* at *7.

45 Intertrust Tech Corp. v. Microsoft Corp., 2003 WL 23120174, at *3 (N.D. Cal. Dec. 1, 2003).

46 Rambus, Inc. v. Hynix Semiconductor Inc., 2008 WL 5411564 (N.D. Cal. Dec. 29, 2008).

47 Bender v. Maxim Integrated Prods., Inc., 2010 WL 1135762, at *2 (N.D. Cal. March 22, 2010).

48 *Id.*

49 *Id.*; *see also* Bender v. Maxim Integrated Prods., Inc., 2010 WL 2991257 (N.D. Cal. July 29, 2010).

50 Am. Video Graphics, L.P. v. Elec. Arts, Inc., 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005).

51 *Id.*

52 *Id.*

53 Order Relating to Patent Cases before Judge T. John Ward.

54 Olcott v. Delaware Flood, Co., 76 F.3d 1538, 1544-46 (10th Cir. 1996) (agreeing with the Seventh Circuit and holding that the transferor forum law should apply after the transfer of a federal securities case under section 1404. The Second Circuit has reached a contrary conclusion.).

55 Van Dusen v. Barrack, 376 U.S. 612, 635-37, 639 (1964).

56 35 U.S.C. § 271.

57 McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1357 (Fed. Cir. 2007).

58 Genentech, Inc. v. Amgen, Inc., 289 F.3d 761, 773-74 (Fed. Cir. 2002).

59 *Id.* at 774.

60 SanDisk Corp. v. Memorex Prods, Inc., 415 F.3d 1278, 1292 (Fed. Cir. 2005).

61 *Id.* at 1292.

62 Safeclick, LLC v. Visa Int'l Service Ass'n, 208 Fed. Appx. 829, 834 (Fed. Cir. 2006).

63 O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc., 467 F.3d 1355, 1366 (Fed. Cir. 2006).

64 *Id.*

65 The federal courts already follow distinct rules for bankruptcy cases. 28 U.S.C. § 2075. Thus, Congress and the Supreme Court could adopt the Federal Rules of Patent Procedure to ensure nationwide uniformity. However, such rules may still run afoul of the Rules Enabling Act's attempt to delegate only procedural matters to the Supreme Court while leaving substantive law exclusively in the hands of Congress.

International & National Security Law

A Retrospective on the 1921 Constitution of the Democratic Republic of Georgia

*By George Papuashvili**

INTRODUCTION

Establishing a strong system of constitutionalism is crucial for the development of modern statehood and the democratic institutions of Georgia. An indispensable prerequisite for this end is the existence of a constitution that ensures the principles of democratic governance, human rights, and rule of law. The Constitution of Georgia, adopted on August 24, 1995, is an endeavor in this direction. At the same time, we must analyze those political and legal traditions and documents, which, along with the modern global experience in constitutionalism, laid the ground for the present supreme law of Georgia and its future development.

In this respect, the Constitution of February 21, 1921, ninety years old, is of utmost importance. Soon after its adoption, Georgia was occupied by Russia and the Constitution was suspended. Correspondingly, during Soviet rule, analysis and evaluation of the Constitution were taboo, and only minor works on this theme by foreign and Georgian authors working abroad have been preserved. Having this in mind, I deemed it pertinent to recall the Constitution of 1921 and make a brief analysis and evaluation for interested readers.

It is not coincidental that the 1995 Constitution now in force states in the preamble that it is based on the historical and legal bequest of the 1921 Constitution, thus acknowledging the political and legal hereditary link between modern Georgia and the then-independent Republic of Georgia. The 1921 Constitution symbolizes aspirations of Georgia during that time toward the formation of a unified, democratic, and independent state. Despite the fact that the country did not have an independent legal and constitutional atmosphere and had languished for more than a century under the Russian empire, authors of the 1921 Constitution managed to create a legal document that stood out among the post-World War I constitutions in its uniqueness and vision.

A parliamentary governance system, the establishment of local self governance, the abolition of the death penalty, freedom of speech and belief, universal suffrage (pressing at that time for an equal right to vote for men and women), the introduction of jury trials and guarantee of habeas corpus, as well as many other provisions, were some of the features of the 1921 Constitution that distinguished it among the constitutions of that time, and among the modern European ones too, for its progressiveness.

This document, adopted by the Georgian legislators in 1921, can unquestionably be considered one of the most advanced and perfect supreme legislative acts oriented toward human rights in the world for its time—i.e. the beginning of the 20th century. It reflects the most advanced legal and political discourse and tendencies underway in the Western European countries or the U.S. at that time. In the words of Hans-Dietrich Genscher, the former Federal Foreign Affairs Minister of Germany: "At that time it [the 1921 Georgian Constitution] already advocated such values as liberty, democracy and rule of law, which the modern Europe is based on currently."[1]

Ramsey McDonald, a prominent British politician, later twice Prime Minister of Great Britain, while speaking about the achievements of Democratic Republic of Georgia in the letter published in the magazine "Nation" on October 16, 1920 after his visit, stated: "I familiarized myself with its constitution, its social and economic reconstruction[,] and what I saw there, I wish I could see in my country too."[2]

BACKGROUND

Legal culture in Georgia was being formed from the very early stages of its history. The legal works elaborated in ancient times provided for the important issues of civil, family, and criminal law, as well as state structure.

The most ancient compilation of laws that has come down to us is Bagrat Kurapalat's The Book of Law, which dates back to the 11th century.

Important Georgian legal works were created in the 13th and 14th centuries. Written during the reign of King George V, The Brilliant, "The Order of the King's Court" is the most noteworthy of all the legal works of the era. This unique book is also called the unified feudal Georgia's Constitution.[3]

Another legal work of importance is "Dasturlamali." Its creation laid a solid basis for elaboration of the state law.[4] Old Georgian legal books were published as a single compilation by the order of Vakhtang the 6th, and he drafted this particular work in 1705-07. Dasturlamali reflects the aspiration to develop law[5] and aimed at regulation of the state governance characteristics of a feudal system.[6]

It is noteworthy that during the 19th and 20th centuries, when the adoption of a constitution was considered, political points of view of Georgian lawyers and politicians were greatly influenced by Georgian public figures and statesmen, like Solomon Dodashvili, Ilia Chavchavadze, Niko Nikoladze, Mikhako Tsereteli, Archil Djordjadze, and others, who were acquainted with the advanced political-philosophical thinking of not only the Russian empire of that period, but also of Western Europe and Northern America.[7] As they were advocates of modernization, democratization, and self-determination, they called on Georgia to embark on the road toward Europe and the U.S.[8]

* *The President of the Constitutional Court of Georgia*

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A SHORT HISTORY OF THE ELABORATION AND ADOPTION OF THE CONSTITUTION

The period during which the first Republic of Georgia and later the 1921 Constitution were being formed coincided with a crucial time in world history. The major European empires—Austro-Hungarian, Russian, Ottoman, and others—were breaking up, and smaller nation states were taking their place. In the chaos caused by the First World War, the ultra-left and right political forces jeopardized democratic values. The economic crisis brought about by the results of World War I rendered the socialist ideas rather popular in much of the world, and this, in its turn, led to the formation of communist and later totalitarian-fascist regimes in Europe. They came to power in some countries using socialist-populist slogans.

The successful national emancipatory movement that brought an end to the almost century-long annexation of Georgia, and led to the formation of the first Republic, were to a great extent facilitated by external factors, including the political and military cataclysms underway in Russia. Following the 1917 February Russian revolution, a convention (the so-called "National Council") of political parties of Georgia (excluding Bolsheviks, who boycotted the Council) and representatives of public organizations was held, and it was chaired by Noe Zhordania.

By the time of the establishment of the National Council, the whole Georgian political spectrum (except for Bolsheviks, who did not exert serious influence upon society) had embraced the idea of independence, without serious contradiction.[9]

It was the above-mentioned National Council that on May 26, 1918[10] declared the independence of Georgia.[11] The act, which founded an independent Georgian State, declared that "the political form of governance of independent Georgia is a democratic republic." The final article of the act stated that, before convoking the Constituent Assembly, "the rule of the whole of Georgia was assumed by the National Council . . . .," which was later called the Parliament of Georgia. The government of the newly-created democratic republic had actively begun democratic reforms, reconstruction of the country from scratch, as well as the creation of different institutions.[12]

In 1919, the Constituent Assembly (Parliament) was elected by exercising the most democratic suffrage in that period. It was marked by equal suffrage, women's participation in the elections, and other democratic elements. A governance model that ensured efficient control of the Parliament over the government was put into practice. The Parliament adopted more than 100 laws regulating different spheres. Some of the measures included recognizing private property, creating a positive environment for foreign investors, introducing agrarian reform, mandating judicial reform, putting in place jury trials, and providing for the election of lower judges by the local governments.

Despite unfavorable external factors, Georgia managed to gain recognition in the international arena. In 1920, it was de facto recognized by the major Western countries,[13] and in January 1921, the same countries and the League of Nations recognized it de jure.[14]

The social democrats represented an absolute majority in the National Council (as in the Constituent Assembly, they were elected by direct vote). Therefore, naturally, the government had also been composed of social democrats, and thus the Georgian government of 1918-1921 can be considered the first social-democratic-orientated government in Europe and, in fact, the world.[15]

The primary objective of the government of that time was to create an exemplary democratic state in the Southern Caucasus. Karl Kautsky, a prominent European politician, when speaking about the successful political, legal, and economic reforms launched by Georgian social-democrats, noted that the Georgian democratic road of 1918-1920 had fundamentally differed from the Bolshevik path, which consisted of dictatorship and tyranny.[16] Creation of an exemplary democracy in the Southern Caucasus should have been, to a certain extent, an antidote and even an effective alternative to the Bolshevik tyranny in Russia. But in hindsight, Kautsky's impression seems a little idealistic, as later, the Bolshevik aggression against Georgia could not be stopped solely by democratic values.

The crowning achievement of the entire process was the adoption of the 1921 Constitution. During the three years before the occupation by Soviet Russia, Georgia acted speedily to adopt democratic reforms and commence work on a new draft Constitution based on democratic principles. The goals of the new Constitution were to streamline the internal legal and political system as well as represent Georgia in the international arena as the most democratic country not only in the region, but in all of Europe. This factor was important as the country embarked on the road to restoration of its historical independence.

The "National Council of Georgia" began the elaboration of the 1921 Constitution through the activity of the Constitutional Commission created in June 1918. The Commission consisted of members of different political parties. Election of the Constituent Assembly by direct vote and universal suffrage was marked by the participation of women and the absence of a property census and was held on February 14-16, 1919. The Georgian social-democratic party earned the vast majority of parliamentary seats (109 seats out of 130). The remaining seats went to national-democrats, social-federalists and Essers (social-revolutionaries). Bolsheviks earned very few votes and did not receive a single seat.[17]

The newly-elected Constituent Assembly set up a Constitutional Commission consisting of fifteen members, the majority of whom were social democrats.

The authors of the Constitution, who had the experience of studying and working in Europe, naturally knew the texts of contemporary world constitutions, their underlying principles, and associated work. Experience gleaned from these constitutions significantly influenced the Georgian legislators. Common approaches on different issues are clear when compared to the Swiss Constitution of 1874, Belgian Constitution of 1831, United States Constitution of 1789, German Constitution of 1919, Czechoslovakian Constitution of 1920, and French Constitution of 1875. Almost all existing constitutions had been translated into Georgian and published

in the press between 1919-1920, and concurrently in various issues of the newspaper *Ertoba*. Members of the Constitutional Commission and other lawyers had also published articles and reviews on the essence of different constitutions.

The process of working on the new draft Constitution had taken the newly-created commission considerable time as it endeavored to study as much international experience as possible, and also reach a political consensus on important issues. In July 1920, the draft Constitution was published for review. And in November 1920, the Parliament started the procedure of its review and adoption.

At the same time, Russia tried to hamper Georgia's aspirations to become an independent state. In February 1921, Soviet Russia occupied and subsequently annexed the country. The Russian army offensive prioritized the adoption of the draft Constitution, with certain amendments on February 21, 1921. By this time, almost all chapters of the Constitution had been reviewed and adopted by the Parliament, and the article-by-article review process had already started. Given the existing situation, it became necessary to speedily adopt a full-fledged Constitution that represented a sovereign country before the world and the enemy. On February 25, 1921, the 11th Army of Soviet Russia occupied Tbilisi and declared Soviet power in Georgia. The government of independent Georgia was forced to move to Western Georgia—the Black Sea town of Batumi. It was in this town that the official text of the 1921 Constitution of Georgian Republic was first published.

THE STRUCTURE AND LEGAL NATURE OF THE 1921 CONSTITUTION

The landmark 1921 Georgian Constitution consisted of 17 chapters and 149 articles.

Based on the fact that, practically speaking, the 1921 Constitution of the Democratic Republic of Georgia was never implemented, it is hard to say whether or not it would have worked. Nevertheless, article-by-article study and research of its contents gives us an opportunity to draw interesting conclusions. The importance of these conclusions is not defined solely by historical and legal points of view, as the basic principles recognized by the norms of the 1921 Constitution and the majority of relationships regulated by it are also relevant to modern constitutional law. It is also possible to draw many political-legal parallels between the 1921 and present Constitutions and between the stages of development of Georgia now and then.

It must be mentioned that the 1921 Constitution belongs to the first wave of constitutions drafted as a result of the historical evolution of justice. The date of its adoption coincides with the end of World War I and the emergence of new states in place of empires like the Russian, Ottoman, and Austro-Hungarian Empires. The countries that adopted new Constitutions at that time include Austria, Germany (the Weimar Republic), Czechoslovakia, Finland, and the Baltic Republics.

THE BASIC HUMAN RIGHTS STIPULATED BY THE 1921 CONSTITUTION

The constitutional provisions reflecting human and citizens' rights can be considered the greatest achievement and the prominent symbol of progressiveness of the 1921 Constitution of the Georgian Democratic Republic. The authors of the 1921 Constitution tried to establish a system under which these rights were based on the traditional principle of individual liberty.

Articles 25 and 26 of the Constitution provide a liberal approach to human rights for that period, defining the principle of habeas corpus. Unlike in other democratic countries during that time, the provisions provided for expedited court hearings for those arrested for alleged crimes. An arrested person had to be brought before a court within twenty-four hours of arrest, but, as an exception, this term could be extended for twenty-four hours more if the court was too far away and it took more time to bring a suspect before it (forty-eight hours in total). A court was also given twenty-four hours to either remand an arrested person to prison or release him immediately. The present Constitution provides for similar terms.

It is noteworthy that the 1921 Constitution abolished the death penalty.

Like other democratic constitutions of that period, the 1921 Constitution upheld the freedom of belief and conscience (Article 31). The Constitution separated church from state. The political rights of citizens were also widely covered in the Constitution in such provisions as those recognizing the freedom of speech and printed media (Article 32), the abolition of censorship, and the freedom of assembly (Article 33). Chapter 3 also guaranteed the freedom of trade unions (Article 36) and the right of laborers to strike (Article 38). The Constitution separately provided for the rights to individual and collective petitions (Article 37).

Article 45 stipulated that "the guaranties listed in the constitution do not deny other guarantees and rights which are not listed here, but are taken for granted due to the principles recognised in the constitution." Article 39 of the present Constitution of Georgia contains a provision with similar content. This once again underscores the inherent link that exists between the main principles of the 1921 Constitution and the present Constitution of Georgia. This provision is also similar to the Ninth Amendment to the U.S. Constitution, and origins of its inclusion presumably stem from that document.

The 1921 Constitution is one of the first documents in the world to reflect citizens' socio-economic rights, which is not surprising given that social democrats were heading the government. At the same time, Georgian legislators naturally were aware of how the communist rulers in Russia had been lavishly distributing populist, social promises, and it was probably not desirable to "lag behind" the Bolsheviks in that respect.

GOVERNANCE SYSTEM

We can group the governance system defined by the first Constitution of Georgia with the European-type parliamentary systems popular by that time, albeit with many peculiarities.

The Constitution did not achieve a balance among the three branches of power, as its structure did not incorporate sufficient mechanisms through which the government could check the Parliament or vice versa. Some peculiarities of this governance system that distinguished it from other parliamentary systems of that time were the non-existence of a

neutral institution (from the executive or legislative branches) like President (or Monarch, in the case of a constitutional monarchy), establishment of only the individual responsibility of the government, meaning that only individual ministers of the government, not the entire government as a collective body, could be replaced or dismissed by a vote of Parliament; and the government's inability to dissolve Parliament in case of crisis.

The authors of the Constitution attempted to merge the Swiss type of direct popular democracy with the elements of a representational parliamentary system.[18] Pursuance of popular sovereignty principles in the Constitution was fashionable at that time and was probably influenced by Rousseau's ideas and the Swiss democratic experience. More precisely, in accordance with Article 52 of the Constitution, the principle of popular sovereignty was laid down: "Sovereignty belongs to the whole nation."

CONSTITUTIONAL REVIEW

The notion of constitutional review is to a certain extent provided in Articles 8 and 9. It underscores the principle of constitutional supremacy: "No law, decree, order or ordinance which contradicts the provisions and the purport of the Constitution can be issued." The above-mentioned provisions unequivocally show the necessity of establishing consistency between the Constitution, the legal acts existing before adoption of the Constitution, and the legal acts issued after its adoption, which would have been impossible without exercising constitutional review. But the 1921 Constitution did not provide for a body of constitutional review, similar to a constitutional court in the classical understanding of this institution and its regulatory functions and authority, as was done in Austria and Czechoslovakia in 1920. It must be noted that the government, as it turns out, had already exercised some constitutional review leverage. Under sub-paragraph "B" of Article 72, one of the authorities of the government was "scrutiny and enforcement of the Constitution and laws," although it is logical that such a function must be under the competence of a court. It is interesting that only the court had the right to repeal the acts of local governments (central bodies had only enjoyed the right to suspend these acts and appeal to the court by submitting the request for repeal of these acts). Hence, we can conclude that, though in such a case full constitutional review was not exercised, full court scrutiny of the legitimacy of legal acts was carried out, which manifested itself in courts examining the relevance of legal acts issued by local government bodies.

This is also corroborated by the function of the Supreme Court, the Senate, stipulated in Article 77, which is obliged to "scrutinise how the law is abided by." This provision, adopted on July 29, 1919, gave the Senate the authority to examine the legitimacy of acts of all of the governmental institutions, high-ranking officials, and local governmental bodies, and, in case of aberrations from the law, the Senate was required to either suspend or repeal them. Another function of the Senate was the resolution of disputes between the state bodies concerning their competencies.

Because the Constitution abounded in ideas and principles necessary for administering constitutional review, we can conclude that establishment of such a separate constitutional body in the future or granting the function of constitutional review to general courts would have been logical had the independent Georgia not ceased to function.

Such a concept was not alien to Georgian legislators. Giorgi Gvazava, a national democrat and one of the members of the Constitution Elaboration Commission, noted:

> There is only one case, when a citizen has a right not to abide by law. Such a case is called disputing constitutionality of the law. A citizen has a right to lodge a claim with a court on the constitutionality of the law which restricts his liberties or threatens him with such a restriction. The court is obliged to review this case and if it deems that the plaintiff's claim is well grounded, it can reject the law and not guide itself by it in deciding the case.[19]

Gvazava, who was well-aware of the constitutional review mechanisms of Western Europe and the United States, also noted: "The court is obliged to defend the Constitution, as the main law, and reject all new laws which contradict it. Such right of review is enjoyed by the court in the USA . . . ."[20]

Popularity of the concept of constitutional review in political and legal circles of Georgia of that time is emphasized by the views of K. Mikeladze, one of the famous public figures and attorneys in Georgia in that period. He expressed these views in his work on the process of the elaboration of the Constitution. Drawing mostly on the United States' experience, he maintained that the role of a court must be more than just hearing cases: they must also "review[] laws elaborated by legislative bodies in terms of their compatibility with the Constitution."[21]

OCCUPATION AND ANNEXATION OF GEORGIA AND SUSPENSION OF THE CONSTITUTION

In 1918-1920, Russia had attempted a number of times, directly or indirectly,[22] to trigger internal chaos on social grounds, and to foment ethnic strife in Abkhazia and Tskhinvali and other regions of Georgia. Due to the failure of these attempts and the complicated internal and external situation in Russia, it was forced to temporarily conceal its intentions. On May 7, 1920, Russia signed an agreement with Georgia and recognized its independence and territorial integity.

However, Soviet Russia managed to occupy and "Sovietize" Azerbaijan (April 1920) and Armenia (November 1920). It became evident that despite the signed agreement, soon it would attack the Democratic Republic of Georgia, too. The Georgian government still hoped that Russia would not breach the 1920 agreement and become discredited before the international community. However, the events took a different turn. In December 1920, at a meeting of the League of Nations in Geneva, Georgia was denied membership in the League (in the required two-thirds vote for admittance, ten members voted in support of Georgia, thirteen voted against Georgia, and seventeen abstained).[23] Later, in January, the League and the leading states of the West recognized Georgia's independence de jure.

After strengthening its positions inside the country and facing no sharp resistance in the international arena, despite the

international recognition of Georgia, Russia violated the treaty and, with the pretext of supporting the rallying workers whom they had instigated in the district of Lore, invaded Georgia from the Armenian side in February 1921.[24] On February 25, the government of the Democratic Republic of Georgia was forced to leave Tbilisi and move to the city of Batumi. Defeated by Bolshevik Russia, the last meeting of the Constituent Assembly of the independent Republic of Georgia was held on March 17, 1921, and the Assembly passed a decree temporarily suspending the operation of the Georgian Constitution.

The Georgian government in exile (mainly in France) tried by means of internal resistance and support of the Western countries to stop Bolshevik Russia's occupation and annexation of Georgia. Noe Zhordania, addressing the international community via the British newspaper *The Times* (commenting on the invitation of Bolshevik Russia to the international conference in Genoa in April-May of 1922), noted: "Unless Europe voices its concern about the flagrant injustice, with which the government of Soviet Russia treats Georgia, each major country will consider this as a consent to attack neighbour countries and occupy their territories."[25] But the international situation of that period did not allow for fending off Russian aggression. Major Western countries and the League of Nations had only been expressing their "concern and worry" about Russia's actions.[26] In 1924, the rallies against the Communist regime were quashed by military force.

FURTHER DEVELOPMENT OF CONSTITUTIONALISM

From that time on, the "Sovietized" Republic of Georgia "adopted" four Constitutions (1922, 1927, 1937, and 1978), based on the principles of the Communist party. In doing so, the Soviets legitimized the existence of a one-party communist system, which had nothing in common with the principles of constitutionalism associated with democratic governance. All of them had essentially been copies of their respective preceding USSR constitutions.

In 1990, after holding multi-party elections that ushered in the national-emancipatory political parties, Georgia declared independence from the USSR. The newly-elected multi-party Parliament made important amendments to the 1978 Constitution and expunged the provisions defining existence of the Soviet-type one-party system and other anti-democratic provisions.

The Parliament elected in 1992 set up a special commission for preparing the concept of and drafting a new Constitution on February 16, 1993.[27] Eventually, the commission drafted a wholly new draft Constitution, as revision of the 1921 Constitution would have been very difficult seventy years after its inception, considering the new political-legal reality.[28]

On August 24, 1995, the Georgian Parliament adopted the present Constitution, the preamble of which reads that it is based on "many centuries old traditions of the statehood of Georgian nation and historical legacy of the 1921 Georgian constitution."[29]

Thus, despite many vital differences between the present and the 1921 Constitutions, they have the same legacy, which had been forcefully interrupted for some seventy years by Soviet Russia.

The 1995 Constitution, by taking into account modern conditions and international experience, has defined fundamental principles of human rights, forms of governance, organization of state, and other crucial issues for the country.

CONCLUSION

The 1921 Constitution was unprecedented. As the supreme law of an independent democratic state, it established representational democracy as well as the system of democratic governance based on popular sovereignty by ensuring an independent judicial system. The provisions on human rights created the most progressive European mechanisms oriented toward protection and guarantying of human rights.

At the same time, this document reflected the democratic aspirations of the Democratic Republic of Georgia, which could have earned our country an important place in the civilized world. Though the conditions of occupation and the resulting Soviet suspension of the 1921 Constitution negated its immediate significance, it played an important role in the political and legal development of modern Georgia.

Unlike the tyranny of Bolshevik Russia, the adoption of the 1921 Constitution is a crowning achievement of the democratic and civilized traditions and methods of democratic Georgia. While trying to substantiate this choice, Noe Zhordania (Chairman of the government of the Democratic Republic in 1918-1921), who had a premonition about Bolshevik Russian occupation of Georgia, noted: "And if we do not achieve our goal and fail, one thing will be sure, and impartial history will attest to it—that we had been going in the right way and d[id] what we could."[30]

Endnotes

1 Hans Dietrich Genscher, *Introduction* to Wolfgang Gaul, Adoption and Elaboration of the Constitution in Georgia (1993-1995), at 9 (IRIS Georgia 2002).

2 Malkhaz Matsaberidze, The Georgian Constitution of 1921: Elaboration and Adoption 171 (2008).

3 Valerian Metreveli, The History of Georgian Law 26 (2005).

4 Zaza Rukhadze, Georgian Constitutional Law 21 (1999).

5 I. Surguladze, The Sources of History of Georgian Law 131 (2002).

6 Ivane Javakhishvili, The History of Georgian Law, Book 1 (1928).

7 A. Demetrashvili & I. Kobakhidze, Constitutional Law 27 (2008).

8 Stephen Jones, Socialism in Georgian Colors 2 (2005).

9 The full support of the idea of national independence by the social democrats and N. Zhordania at that time was also pointed out by Geronti Kikodze, the politician of the nationalist sentiment and a prominent public figure. *See* G. Kikodze, National Energy 138-141 (1917).

10 May 26 has been celebrated as Georgia's Independence Day since 1990.

11 Two days later Armenia and Azerbaijan also declared independence.

12 Stephen Jones, on the 90th Anniversary of the Democratic Republic of Georgia, Matiane (Aug. 30, 2009), http://matiane.wordpress.com/2009/08/30/stephen-jones-on-the-90th-anniversary-of-the-democratic-republic-of-georgia/; *see also* Karl Kautsky, Georgia: A Social-Democratic Peasant Republic—Impressions And Observations, Chapter IX (H.J. Stenning trans., International Bookshops Limited 1921), *available at* http://www.marxists.org/archive/kautsky/1921/georgia/ch05.htm.

13 Z. Avalishvili, Georgian Independence in the International Politics in 1918-1920, at 281 (Mkhedan 2011) (1924).

14 *Id.* at 260.

15 Social-democratic orientation parties may have been in coalitions together with other parties (e.g. in Great Britain, with the Liberal Party), but Georgia's experience was novel in that the government was solely composed of one party—Georgian social democrats.

16 Karl Kautsky, Georgia: A Social-Democratic Peasant Republic—Impressions and Observations, Chapter IX (H.J. Stenning Trans., International Bookshops Limited 1921), *available at* http://www.marxists.org/archive/kautsky/1921/georgia/ch05.htm.

17 Out of 505,000 constituents, Bolsheviks received only 800 votes. *See* Report of Georgian Constituent Assembly of 11 April 1919, at 31.

18 For discussions of this issue, see P. Sakvarelidze, Georgian Republic, Feb. 4; see also N. Zhordania, Remarks at the Tbilisi Party Meeting: Social Democracy and Organization of Georgian State, at 14-17 (Aug. 4, 1918).

19 Giorgi Gvazava, Basic Principles of Constitutional Right 97 (1920).

20 *Id.* at 76.

21 K.D. Mikeladze, Constitution of Democratic State and Parliamentary Republic, Some Considerations on Elaboration of Georgian Constitution 47 (1918).

22 Karl Kautsky, Georgia: A Social-Democratic Peasant Republic—Impressions and Observations, Chapter XII, The Bolshevist Invasion (H.J. Stenning trans., International Bookshops Limited 1924), *available at* http://www.marxists.org/archive/kautsky/1921/georgia/ch08.htm.

23 Z. Avalishvili, Independence of Georgia During 1918-1920 International Politics 351-360 (Mkhedari 2011) (1924).

24 On the whole, in February-March of 1921, the Russian red army, which consisted of four military corps, simultaneously unleashed an attack in five directions. They dealt two main blows on Georgia from the East (Azerbaijan) and the South-East (Armenia); the other three attacks were launched from the North—from the mountains of Caucasus, through the Dariali and Mamison mountain ranges, and by occupying Racha and Tskhinvali regions and invading Abkhazia from the Black Sea side.

25 Noe Zhordania, Times, Mar. 21, 1922.

26 Walter Elliott, a famous Scottish politician, was ironically criticizing R. McDonald, the Prime Minister and foreign affairs minister of that time because, although McDonald knew the situation in Georgia and was one of the first advocates of Georgia's independence and defense of the country against Russian aggression at the beginning of twenties, as leader of the government, McDonald preferred to recognize Soviet Russia and be silent on the Georgian issue. *See* Walter Elliott, Georgia and Soviets, Letters to Editors, 27, 09, 1924.

27 George Papuashvili, Presidential System in the Post-Soviet Countries: Georgian Example, Review of Georgian Law, third quarter, at 22 (1999).

28 In 1992-1995 the law on the "State Authority" was active, which, to fill in the vacuum, was temporarily considered as the so-called "minor constitution."

29 The first version of the Constitution adopted in 1995 referred to "[t]he basic principles of the 1921 constitution . . . ."

30 Noe Zhordania, Social-democracy and the State Organization of Georgia 32 (1918).

The European Court of Human Rights—A European Constitutional Court?

*By Jacob Mchangama**

Legal discussions of constitutionalism will typically focus on national developments and differences between various national constitutional systems. However the focus of my remarks will not be on national constitutions and constitutional courts—at least not directly—but rather on the idea of supranational or European constitutionalism. This is an idea that holds great appeal to many lawyers and politicians.

The EU and the European Court of Justice (ECJ) is obviously central to any discussion of European constitutionalism, but my focus will be on the European Convention on Human Rights (henceforth ECHR) and in particular on the European Court of Human Rights (henceforth the Court) set up to enforce this convention.

There are those who believe that the ECHR has attained a constitutional character and that thus the Court has become a European constitutional court.[1] Proponents of this idea highlight that the ECHR has been incorporated into the national law of most member states of the Council of Europe, that the case law of the Court is often referred to by national parliaments and courts as well as by the ECJ, that the ECHR forms part of the basic principles of EU law, and that Article 6 (2) of the Lisbon Treaty formally commits the EU to become a party to the ECHR.

The notion that the ECHR is a constitutional document has been given some support by the Court itself. In the *Louizidou* case from 1995, the Court stated that the ECHR is "a constitutional instrument of European public order."[2] For ten years the Court did not repeat this extraordinary claim but then did so again in the hugely important *Bosphorus* case in 2005, where the Court—however *sotto voce*—claimed that it—and therefore not the ECJ—has the ultimate competence to determine whether EU regulations comply with the ECHR when applied by member states.[3]

For lawyers and politicians in favor of individual freedom, the rule of law, and limited government, it might seem natural that one should support the constitutionalization of a convention and court explicitly set up to ensure the respect for such rights and values. However, there are very good reasons to be skeptical of attaching constitutional weight to the ECHR and of the Court assuming the role of a European constitutional court.

First of all, as noted in a much-debated speech by the now-retired English judge Lord Hoffmann, it is clear from the drafting of the ECHR that its founders—representing Western liberal democracies at the time—did not envisage the ECHR as a constitution for Europe but rather as a unifying bulwark against the reemergence of totalitarianism.[4] As noted in a document drafted by high-ranking UK civil servants engaged in the drafting of the ECHR: "The original purpose of the Council of Europe Convention on Human Rights was to enable public attention to be drawn to any revival of totalitarian methods of government and to provide a forum in which the appropriate action could be discussed and decided."[5]

Judicial enforcement was to be the exception; in fact, it was assumed by drafters that the ECHR would not result in any significant problems for the state parties. The UK Attorney-General Sir Hartley Shawcross stated:

> No other country engages, or need engage, in any over nice and meticulous comparison of its own municipal laws against its treaty obligations . . . . The most that can be sought in connection with such political manifestos as in effect are constituted by these Conventions on Human Rights is that in substance and principle, if not in every detail, our practice protects the rights laid down.[6]

The ECHR is an instrument of international law that differs in many respects from national law. Moreover, a constitutional order is not merely concerned with fundamental rights, however important; these are for individual freedom. A constitutional order sets out the basic structure and framework of the political and legal order of a nation state. As such a constitution should represent the specific history and political and legal culture of its people. An international convention agreed by diplomats of thirteen states and subsequently amended in order to accommodate all forty-seven member states of the Council of Europe is by definition ill-equipped to serve such a purpose. However important the role of human rights, an international convention for states with as different legal and political cultures as, say, Germany and Turkey or Denmark and Moldova cannot assume the unifying character and country-specific characteristics essential for a constitution.

It is, I think, also essential to stress that there is little evidence that international human rights conventions can secure individual freedom and the rule of law on their own. At the time of writing, there are 167 state parties to the International Covenant on Civil and Political Rights (ICCPR), which guarantees basic freedoms essential for individual liberty and a functional democracy. However, the state parties include numerous states with little or no tradition or respect for individual freedom and the rule of law, including North Korea, Iran, Kyrgyzstan, and Somalia, to whose rulers the ratification of such an international convention seems to mean very little. As for the ECHR, state parties include Russia, Azerbaijan, and Moldova, who are ranked as non-free (the former two) or partly free (the latter) in Freedom House's annual Freedom of the World Report.[7] Moreover, these countries have all seen respect for civil and political rights decline in the past years despite being parties to the ECHR and subject to the jurisdiction of the Court. On the other hand, with a few exceptions the original

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thirteen signatory states to the ECHR were established liberal democracies prior to adopting the ECHR.

These facts underscore that securing respect for human rights depends first and foremost on a national legal and political constitutional order committed to these principles. When such a national legal and political order is in place, the ECHR and the Court can play—and has in several cases played—an important subsidiary role by affirming these rights and freedoms and pointing to the most egregious transgressions thereof.

If we are to take seriously the idea that the ECHR is of a constitutional character and the Court a constitutional court, that in turn would entail that the Court would have the competence to—directly or indirectly—declare national laws "unconstitutional" whenever the Court finds a violation in specific cases. To a significant extent this is already happening as some countries, such as Sweden and Norway, have incorporated the ECHR into their constitutions (directly or through reference thereto) and most national courts turn to Strasbourg jurisprudence when interpreting national law. But in countries, such as Denmark, where the ECHR merely forms part of the ordinary law, national parliaments retain the ability to depart from the jurisprudence of the Court should they think that the interpretation is repugnant to their own constitutional principles. Should Strasbourg case law be considered as having constitutional status, that would arguably no longer be the case. And there are clear signs that this is the direction toward which we are heading. The newly-elected Danish government recently stated that it wishes to incorporate the ECHR into the Danish constitution. That would have dramatic effects on the Danish constitutional order and signify a further power shift from national parliaments (and courts) to Strasbourg.

The risks associated with this development have much to do with the interpretational principles employed by the Court, in particular the Court's "dynamic" interpretation insisting on the ECHR as a "living instrument" to be interpreted according to "present day conditions," which has seen the scope of the ECHR expand dramatically, touching virtually all areas of law from planning to social security and asylum. In some cases the Court acts more like a European Supreme Court than a Constitutional Court, let alone a human rights Court. This has seen the Court increasingly intrude on the powers of national parliaments and courts in areas that have very little to do with fundamental rights.

Until the 1970s, the Court and the now-defunct commission were actually very—perhaps even too—deferential to the member states. But in the 1970s this changed, and the Court became much more assertive. In 1979 the Court decided that a Belgian law that did not recognize babies born outside of wedlock violated, inter alia, Article 8 on the right to private and family life.[8] The Court stated that there "may be positive obligations inherent in an effective 'respect' for family life," despite the wording of Article 8, which states that "there shall be no interference by a public authority" with this right, thus clearly envisaging a negative protection.

The Court's evolutive interpretation prompted one of the most remarkable and eloquent dissenting opinions ever filed by a Strasbourg judge. The British judge Sir Gerald Fitzmaurice wrote:

> It is abundantly clear (at least it is to me)—and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view—that the main, if not indeed the sole object and intended sphere of application of Article 8 (art. 8), was that of what I will call the "domiciliary protection" of the individual. He and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delayings and confiscation of correspondence; to the planting of listening devices (bugging); to restrictions on the use of radio and television; to telephone-tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another,—in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8 (art. 8), and it was for the avoidance of these horrors, tyrannies and vexations that "private and family life . . . home and . . . correspondence" were to be respected, and the individual endowed with a right to enjoy that respect—not for the regulation of the civil status of babies . . . .

It seems to me that Fitzmaurice's dissenting opinion in the *Marckx* case is an accurate description of the object and purpose of the ECHR and the role the Court should play as its enforcer. Yet, as the long line of dissenting opinions filed by Fitzmaurice testify, his view has long since been abandoned, and the scope of the ECHR has increased unrecognizably since.

The *Hatton* case is a good example of how the right to privacy and respect for the home has developed since the *Marckx* case based on the "dynamic interpretation."

In the *Hatton* case eight applicants complained that night flights from the privately-owned Heathrow Airport in London disrupted their sleep and thus violated their right to privacy and respect for the home.[9] In the chamber judgment from 2001, the Court found in favor of the applicants, but that decision was reversed by the Grand Chamber in 2003. However, the Court went into a meticulous review of domestic UK legislation and procedure in order to ascertain that the UK authorities had struck the right balance between the right to respect for the home and the economic interests of the UK in keeping Heathrow operational during night. As such the Court assumed the role of a national administrative court, with the consequence being that Council of Europe states will have to consult ECHR case law whenever planning major construction works that may impact the quality of life of nearby residents. It seems to me that the *Hatton* case should have been rejected as manifestly ill-founded, or even *ratione materiae*, as noise pollution is hardly a practice apt to reintroduce totalitarian

measures in Europe and does not seem to touch upon human rights in any meaningful sense of the word.

The second example is a particularly worrying instance of judicial activism and rights inflation with potential wide-ranging effects for national sovereignty. Since 2005 the Court has interpreted the right to peaceful enjoyment of possessions—in essence private property—as encompassing state financed and non-contributory welfare benefits such as social security. In the *Stec* admissibility decision the Court stated:

> In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on . . . welfare benefits. Many domestic legal systems recognize that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfillment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding the ECHR to be applicable.[10]

In other words individuals affected by welfare reforms—such as those carried out or underway in many European countries due to the current debt crisis—may argue that the slashing of welfare benefits constitutes a violation of the right to property. First of all, this would seem a corruption of both the language and concept of private property and possessions. This was noted in a stinging criticism from the President of the Belgian Constitutional Court Marc Bossuyt, who stated that "[i]f social support has become a property right, then the Judges in Strasbourg have succeeded in making an owner of he who owns nothing. Even [Karl] Marx had not been able to do that!"[11]

Secondly, while member states have a wide margin of appreciation or discretion when it comes to welfare reforms, the possibility that years down the line such reforms may fall afoul of the ECHR greatly inhibits the efficacy of governments in the economic sphere and provides a political trump card disguised as human rights to those who oppose welfare reforms. Already we have seen two Danish unions announce that a recently-agreed reform limiting the possibility of early retirement in Denmark will be challenged in the courts. If successful in Strasbourg, the government will have to come up with a new plan for reducing the budget deficit with unforeseeable consequences for an economy that has factored in the early retirement reform. The Court's jurisprudence in this area is particularly interesting, taking into account that the EU has been instrumental in pushing through austerity measures in European countries such as Greece and Italy, which include slashing or abolishing welfare benefits. As has been the case in Denmark, such measures may well be challenged in court, which could lead to a scenario where the Court is to decide whether such austerity measures fall afoul of the ECHR with potential wide-ranging consequences for the economy in the Euro-zone or (more likely) the Court being ignored by both the EU institutions and member states and thus marginalizing its own influence through judicial overreach.

It is difficult to envisage an area less suited to the judicial review of an international human rights court than economic and fiscal policies which to a large degree constitute the basis on which the electorate chooses its politicians and sets the course of the economic future of their country.

From the viewpoint of constitutionalism, the cases mentioned above have an obvious impact on the constitutional order of member states when national legislatures have to take into account Strasbourg case law on areas that have little to do with human rights. This development has most prominently seen the Conservative part of the UK's coalition government exploring the possibility of reducing the influence of the Court through repealing the Human Rights Act (which incorporates the ECHR into domestic English and Welsh law) and replacing it with a "British Bill of Rights." The British government is also in the process of drafting a declaration which it hopes will be adopted at a high-level meeting of the Committee of Ministers of the Council of Europe in Brighton in April 2012. The so-called Brighton Declaration aims to amend the ECHR in order to, inter alia, emphasize and strengthen the role of national governments and the subsidiary role of the Court, when it comes to safeguarding the rights of the ECHR.

Moreover, at a recent hearing before the Parliamentary Joint Committee on Human Rights, Lord Judge, the most senior judge in England and Wales, seemed to endorse the view that courts in the UK have been too accommodating of Strasbourg case law:

> Most of the decisions are fact-specific decisions, they are not deciding any point of principle. They are just saying "here are the facts, here is the answer." That is not precedent for anything . . . . There has been a tendency to follow much more closely than I think we should . . . . I think there is a realisation of that and I think judges generally are aware of this and are examining decisions of the European court that much more closely to see whether what you can spell out of it is a principle or just a facts-specific decision.[12]

The activism of the Court may also have ramifications for the EU. As mentioned the EU is formally committed to becoming a party to the ECHR, and the EU Charter of Fundamental Rights is to be interpreted in light of the ECHR and therefore in light of the jurisprudence of the ECHR. This gives the Strasbourg Court a significant say in the interpretation of not only national laws of the member states of the Council of Europe but also potentially in the interpretation of EU law, though one would expect the Strasbourg Court not to challenge the Luxembourg Court too boldly.

Of course, the accusation of judicial activism is one familiar to both American constitutional and European Union lawyers as both the U.S. Supreme Court and the European Court of Justice have been accused of such practices. Whatever the merits of such criticisms, there is an important difference between the Court on the one hand and the ECJ and the U.S. Supreme Court on the other. As noted by Lord Hoffmann, the U.S. Supreme Court forms one of the branches of government within a national constitutional system, and since *Marbury v. Madison* in 1803, it has been accepted that it has the competence to perform judicial review. The U.S. Supreme Court enjoys a high level of respect in the American population and is a part of the national fabric in a way that the Court can never hope to emulate. As for the EU, the member states have, for better or for worse, explicitly given up their sovereignty on a wide number of areas where the EU institutions are competent to legislate in order to unify and harmonize legislation. The

ECJ has a mandate to interpret and enforce EU legislation in these areas. The ECHR, on the other hand, is an international convention aimed at securing respect for basic rights not to unify or harmonize the policies of the member states of the Council of Europe.

In conclusion, I hope to have demonstrated the dangers in forming a supranational or Pan-European constitutionalism on the basis of a human rights convention interpreted by an international court. While such a rights enforcement machinery has its merits, it should be based on the principle of subsidiarity, not constitutionalism.

Endnotes

1 *See, e.g.*, Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court* (Faculty Scholarship Series, Paper 71, 2009).

2 Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995).

3 Bosphorus v. Turkey, Appl. No. 45036/98 (June 30, 2005).

4 Lord Hoffmann, The Universality of Human Rights, Judicial Studies Board Annual Lecture (Mar. 19, 2009).

5 Brian Simpson, Human Rights and the End of Empire (2001).

6 *Id.*

7 The report is available at http://www.freedomhouse.org/template.cfm?page=15.

8 Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) (1979).

9 Hatton v. UK, App. No. 36022/97 (2003).

10 Stec v. UK, 41 Eur. Ct. H.R. SE18 (2005).

11 Interview in Gazet Van Antwerpen, May 11, 2010.

12 BBC, Nov. 15, 2011.

Litigation

Losing Confidence in Confidentiality: Do Expanding Exceptions to the Attorney-Client Privilege Gut Its Purpose?

*By Raymond J. Tittmann**

True or false: attorney-client communications, simply speaking, are privileged? False, both under law and—more importantly—in practice.

That answer may surprise clients and even many lawyers. If it does, these clients have a problem: sensitive communications transmitted on the assumption of confidentiality may one day be ordered produced under a multitude of exceptions that now exist under the law. As the law has developed to erode the privilege, lawyers and clients—and especially insurance companies and their lawyers—may decide to operate on the assumption they will one day be compelled to produce their communications. They may prefer to avoid frank communication out of concern for creating written communications that could be troublesome in future litigation.

Confidence in Confidentiality Is the Cornerstone of the Privilege and Necessary to Achieve Its Purpose

Distrust in the attorney-client privilege guts its purpose. The purpose of the attorney-client privilege is:

> to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[1]

But this purpose cannot be achieved if the participants do not have full confidence that confidentiality will be preserved. "The free-flow of information and the twin tributary of advice are the hallmarks of the privilege. For all of this to occur, there must be a zone of safety for each to participate without apprehension that such sensitive information and advice would be shared with others without their consent."[2]

When attorneys and clients lack confidence in the privilege, the value dissipates. They simply will not engage in the desired "full and frank" communications if the law creates a realistic possibility that a court will one day force disclosure. When the law reaches the point where the risk of disclosure makes frank communication too dangerous, lawyers and clients will operate on the assumption that the communication will be produced. For the reasons discussed below, we are nearing that point. Indeed, some lawyers have already concluded that it is no longer safe to count on the attorney-client privilege.

Attorney-Client Communications, Without More, Are Not Privileged

Many regard the strict confidentiality of attorney-client communications as a truism, a mantra repeated in television legal drama, higher education, and even in the highest courts of the land. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[3] So the assumption that these communications are privileged is sensible and justified.

But that assumption is still wrong, or at least imprudent:

> Contrary to modern yet ill-informed perceptions, the attorney-client privilege is often "[n]arrowly defined, riddled with exceptions, and subject to continuing criticism." Grand as the privilege stands in our legal lexicon, it is nonetheless narrowly defined by both scholars and the courts. The attorney-client privilege is not given broad, unfettered latitude to every communication with a lawyer, but is to be narrowly construed to meet this narrowest of missions.[4]

Under the California Evidence Code, for example, a communication between an attorney and client, without more, satisfies only the first three of six elements required to establish the privilege. The party claiming privilege must show:

(1) Attorney: a person authorized to practice law;[5]

(2) Client: a person who consults a lawyer to secure legal service;[6]

(3) Information transmitted between a client and lawyer;

(4) In the course of that relationship;

(5) In confidence by a means which discloses the information to no third persons, and

(6) Includes a legal opinion formed and the advice given by the lawyer.[7]

If any of the last three conditions are not satisfied, the attorney-client communication is not privileged. And even if all six conditions are satisfied, parties seeking production of the communication have a multitude of waiver theories at their disposal.

Insurance Companies in Particular Face Hurdles in Preserving the Privilege

Insurance lawyers and clients should be especially concerned with the erosion of the attorney-client privilege due to three common situations that lead to production of their communications: (1) the "at issue" waiver, e.g., when the insurance company seeks to defend a bad-faith claim by asserting that they reasonably relied on the advice of counsel; (2) the implied waiver, i.e., when a court finds that merely denying bad faith (or general assertions that the claim was handled properly under the law) automatically puts the attorney's advice at issue; and (3) when the attorney is not serving in the role of an attorney as defined by the last three legal elements, e.g.,

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when they conduct a factual investigation or offer guidance on company policy or give business advice, rather than legal advice.

Insurance companies and their lawyers can take steps to increase the likelihood of preserving the privilege, as discussed further below. But, despite best efforts, the law does not give sufficient clarity and certitude in the ultimate confidentiality sufficient to justify the risk of frank communication. They are thus tempted to take the safer route of assuming disclosure. This article addresses each of these situations and recommends steps to help preserve the privilege, but nevertheless recognizes that the law is, in certain contexts, too inconclusive to give the confidence necessary to serve the purpose of the privilege.

The "At Issue" Waiver: Advice of Counsel Defense

The attorney-client privilege is waived when the client puts the privileged communication at issue in litigation. For example, a client can be held to have waived the privilege when it alleges that it relied on the advice of counsel, misunderstood terms of an agreement, or diligently investigated a claim with the assistance of counsel.[8]

Courts generally apply a three-part test to determine whether a party has put the advice at issue: (1) a party asserting privilege must take an affirmative act that (2) makes the protected information relevant to the case, and (3) application of the privilege would deny the opposing party access to information vital to defending against the affirmative assertion.[9]

Other courts say this "relevance" standard is too broad, and require that the party asserting the privilege specifically rely on privileged communications for a claim or defense or as an element of a claim or defense.[10]

Either way, merely denying an allegation does not result in an "at issue" waiver under this rule.[11] Where the opponent injects attorney-client communication into the case, the privilege has not been waived.[12]

For insurance companies, at-issue waiver occurs most commonly when the company argues that it had a good-faith reason to deny coverage because it reasonably relied on the advice of its counsel. Ideally, the company would decide at the outset of the claim whether to assert the defense, and hire counsel specifically for this purpose, rather than hiring the attorneys it intends to use for future coverage litigation. Under this scenario, both attorneys and clients can conduct their communications with full recognition of the likely disclosure.

However, even if this decision is not made at the outset, attorneys and clients must always recognize the possibility that circumstances may arise in the future to justify assertion of this defense. Indeed, a lack of care in these communications during the claim may limit the client's future options in asserting this defense. Accordingly, clients and lawyers are well-advised to assume throughout the claim process that the communications will be released.

Implied Waiver: Some Jurisdictions Find that Simply Opposing a Claim of Bad Faith Waives Privilege

The most significant erosion of the attorney-client privilege over the last twenty years arises from the implied-waiver doctrine. Courts in Ohio, Delaware, and Arizona hold that insurance companies can waive the privilege even without asserting the advice-of-counsel defense.[13]

In *Tackett v. State Farm*, State Farm denied that there was "any unreasonable justification for denying" coverage. The Delaware Supreme Court ruled that State Farm's denial put the privileged communications at issue, as counsel's advice could lead a jury to find against State Farm on its "assertion" (i.e., its denial of the allegation).

> Where, however, an insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party an opportunity to uncover the foundation for those assertions in order to contradict them.[14]

In *Boone v. Vanliner* and *Moskovitz v. Mt. Sinai Medical Center*, the Supreme Court of Ohio ruled that the attorney-client privilege did not protect communications if they were conducted in the context of claims handling and could be used to show bad faith: "Documents and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege." Thus, "neither the attorney-client privilege nor the so-called work production exception precludes discovery of the contents of an insurer's claims file."[15]

In *Boone*, the Ohio Supreme Court clarified that the doctrine applies to pre-denial communications: "[W]e hold that in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage."[16]

In *State Farm v. Lee*, State Farm argued that it was acting on its good-faith understanding of the law, but it did *not* argue that it was relying on its lawyer's advice. The Arizona Supreme Court found the two arguments inseparable: a client's reliance on its understanding of the law puts at issue its attorney's advice on that law. The Arizona Supreme Court did not purport to apply the implied waiver theory: "We also agree that mere denial of the allegations in the complaint, or an assertion that the denial was in good faith, is not an implied waiver."[17]

Yet implied waiver was, in effect, the consequence:

> But as our cases have shown, a litigant's affirmative disavowal of express reliance on the privileged communication is not enough to prevent a finding of waiver. When a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reaching a well-founded belief that the law permitted the action it took, then the extent of its investigation and the basis for its subjective evaluation are called into question. Thus, the advice received from counsel as part of its investigation and evaluation is not only relevant but, on an issue such as this, inextricably intertwined with the court's truth-seeking functions.[18]

The Arizona Supreme Court's finding in *Lee* makes sense in theory, but in practice it puts the insurance company in a precarious situation as to what it might say in litigation that

a court could find puts counsel's advice at issue. An insurance company cannot know in advance whether a court might apply *Lee* to find a waiver in a multitude of circumstances: if an adjuster testifies in deposition that she sought guidance from the legal department before denying; if she testifies about the company's reasoned practice in interpreting and applying a policy exclusion; or if she testifies that she conducted a full claim investigation. At the time of the communication, the attorney and client have no idea what future statement might be made in litigation that could be construed as a waiver under this rule.

Whereas the "at issue" waiver doctrine brings certitude at least at the time the insurance company decides to assert the defense, the implied waiver doctrine offers little certitude at any point. For any insurance companies handling claims in states that follow some version of the implied-waiver doctrine, attorneys and clients, to be safe, may simply assume that their communications in claims handling will not be kept confidential.

Lawyer Playing the Role of a Lawyer

While the first two situations discussed are focused on attorneys involved in the underlying claims-handling process, both claims and litigation counsel may lose privilege to the extent they take actions that do not appear connected with legal advice.

As noted above, to be privileged, an attorney-client communication must also meet three additional requirements. The communication must be in the course of that relationship, in confidence by a means which discloses the information to no third persons, and include a legal opinion formed and the advice given by the lawyer.[19]

These elements leave substantial ambiguity concerning how any one jurisdiction might apply them in a particular case.

For example, any communication that appears primarily factual, and not intertwined with legal advice, is at risk. Purely factual documents prepared and sent to a lawyer may be held not to be privileged because facts alone are not privileged.[20] Likewise, a lawyer's interview memorandum in an investigation was held not privileged because no groundwork was laid with the witnesses to ensure confidentiality.[21] Counsel's memoranda that simply transmitted factual information might not be privileged because the lawyer is merely acting as a conduit for factual data.[22]

But if the same documents stated that the factual information was prepared in order to seek or give legal advice, ideally framing or answering a specific legal question in the document itself, it should be preserved as a privileged attorney-client communication.[23] "Factual investigations performed by attorneys *as attorneys* fall comfortably within" the privilege.[24]

It can be difficult to predict where a court will draw the distinction between simply factual information and factual information tied to legal advice. As courts have drawn sometimes subtle distinctions, attorneys and clients have little choice but to err on the side of safety by drafting such communications on the assumption it will be produced.

Similar problems arise when legal advice is distributed broadly. Privilege is not waived just because non-lawyers forward the attorney's legal advice to other non-lawyers, but all recipients must be among those that "need to know" the legal strategy.[25] Otherwise, sharing privileged information too broadly within the company or with people that do not "need to know" defeats or waives the privilege, as it suggests the speakers did not consider the communication to be confidential in the first place.[26] How a court might determine who "needs to know" the advice in any particular case creates uncertainty that further undercuts the purpose of the privilege.

A larger problem occurs when the distinction between legal advice and business advice is blurred. Business advice or statements of corporate policy are not privileged.

There is general agreement that the protection of the privilege applies only if the primary or predominate purpose of the attorney-client consultations is to seek legal advice or assistance. There are substantial policy reasons for holding that business documents submitted for attorney review are not by that virtue automatically exempt as privileged or work product protected communications.[27]

This distinction between business and legal advice is especially difficult for insurance companies because their business requires them to interpret and apply contract terms. In effect, insurance companies are in the business of legal interpretation. Insurance lawyers and clients cannot predict easily whether advice on interpretation of an insurance policy constitutes legal advice or business advice.[28] The attorney can best protect himself by taking extra steps to establish privilege, e.g., by citing case law and expressly characterizing the analysis as a legal opinion.

In-house counsel for insurance companies faces extra scrutiny. The law recognizes a "presumption" that "communications to outside counsel" primarily relate "to legal advice," under Diversified v. Meridith.[29] But the *Diversified* presumption is not "applied to in-house counsel."[30] Though costly, hiring outside counsel automatically increases the likelihood of attorney-client protection.

Conclusion

These cases offer guidance on how corporations can best preserve the attorney-client privilege. In summary, attorneys and clients should do whatever possible to emphasize that the attorney is acting in his or her role as attorney, by asking for and giving legal advice expressly and treating the communications confidentially. However, it is often difficult to know at the time of the communications what precautions will be sufficient, or if any precaution will be sufficient. Therefore, even when taking these precautions, attorneys and clients may choose to assume the worst—that the documents will be produced—and structure their communications accordingly.

These concerns are not merely theoretical. Some insurance attorneys already have resolved not to put any sensitive advice in writing. The risk of future production is too great.

Endnotes

1 Upjohn v. United States, 449 U.S. 383, 389 (1981).

2 Lugosch v. Congel, 219 F.R.D. 220, 234 (N.D.N.Y. 2003).

3 *Upjohn*, 449 U.S. at 389-90 (citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

4 NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 125-26 (N.D.N.Y. 2007) (citing inter alia Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 189 (1990); Fisher v. United States, 425 U.S. 391 (1976)).

5 Cal. Evid. C. § 950.

6 Cal. Evid. C. § 951.

7 Cal. Evid. C. § 952.

8 *See, e.g.*, United States v. Mendelsohn, 896 F.2d 1183, 1188-89 (9th Cir. 1990) (party waived privilege by asserting reliance on counsel's advice that conduct was legal); Musa-Muaremi v. Florists' Transworld Delivery, Inc., 270 F.R.D. 312, 317-19 (N.D. Ill. 2010) (in an employee discrimination case, employer waived privilege by asserting that it had conducted an adequate investigation); Restatement (Third) of the Law Governing Lawyers § 80(1)(b) (2000).

9 Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975).

10 *In re* Erie County, 546 F.3d 222 (2d Cir. 2008).

11 N. River Insur. Co. v. Phila. Reinsur. Corp., 797 F. Supp. 363 (D.N.J. 1992).

12 Parker v. Prudential Insur., 900 F.2d 772, 776 & n.3 (4th Cir. 1990).

13 Tacket v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254 (Del. 1995); Boone v. Vanliner Ins. Co., 744 N.E. 2D 154 (Ohio 2001); Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E. 2D 331 (Ohio 1994); State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169 (Ariz. 2000).

14 Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 259 (Del. 1995).

15 *Moskovitz*, 635 N.E.2d at 349.

16 *Boone*, 744 N.E.2d at 158.

17 *Lee*, 13 P.3d at 1175.

18 *Id.* at 1177.

19 Cal. Evid. C. § 952.

20 Hilton-Rorar v. State & Fed. Comms., 2010 WL 1486816 (N.D. Ohio 2010).

21 Gottliev v. Wiles, 143 F.R.D. 241 (D. Colo. 1992).

22 Dawson v. N.Y. Life Ins., 901 F. Supp. 1362 (N.D. Ill. 1995).

23 Gen. Elec. Cap. v. DirectTV, 1998 WL 849389 (D. Conn. 1998).

24 Sandra v. S. Berwyn Sch. Dist., 600 F.3d 612 (7th Cir. 2010) (emphasis in original).

25 Zurich Am. Ins. Co. v. Super. Ct., 66 Cal. Rptr. 3d 833 (Cal. Ct. App. 2007).

26 Muro v. Target Corp., 243 F.R.D. 301 (N.D. Ill. 2007).

27 *In re* Seroquel Prods. Liab. Litig., 2008 WL 1995058, at *4 (M.D. Fla. 2008) (citing Paul R. Rice, Attorney-Client Privilege in the United States § 7.2, 7.5; Visa USA, Inc. v. First Data Corp., 2004 WL 1878209, at *8 (N.D. Cal. 2004)).

28 *See, e.g.*, Arkwright Mut. Ins. Co. v. Nat'l Union, 1994 WL 510043 (S.D.N.Y. 1994) (though an "ordinary claims investigation" would not be protected, the investigation performed as part of a subrogation analysis was protected); Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986) (an insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigation).

29 572 F.2d 596 (8th Cir. 1977).

30 United States v. Chevron, 1996 WL 264769 (N.D. Cal. 1996).

Religious Liberties

A Religious Organization's Autonomy in Matters of Self-Governance: *Hosanna-Tabor* and the First Amendment

*By Carl H. Esbeck**

In the second week of January, the U.S. Supreme Court handed down its unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.[1] The case involved a fourth-grade teacher, Cheryl Perich, suing her employer, a church-based school, alleging retaliation for having asserted her rights under the Americans with Disability Act (ADA).[2] The Equal Employment Opportunity Commission filed the original suit, and the teacher intervened as a party. In the lower federal courts Hosanna-Tabor raised the "ministerial exception," which recognizes that under the First Amendment religious organizations have the authority to select their own ministers—which necessarily entails not just initial hiring but also promotion, retention, and other terms and conditions of employment. Over the last forty years the ministerial exception has been recognized by every federal circuit to have considered it. Indeed, the exception overrides not just the ADA but also a number of venerable employment nondiscrimination civil rights statutes.[3] Just who is a "minister," however, has varied somewhat from circuit to circuit—and in any event the Supreme Court had never taken a case involving the ministerial exception.

The Supreme Court, in an opinion by Chief Justice John Roberts, wrote that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[4] The Court went on to say that although "the interest of society in the enforcement of employment discrimination statutes is undoubtedly important . . . so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[5] Accordingly, in a lawsuit that strikes at the ability of the church to govern the church, any balancing of interests between a vigorous eradication of employment discrimination, on the one hand, and institutional religious freedom, on the other, is a balance already struck by the First Amendment.[6]

I. Internal Governance of Religious Organizations

The U.S. Department of Justice's Office of the Solicitor General (OSG) claimed that there was no ministerial exception because the First Amendment did not require one. All that was required, argued the OSG, was that government be formally neutral with respect to religion and religious organizations. That was successfully done here, said the OSG, when Congress enacted the ADA, which by its terms treated religious organizations just like every other employer when it came to discrimination on the basis of disability. By extension, the same would be true of federal and state civil rights statutes prohibiting discrimination on the bases of sex, age, race, and so forth. The OSG allowed that religious organizations had freedom of expressive association, but so did labor unions and service clubs, and they were subject to the ADA.[7] In the great cause of equal treatment, intoned the OSG, the government could be blind to religion. To be sure, Congress could choose to accommodate religion, but the First Amendment did not require it to do so.

The Court's reaction to the OSG's religion-blind government was to call the proposition "remarkable," "untenable," and "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[8] Solicitude, of course, means attentive care or protectiveness. Religious organizations do have freedom of expressive association to the same degree as other expressional groups.[9] But religious organizations have more. The very text of the First Amendment recognizes the unique status of organized religion, a status that makes a properly conceived separation of church and state desirable because the right ordering of these two centers of authority is good for both.[10]

So the *Hosanna-Tabor* Court held that there is a constitutional requirement for a ministerial exception.[11] Before proceeding to examine more closely the facts that convinced the Court that this fourth-grade teacher was a "minister," the Chief Justice had to distinguish the leading case of *Employment Division, Department of Human Resources of Oregon v. Smith*.[12] The State of Oregon listed peyote, a hallucinogenic, as one of several controlled substances and criminalized its use. The plaintiffs in *Smith* held jobs as counselors at a private drug rehabilitation center.[13] They were fired for illegal drug use (peyote), and later denied unemployment compensation by the state because they were fired for cause. Male members of the Native American Church ingest peyote in the course of a sacrament. The *Smith* Court held that the Free Exercise Clause was not implicated when Oregon enacted a neutral law of general applicability that happened to have an adverse effect on a religious practice. Chief Justice Roberts admitted that the ADA was a general law of neutral application that happened to have an adverse effect on Hosanna-Tabor's ability to fire a classroom teacher.[14] But he then, for a unanimous Court, drew this distinction between the present case and *Smith*:

> [A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. See [*Smith*, 494 U.S.] at 877 (distinguishing the government's regulation of "physical acts" from its

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"lend[ing] its power to one or the other side in controversies over religious authority or dogma").[15]

Accordingly, there is a subject-matter class of cases to which the rule in *Smith* does not apply described as "an internal church decision that affects the faith and mission of the church itself." The firing of Perich was characterized as "internal," meaning a decision of self-governance. The firing of the plaintiffs in *Smith* was characterized as "outward," meaning that the state's denial of unemployment did not regulate a decision of church governance. Moreover, the ingestion of peyote regulated in *Smith* was characterized as a "physical act," whereas the firing of Perich regulated by the ADA was not a physical act but a "church decision."[16]

Obviously a sacrament is an important religious practice. Obviously the plaintiffs in *Smith* suffered a burden on religious conscience that was unrelieved by the rule of *Smith*. But the point of *Hosanna-Tabor* was not to relieve burdens on religious conscience. If it were, then *Hosanna-Tabor* would have overruled *Smith*. That did not happen. Rather, *Hosanna-Tabor* distinguished *Smith*. What was remedied in *Hosanna-Tabor* was not a burden on religious conscience[17] but government interference with the organizational autonomy of religious groups.[18]

Following the quoted language above, the *Hosanna-Tabor* Court went on to provide another example where *Smith* does not apply: in lawsuits over church property, the government must not take sides on the question concerning the rightful ecclesiastical authority to resolve the property question.[19] These two examples—a church selecting its own minister and a church determining the rightful ecclesiastic to solve property disputes—are contrasted with the religious practice at issue in *Smith*, namely the ingestion of peyote as part of a sacrament. The Court distinguished *Hosanna-Tabor* from *Smith* because the decision to hire and fire a minister is about who governs the church.[20]

It follows that projecting the scope of *Hosanna-Tabor*'s distinction from *Smith* means determining what additional subject matter falls into the description "internal church governance." There is help from another quarter: Justice Alito's concurring opinion, joined by Justice Kagan, said that this subject-matter class of cases recognizes a "religious autonomy" found in the Establishment and Free Exercise Clauses that together protect "a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs."[21]

A survey of the cases yields relatively few—but important—subject-matter areas within which civil officials have been barred categorically from exercising authority[22]: (1) questions about correct doctrine and resolving doctrinal disputes;[23] (2) the choice of ecclesiastical polity, including the proper application of procedures set forth in organic documents, bylaws, and canons;[24] (3) the selection, credentials, promotion, discipline, and retention of clerics and other ministers;[25] (4) the admission, discipline, and expulsion of organizational members;[26] (5) disputes over the direction of the ministry, including the allocation of resources;[27] and, (6) communication to the organization's clerics or the laity about matters of governance.[28]

The types of lawsuits that fall into the *Hosanna-Tabor* category of internal church governance are likely few because, inter alia, no reply is permitted based on governmental interests. That is, once it is determined that a suit falls within the subject-matter class of church governance, there is no judicial balancing. There is no balancing because there can be no legally sufficient governmental interest. The First Amendment has already struck that balance.[29] In this regard, the Court lectured the OSG concerning its argument that Hosanna-Tabor's religious reason[30] for firing Perich was pretextual.[31] "This suggestion misses the point of the ministerial exception," wrote the Chief Justice.

> The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical," . . . is the church's alone.[32]

Again, the religious autonomy recognized in *Hosanna-Tabor* is categorical. A federal court has Article III jurisdiction to determine whether the employee in question is a minister. If so, that is the end of the lawsuit.[33] Neither the government nor the employee is permitted to reply that there is an offsetting interest.

As should now be apparent, the decision in *Hosanna-Tabor* is not about an ordinary constitutional right—subject to balancing—but about a structural limit on the scope of the government's authority. That *Hosanna-Tabor* is a limit on the regulatory authority of the government explains why the case is based in part on the Establishment Clause.[34] The text of that clause bespeaks a structural limit on authority: "Congress shall make no law" about a given subject matter described as "an establishment of religion."[35] As the Chief Justice wrote, "[T]he Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission" by controlling who are its ministers, and "the Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions."[36] The Chief Justice gave examples where the English Crown had interfered with the appointment of clergy in the established Church of England.[37] The Establishment Clause was adopted to deny such authority to our national government.[38] Justice Alito is helpful here as well by pointing out one of the historic reasons for why the separation of church and state limits the civil government: "[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws."[39] Religious organizations working to check a government with authoritarian pretensions is one way in which church-state separation does useful work.

Balancing is done in free exercise cases, but not cases decided under the Establishment Clause. In *Hosanna-Tabor*, there is a welcome absence of verbal tests: enjoining "excessive government entanglement with religion"; prohibiting "endorsement" of religion that lessens the standing of some in the political community; and the "principal or primary effect must be one that neither advances nor inhibits religion." Such tests are still valid when applicable, but not in cases

like *Hosanna-Tabor* where the subject matter warrants the categorical protection of what Justice Alito called "religious autonomy."[40] In such cases, the First Amendment, understood within the historical setting that gave rise to its adoption, has determined that there are a few areas of authority that have not been rendered unto Caesar.

II. Testing the Scope of "Internal Church Governance"

In future litigation, advocates on the losing side of *Hosanna-Tabor* will push hard to narrow the foregoing subject-matter classes that implicate internal church governance. Contrariwise, advocates for churches and other religious organizations will push to read the class of decisions affecting "the faith and mission of the church itself" as broader than mere governance—arguing that the mission of church is as expansive as reaching the entire world. The civil courts will do well to resist both of these pressures. The *Hosanna-Tabor* categories are workable so long as they are kept to the sphere of church governance, within which religious organizations are truly autonomous.

Assume that on a Sunday morning the senior pastor of a large church endorses a political candidate for public office whose name will appear on the ballot in a partisan election. The endorsement is integrated into the pastor's sermon, and comes nine days before the general election in which the candidate in question is the challenger to a sitting incumbent. There is no attempt by the pastor to claim that in giving the endorsement he is speaking only in his individual capacity, and not for the church. Polls say the race is tight. Further assume that the church is tax-exempt under Internal Revenue Code § 501(c)(3), and thus the endorsement violates IRS statutes and regulations. Is this the type of church communication to the laity that is protected by *Hosanna-Tabor*? Because the communication is about a matter other than governance within the church, I think the endorsement is not protected by *Hosanna-Tabor*.[41]

We should not suppose that *Hosanna-Tabor* reaches communication to the congregation about everything, even when done by a cleric on a Sunday from the pulpit. Appeals from a church to the effect that the laity should vote against President Obama because he failed to approve the TransCanada Keystone XL pipeline coming out of Alberta is not about church governance. There may well be a Christian view of the environment and the continued use of fossil fuels, but any such religious teaching is remote to the question of a church's self-government.

An example of a communication that was about governance led to a defamation claim growing out of the oversight of a local church by denominational leaders. In a case that arose in Iowa, the district superintendent of the United Methodist Church had heard that certain disruptive activities were occurring at a local church. The superintendent visited the church, attended a worship service, and talked widely with congregants. After returning to his office, the superintendent wrote a letter to the congregation urging that the local church no longer tolerate the disruptive actions of one of its members (she was not named, but it was apparent to most congregants who was being singled out). That person sued, alleging that the letter was defamatory. The state court acknowledged that the letter could not be the basis of a tort claim with respect to "communications between members of a religious organization concerning the conduct of other members or officers."[42] This is consistent with the approach in *Hosanna-Tabor*. A problem developed, however, because the letter was mailed by the superintendent to an audience wider than just the officers and members of the church.[43] The broader distribution took the letter—and the alleged libel—outside the sphere of church governance.

An illustration of the "direction of the ministry" issue implicating *Hosanna-Tabor* occurs in the spate of denominational decisions to close local churches and schools. The Archbishop of Boston sought to close a parish church as part of an overall plan to consolidate resources in a time of financial stress and a shortage of priests. Several parish members sued and sought a preliminary injunction. The district court denied the injunction and held that parish property was under the control of the Archbishop. The court found no evidence of a constructive or resulting trust on behalf of the parish church, as an entity, or the parish members, as individuals.[44] That result is certainly correct, but *Hosanna-Tabor* would take a more direct approach. That the Catholic Church has an episcopal polity is well understood, and that polity places the final decision concerning matters of property in the hands of the diocesan bishop. *Hosanna-Tabor* tells us that civil courts are to defer to the decisions of the highest ecclesiastical authority with respect to disputes like this that concern the future direction of the ministry.

Three years ago legislation was debated in the State of Connecticut that would have reshaped the future direction of Catholic ministry at each local parish. The bill would have taken financial oversight of each local church away from the diocesan bishop and given the authority to a board of directors made up of lay parishioners. What engendered the bill was a case of embezzlement by a parish priest, a matter already addressed by a criminal prosecution. The proposed legislative remedy was far broader. Only after considerable public controversy and a demonstration of opposition by Catholic leaders was the bill withdrawn.[45] Under *Hosanna-Tabor*, a court would find that the bill strikes at self-governance and so is per se unconstitutional.

Consider a more nuanced illustration. A female minister on the staff of a large municipal church is sexually harassed by her supervisor. He pressures for quid pro quo sex, and she finally relents in return for a favorable promotion and transfer within the denomination. Three months after the transfer she sues her church under employment civil rights legislation for having permitted a workplace environment where sexual harassment was widespread. The denomination promptly dismisses her. The minister then amends her complaint, adding a claim for retaliation. With reference to *Hosanna-Tabor*, a civil court should dismiss nearly the entire claim of sexual harassment because the selection of ministers is a matter of internal governance. However, a limited civil rights claim can be kept but sharply pared down to a remedy for tort-like damages as a result of the sexual harassment. The minister cannot sue for reinstatement, or for back pay,

front pay, or any other compensation, punitive damages, or attorney's fees based on the loss of her job. The retaliation claim is derivative of the claim for sexual harassment; because the primary job-loss claim is precluded by *Hosanna-Tabor*, the retaliation claim must fail as well. The minister can sue her former supervisor alleging an intentional tort.[46] And the state may try to prosecute the supervisor for a sexual assault.[47]

Finally, consider a case where the spouse of a minister alleged that she suffered harm as a result of her husband's dismissal from a church's employment. Such a claim is entirely derivative of the church's decision not to retain her spouse.[48] Following *Hosanna-Tabor*, such claims will continue to be dismissed.

III. Who is a "Minister"?

While declining on this occasion to set down a more rigid test or list of factors for determining who is a "minister,"[49] a unanimous Supreme Court easily found that in function and credentials Cheryl Perich was a minister. While declining to range too far beyond the case at hand, the Court said it agreed with the circuit courts "that the ministerial exception is not limited to the head of a religious congregation."[50] It seems implicit in *Hosanna-Tabor* that for the ministerial exemption to be in play the employer would likely need to be religious[51]—but it does not need to be a church.[52] Additionally, if the employer is not a church, the religious fervor of the religious organization may influence the determination of whether the employee is a minister. None of these issues was present in *Hosanna-Tabor*, and so they were not discussed.

Chief Justice Roberts began by noting that Hosanna-Tabor held Cheryl Perich out as a minister. She had received the title of "Minister of Religion, Commissioned," which was attained only with formal training that took her six years to complete.[53] Perich also held herself out as a minister in her communication with others and by taking a housing allowance for ministers on her tax return.[54] As to job functions, Perich taught religion classes four days a week, led her students in prayer three times a day, conducted a daily devotional, accompanied her class to chapel every Friday, and took her turn with the other teachers in leading the chapel service.[55]

The OSG and Perich both pointed out to the Court that other teachers in the school who do not hold the title of a "commissioned" teacher did the same above-listed religious activities. In reply, the Court first agreed that a religious title, like that held by Perich, without the substance, would not itself make an employee a minister. But it was also wrong to dismiss the significance of a title: it is properly a factor in concluding that Perich was a minister.[56] Second, the fact that other teachers did not have a religious title but did the same religious duties did not help Perich's case. First, it might be that the other teachers were also ministers within the meaning of the exception. Second, it cannot be dispositive that performing the religious duties did not require the title held by Perich, wrote the Chief Justice, especially in light of the agreed facts that there was a shortage of commissioned teachers.[57]

The circuit court had ruled that Cheryl Perich was not a minister because the religious duties such as religion class, prayer, and chapel consumed only a small part of her school day, perhaps as little as forty-five minutes. To that line of analysis, the Chief Justice said, "[T]he issue before us . . . is not one that can be resolved by a stopwatch."[58] It is not that the amount of time spent on particular duties is irrelevant, wrote the Court, but that the time "factor cannot be considered in isolation, without regard to the nature of the religious functions performed," as well as the other factors.[59]

Summarizing his points, the Chief Justice wrote: "In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception."[60]

Justice Thomas, concurring, took a view more favorable to the church. So long as a church asserted in good faith that one of its employees was a minister, it was his argument that this should be the end of the matter. To probe beyond testing the sincerity of the church's assertion was to have a civil court resolve a religious question, a matter prohibited by the First Amendment.[61]

Justice Alito, concurring, joined by Justice Kagan, believed that the Court should take more affirmative steps to resolve the inevitable cases that will come before the lower courts. While Justice Thomas would leave the definition of minister entirely up to the church, Justices Alito and Kagan would not. These two Justices twice described in near identical terms three functions, at least one of which is performed by an employee who they would considered a minister. The first passage reads: "The 'ministerial' exception . . . should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[62] The second passage reads:

> Different religions will have different views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of "employees" whose functions are essential to the independence of practically all religious groups. These include those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.[63]

Justices Alito and Kagan sought to guide future courts. They believed that a minister will serve at least one of three functions: lead the organization, conduct worship and rituals, or teach the faith. Given that the Chief Justice's opinion does not provide a baseline for defining who is a minister, I predict many lower courts will at least mention, if not follow, Justices Alito and Kagan when it comes to the three alternative functions of a minister.

What about the status of a faculty member at a religious school who teaches only subjects such as history, mathematics, science, or grammar, and is not involved in classroom prayer, devotions, or chapel? Justices Alito and Kagan opined that such a teacher is not a minister.[64] Although a religious school that wholly integrates faith and temporal learning might provide

a counterexample,[65] I think Justice Alito's presumption will generally hold up. I hasten to add that this does not mean that a religious school has lost all of its First Amendment rights vis-à-vis the teacher devoted exclusively to math or history. For example, the math teacher could be hired and fired on a religious basis, albeit not on the bases of race, sex, disability, and so forth. For a religious school to discharge a teacher for religious cause is parallel to a legitimate business reason.

Conclusion

In *Hosanna-Tabor*, a unanimous Supreme Court took a discrete line of cases involving religious disputes and church property[66] and enlarged on it so as to give rise to a full-throated protection of religious institutional autonomy. The Court did not assume that religious organizations act without error. But when mistakes are made of a certain subject-matter class, *Hosanna-Tabor* locates authority solely in the religious organization as a matter of self-governance. Far more harm than good would result if civil government were to intervene in this class of cases, harm that would flow from a disorder of relations between church and state.

Going forward, there is danger from those who were on the losing side of *Hosanna-Tabor* and who will deny the decision's obvious importance.[67] But *Hosanna-Tabor* is also in danger from those who embrace it eagerly and then proceed to apply it where not intended. An overly-eager embrace will yield a series of lower court opinions seeming to cut back on *Hosanna-Tabor*, with all the attendant rhetoric about a "clear and present danger" of religion unregulated and out of control.

Endnotes

1 132 S. Ct. 694 (2012).

2 42 U.S.C. §§ 12101 *et seq*.

3 *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (race, color, national origin, sex, and religious discrimination); The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (sex discrimination); Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*.; 42 U.S.C. §§ 1981 and 1981a (race discrimination).

4 *Hosanna-Tabor*, 132 S. Ct. at 706.

5 *Id.* at 710.

6 *Id.* ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").

7 *Id*. at 706.

8 *Id*.

9 *Id.*

10 *See, e.g.,* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); Engel v. Vitale, 370 U.S. 421, 431 (1962) (The Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."). *McCollum* held that for a public school to open its classrooms to the teaching of elective religion classes was a violation of the Establishment Clause. *Engel* held that teacher-led prayer in a public school classroom violated the Establishment Clause.

11 *Hosanna-Tabor*, 132 S. Ct. at 706.

12 494 U.S. 872 (1990).

13 *Id*. at 874.

14 *Hosanna-Tabor*, 132 S. Ct. at 707.

15 *Id.*

16 This passage in *Hosanna-Tabor* references *Smith* where it also says that the exercise of religion often involves "the performance of (or abstention from) *physical acts*: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." 494 U.S. at 877 (emphasis added).

17 *Hosanna-Tabor*, 132 S. Ct. at 709 ("The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason."). *See infra* notes 30-32 and accompanying texts.

18 One can predict that the Court's distinction between *Smith* and *Hosanna-Tabor* will be contested. It is true that a governance decision by the church was not directly countermanded in *Smith* like it was by the ADA in *Hosanna-Tabor*. In *Smith*, the plaintiffs were fired from their jobs because of peyote use and then later denied unemployment compensation. Neither the loss of the jobs nor the denial of compensation directly countermanded the sacramental practice of the Native American Church. For all practical purposes, however, the actual practice of peyote ingestion during the sacrament was prevented or driven underground. But—as I say in the text—Oregon imposed a burden on religious conscience, whereas *Hosanna-Tabor* is not about remediating burdens on religious conscience.

19 This passage need not be read as in tension with *Jones v. Wolf*, 443 U.S. 595 (1979), which the Court does not cite. In intra-church disputes over church property, *Jones* permitted state courts to use neutral principles of law so long as in locating the person or body with authority to resolve the dispute the tribunal does not consider, in the Court's words, "religious doctrine and polity." *Id*. at 608. *Jones*, of course, was consistent with prior church autonomy cases such as *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 116 (1952), which reserves to the church alone questions of "church government as well as those of faith and doctrine." *See Hosanna-Tabor*, 132 S. Ct. at 704 (quoting *Kedroff*).

20 Another way to think about neutral laws that apply generally but happen to have a disparate effect on a particular religion (the *Smith* rule) is to focus on the practical implications of the Supreme Court extending the categorical autonomy of *Hosanna-Tabor* to the means of performing religious sacraments. With minors present, the taking of LSD or the handling of poisonous snakes could not be prohibited if categorical autonomy was extended to this subject matter. Drug use and other inherently dangerous activities are best handled by a balancing test where the government's interests in health and safety can be factored into the mix. *Cf*. Gonzales v. O Centro Espirita Beneficente Uniào Do Vegetal, 546 U.S. 418 (2006) (Religious Freedom Restoration Act's balancing test applied to importation of otherwise illegal drug for use only by adult members of sect in the course of religious rite). Accordingly, while the Court's distinction of *Smith* and *Hosanna-Tabor* is contestable, it does make practical sense to distinguish governance from sacraments.

21 *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring); *see* Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 341 (1987) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.") (Brennan, J., concurring) (internal quotations and citation omitted).

22 I do not claim that the series of subject-matter classes to follow is necessarily a closed set. There may be other types of disputes the subject of which fit the description of "internal church governance," but my research failed to turn them up.

23 Maryland & Va. Churches of God v. Church at Sharpsburg, 396 U.S. 367, 368 (1970) (per curiam) (avoid doctrinal disputes); Presbyterian Church v. Hull Mem'l Church, 393 U.S. 440, 449-51 (1969) (rejecting rule of law that discourages changes in doctrine); Watson v. Jones, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied-trust rule because of its departure-from-doctrine inquiry); *see* Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (courts not arbiters of scriptural interpretation); Order of St. Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914) (religious practices concerning

vow of poverty and communal ownership of property are not violative of individual liberty and will be enforced by the courts).

24 Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church polity); Presbyterian Church v. Hull Mem'l Church, 393 U.S. 440, 451 (1969) (civil courts forbidden to interpret and weigh church doctrine); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952) (same); Shepard v. Barkley, 247 U.S. 1, 2 (1918) (aff'd mem.) (courts will not interfere with merger of two Presbyterian denominations).

25 In addition to *Hosanna-Tabor*, see *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-20 (1976) (civil courts may not probe into defrocking of cleric); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (courts not to probe into clerical appointments); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929) (declining to intervene on behalf of petitioner who sought order directed to archbishop to appoint petitioner to ecclesiastical office). *Cf.* NLRB v. Catholic Bishop, 440 U.S. 490, 501-04 (1979) (refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers); Rector of Holy Trinity Church v. United States, 143 U.S. 457, 472 (1892) (refusing to apply general law preventing employment of aliens to church's clerical appointment); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1872) (unconstitutional to prevent priest from assuming ecclesiastical position because of refusal to take civil oath).

26 Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872) ("This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872) (no court jurisdiction as to church discipline or the conformity of members to the standard of morals required of them); *cf.* Order of St. Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914) (so long as individual voluntarily joined a religious group and is free to leave at any time, religious liberty is not violated and members are bound to the rules consensually entered into, such as vow of poverty and communal ownership of property).

27 What is meant by "direction of the ministry" are decisions like the adoption of a budget, expanding the existing church building in the downtown area rather than to sell and move to the suburbs, and to continue renting a building for worship so as to have more resources for the support of missionaries. Decisions of this sort have led to church splits and generated lawsuits.

28 *See* Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002). In *Bryce*, a local Episcopalian church was sued by its fired youth pastor and her domestic partner. The church had communicated among its leaders and to the parents of the youth in the church with respect to why the youth pastor had been dismissed, giving her lesbian relationship as a primary reason. Among the various claims was the theory that the privacy of the two was invaded by the communication of the sexual relationship to the leaders and parents. The court held that the church's communication was protected by the First Amendment. *Id.* at 657-59. The communication was relevant to the governance of the church so as to explain to the leaders and parents the reason for the dismissal. Similarly, the claim of the domestic partner was dismissed because her claim for invasion of privacy was derivative of the decision not to retain the youth pastor. *Id.* at 658-59.

29 *Hosanna-Tabor*, 132 S. Ct. at 710 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us.").

30 Perich told Hosanna-Tabor that she had seen an attorney and intended to assert rights under the ADA. *Id*. at 700. One response was for the church to invoke the Lutheran teaching that ministers must not sue their congregations or fellow ministers, but instead seek to resolve complaints through church judicatories. This teaching, first articulated by Luther himself, is premised on the New Testament passage found at First Corinthians 6:1-8. Given the Supreme Court's disposition of the case, it turned out to be irrelevant that Hosanna-Tabor had a religious reason for dismissing Perich. *Id.* at 709.

31 *See id.* at 715-16 (Alito, J., concurring) (discussing limits on the operation of "pretext" if raised by an employee). Unlike *Hosanna-Tabor*, claims for employment discrimination based on sex, race, and so forth, may be brought against a religious organization by an employee who is not a minister. The organization may defend itself by saying that the employee was dismissed for religious reasons. There are two possible issues here, and care should be taken so as not to conflate them. One issue is sincerity, and the other is pretext. The plaintiff may respond by arguing that there is no such religious belief and the assertion by defendant that there is one is fake (insincere). *See* United States v. Ballard, 322 U.S. 78 (1944) (holding that courts may inquire into the sincerity of claims of religious belief (Is he faking it?), but not the truth or falsity of a religious tenet (Is it heresy?)). Pretext is different. Pretext is a common response by plaintiffs when a religious employer raises the defense that the plaintiff's dismissal from employment was for religious reasons. By raising pretext the plaintiff is saying that religion was not the real reason for the dismissal, but that the actual reason was plaintiff's disability, or plaintiff's sex, or the like. Pretext cannot challenge whether the asserted religious belief exists; pretext merely claims that the religious belief was not the cause of the dismissal. *Hosanna-Tabor* at 715 (Alito, J., concurring) (Even when employee is not a minister, First Amendment constrains weighing both "the importance and priority of the religious doctrine in question with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.").

32 *Hosanna-Tabor*, 132 S. Ct. at 709 (internal citation omitted).

33 *Id*. at 709 n.4. The ministerial exception is characterized in this footnote as an affirmative defense, which means that the religious organization has the duty to plead the matter and meet the burdens of producing evidence and persuasion if the defense is factually in contention. In most instances the question ("Is plaintiff a minister?") is to be disposed of as a threshold matter. *See* Fed. R. Civ. P. 12(b)(6), 12(c) & (d); *id*. ("District courts have power . . . to decide whether the claim can proceed or is instead barred by the ministerial exception."). Courts initially should restrict discovery to the "minister" question lest the burden of discovery qua discovery violate religious autonomy. It is a question of law, of course, whether the court has before it a lawsuit that falls into one of the subject-matter classes that *Hosanna-Tabor* has set aside as a matter of categorical religious autonomy.

34 *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1998).

35 The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

36 *Hosanna-Tabor*, 132 S. Ct. at 706.

37 *Id.* at 702.

38 *Id.* at 703-04. The Court relied on two events involving James Madison, one while he was Secretary of State and one while President. *Id*.

39 *Id*. at 712 (Alito, J., concurring).

40 The label "ministerial exception" does not really fit the holding, and Justice Alito's use of "religious autonomy" could be understood as an attempt to give a new name to the affirmative defense. *Hosanna-Tabor* is not about an exception to a general rule granted at the benevolence of a tolerant state. Rather, we have a civil government of limited authority, and one of those limits is acknowledged by the Court in *Hosanna-Tabor*. In the American constitutional settlement, the King's writ simply does not run to matters that concern the inner governance of a church.

41 The political endorsement by the pastor may well be protected by the Free Speech Clause. However, that is an altogether different analysis than the one present in *Hosanna-Tabor*, and it will involve a discussion of unconstitutional conditions.

42 Kliebenstein v. Iowa Conf. of the United Methodist Church, 663 N.W.2d 404, 407 (Iowa 2003). The court also noted with approval that the parties filing the tort "[c]oncede that the Free Exercise and Establishment Clauses of our federal and state constitutions preclude civil court interference in the disciplinary and governance matters of a religious entity." *Id.* at 406.

43 *Id*. at 407.

44 Akoury v. Roman Catholic Archbishop of Boston, 2004 WL 2341333 (Mass. Super. Ct. Sept. 14, 2004).

45 *See Bill Would Place State in Charge of Catholic Church*, Onenewsnow.com, Mar. 11, 2009, http://www.onenewsnow.com/Printer.aspx?id=441410; *Catholics Protest Connecticut Church Finance Bill*, Reuters, Mar. 11, 2009, http://www.reuters.com/article/2009/03/11/us-usa-religion-catholics-idUSTRE52A7EQ20090311.

46 *Cf. Hosanna-Tabor*, 132 S. Ct. at 710 ("Today we hold only that the ministerial exception bars [an employment discrimination] suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."). Whether the female minister can prove the elements of an intentional tort is another matter.

47 *See id.* ("Hosanna-Tabor responds that the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings. . . . Today we hold only that the ministerial exception bars [an employment discrimination] suit."). Whether the prosecutor can prove the elements of a sexual assault is another matter.

48 Lewis v. Seventh-day Adventists Lake Region Conf., 978 F.2d 940 (6th Cir. 1992) (wife's claims dismissed along with the underlying claims of minister-husband); Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974) (wife's 42 U.S.C. §§ 1985 and 1986 claims barred along with underlying claims of her minister-husband); Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989) (wife's claims dismissed along with the underlying claims of minister-husband); Tidman v. Salvation Army, 1998 Tenn. App. LEXIS 475, 136 Lab. Cas. (CCH) ¶ 58,441 (Tenn. Ct. App. 1998) (both husband's and wife's claims barred by First Amendment, including all claims indirectly related to church-minister employment relationship).

49 *Hosanna-Tabor*, 132 S. Ct. at 707. Shortly after the decision in *Hosanna-Tabor*, the Supreme Court dismissed petitions for certiorari in two cases that were being held pending the decision. *See* Weishuhn v. Catholic Diocese of Lansing, No. 10-760, *cert. denied*, 2012 WL 117540 (U.S. Jan. 17, 2012) (where elementary teacher at religious school was a "minister" subject to the exception, is teacher barred from bringing state whistleblower claim against church for failure to report violations of state law?); Skrzypczak v. Roman Catholic Diocese of Tulsa, No. 10-769, *cert. denied*, 2012 WL 117541 (U.S. Jan. 17, 2012) (where director of religious formation was "minister" subject to the exception, is she barred from pursuing civil rights claim for hostile work environment?).

50 *Hosanna-Tabor*, 132 S. Ct. at 707.

51 The civil courts understandably struggle when defining "religious organizations," for they do so against the backdrop of limitations imposed by the First Amendment. The struggle is equally difficult when the term or its equivalent is used by Congress in legislation. For an impressive effort, see *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 226 (3d Cir. 2007) (setting forth a nine-factor test for determining if an organization is religious for purposes of sec. 702(a) of title VII of the Civil Rights Act of 1964).

52 In its corporate form, Hosanna-Tabor was a church that operated a school. However, throughout *Hosanna-Tabor* the Justices freely interchanged "church" and "religious organization." It is safe to conclude that *Hosanna-Tabor* is not limited to churches.

53 *Hosanna-Tabor*, 132 S. Ct. at 707.

54 *Id.* at 707-08.

55 *Id.* at 708.

56 *Id.*

57 *Id.*

58 *Id.* at 709.

59 *Id.*

60 *Id.* at 708.

61 *Id.* at 710-11 (Thomas, J., concurring).

62 *Id.* at 712 (Alito, J., concurring).

63 *Id.*

64 *Id.* at 715 ("It makes no difference that [Perich] also taught secular subjects. While a purely secular teacher would not qualify for the 'ministerial' exception, the constitutional protection of religious teachers is not somehow diminished when they take on secular functions in addition to their religious ones.").

65 Justices Alito and Kagan take for granted independent religious and secular realms each largely defined as the opposite of the other. Secular is not religious; religious is not secular. That dichotomy is liberalism's worldview, but it is not reality for others. For others, religious convictions and practices typically shape the totality of life, including educational, economic, and political life. For people with a completely integrated world and life view, granting equal treatment to people of diverse faiths in a constitutional system does not set the political system apart from the religious convictions of its citizens, it just means that the political community is not constituted as a community of faith. To teach math or science from a comprehensive viewpoint, for them, is not only a choice but inevitable. The only question is: whose viewpoint? These religious folks enroll their children in a school as an act of choosing—as every parent chooses—a confessional worldview for their children that includes how one thinks about God's hand in all creation, including mathematics. They see liberalism as unthinkingly excluding religion from the public realm because liberalism presumes an absence of God. This is fine as a personal position, they would argue, but discriminatory when it is the government's position.

66 *Id.* at 704-05. The *Hosanna-Tabor* Court cited *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); and *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Additional cases involving religious disputes and church property are *Jones v. Wolf*, 443 U.S. 595 (1979); *Md. & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367 (1970) (per curiam); *Presbyterian Church v. Hull Mem'l Church*, 393 U.S. 440 (1969); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (per curiam); and *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

67 Another approach is alarmism, suggesting that results like that in *Hosanna-Tabor* threaten liberalism and its hold on the state. Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 Utah L. Rev. 47, 51-52, 61-64 (2010); *see id.* at 62 ("The toleration of illiberal groups is fraught with danger for liberal democracy, which by definition cannot guarantee that such groups will not seize the reins of democratic power." (footnote omitted)). To the fear that the state is in danger from religion, Justice Alito suggests that another way to look at the matter is to ask, "Who watches the watch dog?" *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) ("[I]t is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.").

The Ohio Constitution of 1803, Jefferson's Danbury Letter, and Religion in Education

*By David W. Scott**

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of conscience; that no human authority can, in any case whatever, control or interfere with the rights of conscience;
>
> that no man shall be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent; and that no preference shall ever be given by law to any religious society or mode of worship and no religious test shall be required as a qualification to any officer of trust or profit.
>
> But, religion, morality and knowledge being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.

Introduction

These statements come from the Ohio Constitution of 1803. They are from Section 3, the religion section of Article VIII, the Bill of Rights.[1] This last sentence of Section 3, which addresses education, is taken directly from a statement in the Northwest Ordinance, passed by the Continental Congress July 13, 1787, which provided the framework for the admission of Ohio to the Union.[2] It is the contention of this paper that these words express widely-held attitudes in regard to church and state, as well as religion and education, in the early days of the United States.[3]

What gives added support to this argument is the political background of those who pushed for Ohio statehood and led the Constitutional Convention at the territorial level and those who supported statehood and approved the work of the Convention at the national level. At both levels the Republican Party, the party of Thomas Jefferson, was in the majority. Statehood came to Ohio by congressional vote and approval by President Jefferson on February 19, 1803.

The reason to attach importance to the political setting of the drafting and approval of the Ohio Constitution is that shortly before—in January 1802—Jefferson had written a letter to the Danbury Baptists of Connecticut interpreting the absence of religious establishment at the national level as a "wall of separation between church and state." Such a wall, according to the letter, was to protect individuals from government interference in matters of faith and worship. Specifically, of course, Jefferson was referring to the First Amendment, which forbids Congress from enacting laws respecting an establishment of religion.[4]

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This paper addresses the extent to which Jefferson's support for the Ohio Constitution implies a lessening of the significance of his Danbury letter as an interpretation of original intent regarding the relationship of church and state and of religion and education. The education statement in the religion article of the Ohio Constitution does not seem to provide for a wall of separation between government, education, and religion.

The paper first examines the 1948 *McCollum* case in the United States Supreme Court. In *McCollum*, the Court rejected arguments defending the constitutionality of allowing a limited accommodation for religion in schools. The arguments by the defendant school district show the persistence of attitudes associated with the education statement in the 1803 Ohio Constitution 145 years after its adoption, and 159 years after the First Congress under the new Constitution in 1789 adopted *in toto* the Northwest Ordinance of 1787.[5] The paper then examines the background for the inclusion of this provision into the Northwest Ordinance, the issues associated with the movement toward the adoption of the 1803 Ohio Constitution, the politics surrounding the Danbury Letter, and the non-controversial nature of the education provision of the 1803 Ohio Constitution. Together, the existing scholarship on these topics suggests that the Ohio Constitution well represents a consensus regarding religion, state, and education in the early days of the Republic.

Early Intent: The Wall of Separation or the Ohio Constitution?

The current fame of the Danbury letter stems from the use of Jefferson's metaphor of a "wall of separation" by the U.S. Supreme Court as the basic statement of original intent in two landmark cases in the 1940s that shaped subsequent court decisions.[6] In the 1948 *McCollum* case, in an 8-1 vote, the Court declared as an unconstitutional violation of the principle of the separation of church and state a "released time" program in the Champaign, Illinois public schools.[7] The Court rejected the school district's argument for allowing some limited accommodation of religion in public education, which was the approach of the up-to-forty-five-minutes-a-week program of providing religious instruction in the elementary schools in Protestant, Catholic, or Jewish classes. The prevailing argument was that the program was conducted on school time and in school buildings, signaling government support for religion, and that it breached the wall of separation between church and state that the U.S. Constitution was designed to protect. The plaintiff claimed that the program by its nature created an embarrassment for non-participating pupils such as Terry McCollum, thereby violating such person's right to be free of any religious involvement.

The proponents countered that the program was constitutional because there was no coercion to take part;

rather, participation was voluntary, parental permission being necessary, and the classes were educational, not devotional or ceremonial; nor was tax money used. It did not favor one group over another. The Board of Education intended that all interested groups could have a class. Providing constitutional support for the "released-time" program, the defense cited the "no preference" principle set forth in early state constitutions as a basic statement of original intent, Ohio being one example.

The lawyers for the defendant school district contended that the U.S. Constitution was not designed to give the national government authority over such matters at the state and local level. The U.S. Supreme Court rejected this argument, reiterating its position in the Ewing case that the 14th Amendment incorporates the Establishment Clause, thus making it applicable to the states. However, if Section 3 of Article VIII of the Ohio Constitution rather than the Jefferson Danbury Letter's wall of separation had been viewed as a statement of original intent, then the Supreme Court's decision could have been more favorable to the defendants.

The program had been put in place to meet a secular goal of reducing juvenile delinquency in the Champaign community, on the assumption that religious influences tend to improve behavior and citizenship. This assumption links the "released-time" program with the assumptions of the education provision of the Northwest Ordinance and the Ohio Constitution and shows the persistence of the attitudes expressed by the provision. However, neither the provision nor its inclusion in the 1803 Ohio Constitution was cited at any time by any party involved with the case. Still, the defendant's case, in essence, contended that the program did not have elements of a religious establishment and that it was "not inconsistent with the rights of conscience."

The Northwest Ordinance and Its Statement on Education and Religion

The Ordinance created the Northwest Territory and permitted the formation of three to five states in the territory. As people moved into this territory, there eventually were formed, with final approval of Congress and the President, the Midwest states of Ohio (1803), Indiana (1816), Illinois (1818), Michigan (1837) and Wisconsin (1848).[8]

In Congress, Jefferson had a role in the process leading to the Northwest Ordinance, notably his leadership in developing some resolutions in 1784. However, he was not a member when Congress approved the Ordinance in 1787; neither was he a member when Congress proposed the Bill of Rights in 1789.

It is evident that one group and one individual provided the catalyst for the final shaping of the Northwest Ordinance.[9] The group, based in New England, was the Ohio Company of Associates and the individual was Manasseh Cutler, the Company's agent and lobbyist with Congress and a clergyman. Congress was willing to go along with the Company's insistence on a strong, centralized colonial government committed to orderly development that would encourage its stockholders and other entrepreneurial and skilled people from the East to risk moving into a wilderness area full of dangers from Indians and unexplored terrain.

In later years Cutler was recorded as explaining why "the recognition of religion, morality and knowledge as the foundations of civil government were incorporated into the Ordinance." It arose from the fact that "he was acting for associates, friends and neighbors who would not embark in the enterprise unless these principles were unalterably fixed." He included the prohibition of slavery among these principles.[10] In the writings on the development of the Ordinance, there is no evidence that the education statement was controversial.

It is generally held that the Constitution of Massachusetts was the starting point for the words in the Ordinance. The Calvinist-inspired Article III, in the Declaration of Rights, asserted that to secure "the happiness of a people and the good order and preservation of civil government essentially depends upon piety, religion and morality and [as] these cannot be generally diffused through a community but by the institution of public worship of God and of public instruction in piety, religion and morality . . . ."[11]

Obviously there was a substantial simplification in the process of settling on words in the Ordinance. Dropped was any reference to institutions of religion with their implications of an establishment of religion and religion requirements.

The Ordinance also contained a statement on religious liberties, which seems also to have been drawn from the Massachusetts Constitution of 1780.[12] The statement reads: "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory."

The Ohio Constitution of 1803

Ohio was the first state to be formed from the Northwest Territory, and it was the only state admitted to the Union during the eight years of Jefferson's presidency.

The Ohio Constitution of 1803 was primarily the work of Republicans, at both the national and Ohio levels.[13] Federalists, in Ohio as well as nationally, were a waning influence following the elections of 1800, which elected Jefferson President and gave Republicans the majority in Congress.

The governor of the part of the Northwest Territory that was to become the State of Ohio was Arthur St. Clair. As a Federalist, St. Clair was skeptical of representative democracy and specifically of the capability of frontiersmen to assume the reins of government, and thus was inclined to continue to support orderly development by means of centralized control as prescribed in the Northwest Ordinance. It was the desire to throw out an executive unaccountable to the people that broadened the demand for statehood and stimulated the growth of a group of politically-active Republicans to oppose him. Frontier Ohio was heavily populated by people from Pennsylvania, Virginia, and Kentucky, places where sentiments favored individualism, local control, and democracy.

St. Clair's strategy was to split the Ohio territory into an eastern and western part. As Republican sympathizers were particularly strong in south-central Ohio, this boundary change would dilute their strength. It was this plan to divide Ohio that caused an outcry by Ohio Republicans and motivated them to press national party leaders for statehood as soon as possible

and for removing St. Clair from the office of governor. They emphasized that statehood for Ohio under existing territorial boundaries would very likely create two Republican Senators and one Republican House member and thus add three electoral votes for Republican presidential candidates—a particularly appealing argument given the closeness of the 1800 presidential elections.

On March 4, 1802, Ohio Republicans sent an application to Washington seeking statehood.[14] They sought a promise from the national government that it would continue to help finance schools as originally provided for in the Land Ordinance of 1785, which set up a system that created six-square-mile townships. Authored by Thomas Jefferson—one of his many statements supporting education—the Ordinance required that revenue from "section No.16 in every township, sold, or directed to be sold by the United States, shall be granted to the inhabitants of such township for the use of schools."[15] In support of this position, the Committee cited without comment the education statement in the Ordinance.

In direct response to the concerns of Ohioans seeking statehood, Congress passed the Enabling Act for Ohio, and Jefferson signed it on April 30, 1802. This signature occurred only four months after his sending his "wall of separation" letter to the Baptists in Danbury Connecticut. The Act rejected any splitting of Ohio, set the guidelines for constitution-making, and supported the educational use of Section 16 revenues.[16] However, neither the report of the Committee of Ohioans requesting congressional authorization for a constitutional convention nor the Enabling Act by Congress allowing the convention contained any comment or elaboration on, objections to, or justification for any part of the statement in the Ordinance that addresses the general content of education (religion, morality, and knowledge) or its purposes (happiness and good government).

Republicans carried four-to-one the October election for delegates to the constitutional convention thanks to the vote of a public already favorable to the party of Jefferson. At the convention, in a reversal of positions, St. Clair took a Republican position on this issue and strongly defended states' rights and strict construction. He argued that the national government under the Ordinance did not have the power to authorize a constitutional convention or to set conditions for its operation. He argued that such an initiative could only come from people in the territory of the proposed state. In approving the Enabling Act, Jefferson was also involved in a reversal of position. His 1784 resolutions stated that the procedure for calling a state constitutional convention be democratic and decentralized; thus, the call should come from the people in the territory seeking statehood.[17]

The Convention that met in November 1802 placed the education provision of the Northwest Ordinance in Section 3, the religion section, of the Bill of Rights. The constitution contained no separate article for education, indicating that religion was seen as an integral part of schooling. The journal of the Convention contains only the votes on various proposed provisions. The delegates left no record of the debates. There is nothing in the journal of the Convention indicating that any part of Section 3 was controversial.[18]

With only three additions, the education statement was taken word-for-word from the Northwest Ordinance. The additions were: 1) the word "But" precedes the statement, indicating that the framers of the Ohio Constitution thought that these words represented a different perspective from one or more of the previous parts of the Section; 2) the necessity of a role for religion, along with morality and knowledge, in education is enhanced to be "essentially" necessary; and 3) the General Assembly is given a role in encouraging schools as long as it actions are "not inconsistent with the rights of conscience." The entire statement follows with the additions underlined: "<u>But</u> religion, morality and knowledge being <u>essentially</u> necessary to good government and the happiness of mankind, school, and the means of instruction shall forever be encouraged <u>by legislative provision not inconsistent with the rights of conscience</u>." Following the completion of their work in late November, the drafters submitted their constitution to Congress.[19] Thereupon, Congress recognized the State of Ohio as a member of the Union, and President Jefferson approved statehood on February 19, 1803.

Jefferson's Danbury Letter

In signing off on the Ohio Constitution, President Jefferson was by implication supporting its various provisions. Yet only a year earlier he wrote the now-famous letter to the Danbury Baptist Association of Connecticut that contained a strong statement of the individual's right to liberty of conscience: "that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship . . . ." According to Jefferson, this right was set forth with the adoption of the First Amendment to the U.S. Constitution, which stated that Congress should "make no law respecting an establishment of religion or prohibiting the free exercise thereof." The result was, according to Jefferson's interpretation, the creation of a "wall of separation between church and state."[20]

Jefferson's letter was a response to one from the Baptist Association. The Association expressed dissatisfaction with the continuing establishment of the Congregational Church in the state, and the fact that those religious liberties Baptists did then enjoy were granted by the legislature and thus not inalienable rights. They hoped Jefferson's support would help shape public opinion in their favor as they sought to break up the alliance of the Congregational Church and the General Assembly of Connecticut and thus overcome what they considered to be their subordinated position.[21]

According to Philip Hamburger, the Jefferson letter to the Danbury Baptists must be considered in the political context of the national presidential election of 1800. Jefferson had a reputation for anti-clerical attitudes, objecting to conventional and organized Christianity, questioning the civil value of religion, and sympathizing with deism and Unitarianism. His efforts to disestablish the Anglican Church in Virginia were widely known. Notable among the opponents to Jefferson were members of the establishment clergy in Connecticut, who tended to hold Federalist sympathies. In response, Jefferson's Republican supporters in that state advocated the separation of church and state. They meant by "separation" that members of

the clergy should not take part in any way in politics, arguing that politics and government were not their area of expertise. Given this context, writes Hamburger, the letter can be viewed as a political statement "written to assure Jefferson's Baptist constituents in New England of his continuing commitment to their religious rights and to strike back at the Federalist-Congregational establishment in Connecticut for shamelessly vilifying him as an 'infidel' and an 'atheist' in the rancorous presidential campaign."[22]

Jefferson wanted his statement to have a wide impact, and his words that an individual "owes account to none other for his faith or his worship" and "that the legitimate powers of government reach actions only and not opinion" surely found favor with these Baptists. They opposed establishment. They thought that laws should not require the payment of taxes to support religion, or to favor one religious group.

However, the Danbury Baptists failed to publicize and promote Jefferson's response to them, very likely because the opinion held by Baptists and others was that people and the government itself should be subject to religious influences. Along with other religious groups, Baptists wanted the legislature to prohibit amusement, travel, and unnecessary labor on Sunday. Thus, a "wall of separation" was not their goal. As Hamburger states:

> Tactically, dissenters could not afford to demand separation, for a potent argument against them had been that they denied the connection between religion and government—a serious charge in a society in which religion was widely understood to be the necessary foundation for morality and government. Nor could Baptists or other evangelical dissenters, whose preachers had long campaigned for religious liberty, accept separation's implications that the clergy had no right to preach politics . . . . Many Baptists seem to have held that all human beings and all legitimate human institutions, including civil government, had Christian obligations, and some Baptists felt obligated to remind Americans and their government of their Christian duties . . . . At the very least, in their social attitudes, Baptists seem to have had no quarrel with the commonplace that religion was essential for morality, republican government and freedom.[23]

This "commonplace" found expression in the education provision of the Northwest Ordinance.

Recognizing the radical tone of the Danbury Baptist letter, Jefferson took measures to "protect himself from what he assumed would be a clerical onslaught."[24] After issuing his letter on Friday, January 1, 1802, two days later on Sunday, "contrary to all former practice," he went to his first church service in the House of Representatives and "attended it consistently for the next seven years." By attending church services in Congress, "Jefferson intended to send to the nation the strongest possible symbol that he was a friend of religion."[25] "Being . . . . as cautious in person as he was bold in his imagination, Jefferson balanced his anticlerical words with acts of personal religiosity."[26]

The Baptists, understanding federalism, knew that the national government could not force disestablishment upon a state (or, for that matter, force an establishment) because to do so would violate the provision that "Congress shall make no law respecting an establishment of religion."[27] Still, they wanted the President to make some sort of statement that would encourage disestablishment in those states where an establishment still existed, notably in their own state of Connecticut. Jefferson may have intended that the Danbury Baptists could interpret his letter to mean that a wall of separation is also the proper design of the relationship between state government and religion. But Jefferson seems to have realized that it is up to the states to bring about that relationship. According to Dreisback, "a careful review of Jefferson's actions throughout his public career suggest [sic] that he believed as a matter of federalism, that the national government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate and even prescribe religious exercises."[28] Supporting such distinct roles for the states is well in line with Jefferson's reputation of favoring strict construction, states' rights, and local autonomy.

The Education Provision's Non-Controversial Character

As indicated, there is nothing in the official documents associated with the development and approval of the Ohio Constitution to indicate that the inclusion of the language from the Northwest Ordinance was in any way a contentious issue in general or among the various elements of the Republican Party, either in Ohio or in Washington. For example, Ruhl Jacob Bartlett, drawing mainly on the *Annals of Congress*, gives no indication that Congress in considering the Enabling Act had any concern about the inclusion of the education statement from the Ordinance in the petition for statehood from Ohio Republicans.[29]

Nor is there any such indication in books covering this period in Ohio history and cited in footnote 13 of this paper. None of them makes a reference to Section 3 in the Bill of Rights. Rather, they focus on how the constitution was a reaction to the centralization of authority of the governor under the Ordinance, thus creating a strong legislature and a weak executive and judiciary in Ohio. It limited the governor to two terms, denied him the veto power, and gave the legislature the power to appoint judges and approve all executive appointments.

For example, the biography of Thomas Worthington makes no reference to any record of a discussion of any specific provisions of the proposed constitution that Worthington or anyone else had with Jefferson when he was in Washington to lobby for statehood.[30] Worthington was a leading Republican at the Convention and the Republicans' principal liaison with Washington. He did write that the work of the Convention was well-received in Washington and that "our business is before a committee of Congress and I hope it will very soon pass through . . . .Our friends here are generally well pleased with our constitution."[31]

Although very brief and subject to Federalist biases, the principal source of substantive information on Article 3 is the biography of Ephraim Cutler, written by his daughter Julia Cutler.[32] A member of the committee on Article VIII, the Bill of Rights, Ephraim Cutler takes credit for preparing and

introducing the provision relating to education and religion as well as to slavery. The son of Manasseh Cutler, Ephraim Cutler was a member of the minority Federalists in the Convention and shared his father's support for public education, a religion-influenced civil morality, and strong opposition to slavery.[33]

The Cutler biography provides some evidence that Jefferson took an interest in several parts of the constitution. This book quotes the recollections of Jeremiah Morrow, recorded many years later, about an 1803 conversation this Ohio politician had with the President. Although commending the Ohio Constitution highly in its main features, Jefferson expressed several misgivings about it. The only two that stood out in Morrow's recollections were the ones related to the structure of the judiciary and the exclusion of slavery. According to Morrow's memory, Jefferson supported a proposal at the Convention allowing a male under the age of 35 and a female under 25 to be held in slavery in Ohio, and that Jefferson thought the total exclusion of slavery, the position finally adopted by the Convention, "would operate against the interests of those who wished to emigrate from a slave state to Ohio."[34] Cutler also claimed to have evidence of such support from his own observations at the Convention.[35]

A related issue that also generated much controversy was suffrage for black males, which lost by only one vote. The record of votes at the Convention indicated that there were also differences of opinion on the judicial article, annual or biennial sessions of the legislature, the submission of the constitution to the people for ratification, the salaries of officials, and qualification of voters. Not included among those matters upon which there was disagreement was the incorporation of the Ordinance's education provision into the constitution.[36]

One could hypothesize that Jefferson and his supporters might have considered crafting wording to implement the wall of separation so recently endorsed by placing such words into the Ohio Constitution. However, support for these two constituency groups—the Danbury Baptists and the Ohio Republicans seeking a state constitution—called for distinct responses due to distinct and unrelated political circumstances.

For example, it is reasonable to assume that the widely-held view that religion was important as a foundation for morality and good government was also held by the strongly religious men who were centrally involved in creating the constitution for Ohio; and that they specifically wanted the education provision of the Ordinance to be included in the Ohio Constitution.[37] Whatever the extent of Jefferson's involvement with the shaping of the constitution, the predominant view of the day was that the First Amendment guaranteed that states had considerable leeway in how they related to religion. And Jefferson often supported states' rights and local control.

Moreover, party conflict was not prominent at the Convention. Federalists presented themselves as friends of republican government, democracy, personal freedom, and local control. Cutler wrote that Federalists "wished to encourage democracy, by having townships to manage local business; and to encourage schools and education, by providing that it be imperative on the legislature to make laws for that purpose; and that all should enjoy perfect religious freedom, as their conscience should dictate."[38] Was this statement by Cutler and the language adopted in the religion section emphasizing freedom of conscience an effort to address Jefferson's concerns for the rights of conscience, such as those expressed in the Danbury letter? Was this emphasis part of a compromise that gave Federalists and others what they wanted: authority for a governmentally-supported education system that gave religion a role in schooling? A reasonable assumption perhaps, but the scanty remembrances left by participants in the Convention provide no evidence of it. Further, a compromise seemed unnecessary. As indicated, party divisions in the Convention were not prominent. Cutler and his friends supported religious liberties and anti-establishment principles. Jefferson wanted to demonstrate that he was a friend of religion, and one could hypothesize he saw the inclusion of the words from the Ordinance as a chance to demonstrate such friendship.

Perhaps the inclusion of the Ordinance language was simply the sense that because the education provision was in the Ordinance, it should be in the constitution of a state formed from the Ordinance. However, those who wrote the constitutions for Indiana (1816) and Illinois (1818), the next two states to be formed from the Northwest Territory, did not include the education section from the Ordinance, even as they copied much from the other parts of the religion article of the Ohio Constitution.[39]

Conclusion

This article has examined the circumstances surrounding the development of two well-known statements on the role of religion in relation to government from early in the nation's history. One is found in the Northwest Ordinance of 1787, encouraging a role for religion in education; the other is Jefferson's 1802 Danbury Baptist "wall of separation" letter. While the Ohio Constitution makes no reference to such a wall, it certainly rejects any kind of religious establishment, stating:

> [N]o man shall be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent and that no preference shall ever be given by law to any religious society or mode of worship and no religious test shall be required as a qualification to any office of trust or profit.

As indicated, the Danbury letter, however, did not focus specifically on such anti-establishment principles, but rather on the right of conscience. This right was cited at the beginning of the religion section of the Ohio Constitution. A perceived tension between such a right and a role for religious influences in the schools is indicated by the word "But" in the Ohio constitution that precedes the statement taken from the Northwest Ordinance. However, they are not inconsistent, the constitution states, as long as implementation of the education provision is "not inconsistent with the right of conscience."[40]

The education provision brought together two widely-held perspectives. One supported the individual's liberty of religious conscience—a perspective emphasized by Jefferson's letter. The second wanted religion to exert moral influence on people and government, specifically through schools and the means of instruction—a perspective emphasized by religious leaders in New England.

There is nothing in the official documents associated with the development and approval of the Ohio Constitution to indicate that the inclusion of the language from the Ordinance was in any way a contentious issue in general or among the various elements of the Republican Party, either in Ohio or in Washington. Nor is there any such indication in the books covering this period in Ohio history or in the scanty recollections of participants.

In summary, the implication of the information provided in this paper is that the single best statement of early intention in regard to church and state, religion, and education is a little-known and seldom-cited provision in an early state constitution—Section 3, the religion section, in the Bill of Rights of the Ohio Constitution of 1803. It includes Jefferson's central perspective, but not his "wall of separation" interpretation in his letter to the Danbury Baptists. In contrast to Jefferson's letter, it was an official act of government. Thus, according to the evidence and analysis presented in this paper, Section 3 represents the consensus of the early days of the United States.

Endnotes

1 Constitution of the State of Ohio—1802, *in From Charter to Constitution*, 5 Ohio History 132-153 (D.J. Ryan ed., 1897). The work of the conventions concluded in November 1802. February 19, 1803 was the date that Jefferson approved statehood.

2 Article the First, Section 14, An Ordinance for the government of the territory of the United States North west of the river Ohio, passed by Congress, July 13, 1787, *in* The Northwest Ordinance 1787: A Bicentennial Handbook 56-57 (Robert M. Taylor, Jr. ed., 1987).

3 John Eastman cites this statement in the Ordinance as perhaps the most significant of the many statements made in the founding period regarding the importance of morality and virtue underlying republican self-government. John Eastman, *The Establishment Clause, Federalism and the States*, Engage, May 2003, at 55-58.

4 U.S. Const. amend. I.

5 An Act to provide for the government of the territory North west of the river Ohio, approved August, 1789, First Congress, Sess I, ch. 8. 50-53.

6 Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947); McCollum v. Bd. of Educ. of Champaign Dist. 71, 333 U.S. 203 (1948).

7 *See* David W. Scott, *Religion in the Schools: Illinois Courts v. United States Supreme Court,* 100 J. Ill. St. Hist. Soc'y 328, 328-359 (2007-2008). This article is an extensive analysis of the issues involved in the *McCollum* case and the major precedent used by the plaintiff, *People ex rel Ring v. Board of Education of District 24*, 245 Ill. 334 (1910).

8 There was a flurry of books and articles around 1987 generated mainly by Midwestern universities recognizing the Ordinance's 200th anniversary. Treating the Ordinance in substantial detail are Peter S. Onuf, State and Nation: A History of the Northwest Ordinance (1987); and The Northwest Ordinance 1787, *supra* note 2.

9 *See* Ray A. Billington, *The Historians of the Northwest Ordinance*, 40 J. Ill. St. Hist. Soc'y 402, 402-408 (1947).

10 William Parker Cutler & Julia Parker Cutler, Life, Journal and Correspondence of the Rev. Manasseh Cutler, Vol. I, at 344-45 (1888).

11 Mass. Const. of 1780, art. III, Declaration of Rights.

12 *See id*. art. II, Declaration of Rights ("And no subject shall be hurt, molested or restrained . . . . for worshiping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.").

13 The following five books deal in detail with the events leading to the adoption of the Ohio Constitution of 1803: Onuf, *supra* note 8, at chaps. 4, 5; Randolph Chandler Downes, Frontier Ohio, 1788-1803, at chaps. V, VI, Vll (1935); R. Douglas Hurt, The Ohio Frontier: Crucible of the Old Northwest, 1720-1830, at chap. 9 (1996); Andrew R.L. Cayton, Frontier Republic: Ideology and Politics in the Ohio Country, 1780-1825, at chap. 5 (1986); and Alfred Byron Sears, Thomas Worthington: Father of Ohio Statehood, at chaps. vi, v (1958).

14 Application to Erect the Northwest Territory into a State, *in From Charter to Constitution*, *supra* note 1, at 69-73.

15 An Ordinance for ascertaining the mode of disposing Lands in the Western Territory, approved by Congress, May 20, 1785, *in* Onuf, *supra* note 8, at 22-24.

16 Enabling Act for Ohio, *in From Charter to Constitution, supra* note 1, at 74-78.

17 *See* Onuf, *supra* note 8, at 47.

18 First Constitutional Convention, Convened November 1, 1802, *in From Charter to Constitution, supra* note 1, at 80-131. That liberty of conscience was paramount and any aspect of a religious establishment was fully rejected by the Convention is indicated by a proposal at the Convention to strike from a draft of the Bill of Rights a prohibition on a religious test. To be substituted was the following: "No person who denies the being of a God or a future state of rewards and punishment shall hold any office in the civil department of this State." The proposal was overwhelmingly defeated thirty to three. *Id.* at 111. The U.S. Constitution also has a prohibition on a religious test. *See* U.S. Const. art. VI. However, the original Constitution, as ratified, did not contain any other anti-establishment principles, such as those included in the 1803 Ohio Constitution.

19 Constitution of the State of Ohio—1802, *in From Charter to Constitution*, *supra* note 1, at 132-153.

20 The discussion that follows relies heavily on Chapter 7 of Philip Hamburger, *Jefferson and the Baptists: Separation Proposed and Ignored as a Constitutional Principle*, Separation of Church and State 144-189 (2002).

21 The group wrote that "our hopes are strong that the sentiments of our beloved President, which have had such genial Effect already . . . . will shine and prevail through all these States and all the world till hierarchy and tyranny be destroyed from the Earth . . . ." *Id.* at 158. The entire letter is at page 158, and Jefferson's full response is at page 161.

22 Daniel Dreisback, Thomas Jefferson and the Wall of Separation Between Church and State 29 (2002), *cited in* Douglas G. Smith, *Thomas Jefferson's Retrospective on the Establishment Clause*.. 26 Harv. J.L. & Pub. Pol'y 369, 378 n.35 (2003).

23 Hamburger, *supra* note 20, at 177-180.

24 *Id.* at 162.

25 James H. Hutson, Religion and the Founding of the American Republic (1998), *cited in* Hamburger, *supra* note 20, at 162.

26 *Id*.

27 U.S. Const. amend I. The Danbury Baptists recognized, in their letter seeking support, that the President is not Congress and that the national government cannot "destroy the laws of each state." *See* Hamburger, *supra* note 20, at 158.

28 Dreisback, *supra* note 22, at 59-60, *cited in* Smith, *supra* note 22, at 374.

29 Ruhl Jacob Bartlett, *The Struggle for Statehood in Ohio*, 32 Ohio History, *supra* note 1, at 472-506.

30 Sears, *supra* note 13, at chap. x. Sears states:

> In the movement to secure Ohio's admission to the Union and in the framing of an enlightened and democratic constitution, which excluded slavery, banished executive tyranny and safeguarded private and public liberties in a comprehensive bill of rights, no one displayed greater leadership than Thomas Worthington.

See id. at Preface, vii.

31 *See* David Meade Massie, Nathaniel Massie: A Pioneer of Ohio 220 (1896). Perhaps upcoming volumes of *The Papers of Thomas Jefferson* being published by the Princeton University Press will bring to light information on issues related to the education provision. According to the Press, "Jefferson's letters are the largest component of the more than 70,000 documents that have been assembled as photocopies from over 900 repositories and private collections worldwide." The first volume was published in 1950. The two most recent volumes are Volume 36: 1 December 1801 to 3 March 1802, and Volume 37: 4 March 1802 to 30 June 1802, which cover the period of the movement toward statehood through the Enabling Act. Neither volume contains papers addressing the education provision or any other aspect of the planned constitution for Ohio.

32 *See* Julia P. Cutler, Life and Times of Ephraim Cutler (1912).

33 Although Convention members were willing to follow Cutler's lead in adopting a constitutional call for the legislature to encourage school, they were certainly aware that Ohioans were not ready to take the first steps in support of a state public school system. Such steps did not occur until the 1820s. In the meantime, schooling was strictly a local and often private matter with religious content common.

34 *See* Cutler, *supra* note 32, at 74.

35 *Id.* at 75. Such support by Jefferson goes against his reputation as an opponent of slavery. For example, he was the only Southerner to vote for an anti-slavery proposal when the 1784 resolutions were under consideration. Perhaps, however, Jefferson had in this case reversed his previous anti-slavery positions in response to pressure from slave-holding interests in his home state. On the other hand, it is possible that his position was misconstrued as part of the standard political rhetoric of Ohio Federalists that Virginia Republicans wanted statehood in order to extend slavery to Ohio. On this charge, see Hurt, *supra* note 13, at 281.

36 *See* Bartlett, *supra* note 29, at 498-501; Isaac Franklin Patterson, The Constitutions of Ohio; Amendments and Proposed Amendments 29-30 (1912).

37 On the strong religious beliefs of Thomas Worthington and other Ohio Republican leaders, see Cayton, *supra* note 13, at 58-59, and Sears, *supra* note 13, at 103-04. They tended to be Methodists, not Calvinists.

38 *See* Cutler, *supra* note 32, at 69-70.

39 Ind. Const. of 1816, art. I, § 3; Ill. Const. of 1818, art. VIII, §§ 3, 4.

40 The provision supporting religious influence in schools was retained in the 1851 Ohio Constitution with somewhat different wording: "[R]eligion, morality and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws . . . and to encourage schools and the means of instruction." *See* Ohio Const. of 1851, art I, § 7.

Sharia Law in American Courts

Veiled Meaning: Tolerance and Prohibition of the Hijab in the U.S. and France

*By Elizabeth K. Dorminey**

Introduction

France and the U.S. have much in common. Both nations share a commitment to liberty, equality, and freedom, most particularly freedom of religion and freedom of expression. Yet their divergent approaches to the common problem of religious accommodation reveals some striking differences. This article will focus on how each has addressed the issue of religious dress—specifically, the hijab, or head scarf, worn by many Muslim women.

France has twice recently adopted highly controversial legislation to regulate the wearing of the hijab in public. In 2004, France outlawed the wearing of all outward forms of religious attire in schools, and in 2010 prohibited attire that concealed the face in public spaces. In both instances, the legislation was justified in the name of maintaining public order and the secular state. Though both laws were couched in neutral language, they were widely perceived as targeting Islam.

With the exception of a few scattered municipal attempts to ban baggy pants,[1] the U.S. has not attempted to impose any sort of dress code by legislation on a national scale. However, the Equal Employment Opportunity Commission (EEOC), a federal civil rights enforcement agency, has filed lawsuits on behalf of female employees who desire to wear headscarves at work for religious reasons. Although the issue has yet to be addressed by the Supreme Court, two such cases have been decided by circuit courts of appeal, and the EEOC was defeated both times. In each case, the court held that the employer's prohibition of the hijab in its workplace was based on legitimate, nondiscriminatory reasons and did not violate Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace because of sex, color, race, ethnicity, national origin, disability, or religion.

In both France and the U.S., a Muslim woman's ability to wear the hijab in public or at work has been curtailed through legal action. However, France has used legislation to impose a society-wide prohibition, whereas in the U.S., restrictions have been authorized only upon a showing of compelling need in a specific and narrowly-defined, work-related context. The difference in approach reflects profound differences in the relationship between the government and the governed in what otherwise are two very similar countries.

The Hijab

Islam's holy text, the Koran (or Qur'an) does not explicitly instruct Muslim women to cover themselves in public, but rather directs both Muslim men and women to dress in a modest way.[2] Muslim men are enjoined to instruct their wives and daughters to cover themselves when they go out as a means of identifying themselves as believers so they will not be harassed or harmed.[3]

Head-covering as a matter of custom was prevalent in the Arab world, and indeed among Jews and Christians, long before the Prophet, and is still practiced today, to a greater and lesser degree, by a multitude of sects, from Muslims to orthodox Jews, Mennonites, Russian Orthodox, pre-Vatican II Roman Catholics, and even Anglicans. The Muslim headscarf is variously referred to as *hijab* or *khimar*, among other names which are derived from the various countries where it is practiced.

Some Muslim-majority countries require various degrees of covering by law—the Kingdom of Saudi Arabia, the Arab Emirates, Sudan, and Taliban-era Afghanistan are notable examples. Severe penalties may be exacted for infractions. In contrast, Turkey and Tunisia are Muslim-majority countries where the hijab is prohibited in government buildings and schools. In Tunisia, women were banned from wearing hijab in state offices in 1981, and in the 1980s and 1990s more restrictions were put in place.[4] In 2008 the Turkish government attempted to lift a ban on Muslim headscarves at universities, but the repeal was overturned by the country's Constitutional Court.[5]

France

In 1989, a French middle school principal in the Paris suburb of Creil suspended three girls for wearing the hijab in the classroom. The issue immediately drew media attention, and provoked strong and polarizing reactions because it pitted two time-honored principles against each other: individual freedom of conscience or expression versus the secular state. Legal challenges followed. Between 1989 and 2003, parents of aggrieved students brought a multitude of lawsuits challenging such prohibitions. The Conseil d'Etat, France's high court, generally upheld the students' right to wear their religious garb. In fact, between 1992 and 1999, the Conseil d'Etat ruled in favor of the headscarf-wearing students in forty-one of forty-nine cases.

Responding to this controversy, in 2003 then-French President Jacques Chirac appointed a commission charged to identify ways to reinforce the principle of secularity (*laïcité).* Following the Commission's recommendations, in 2004 France adopted legislation which amended its education code to prohibit the wearing in schools of attire or articles that are explicit outward expressions of religious affiliation.[6] The French National Assembly voted 494 to 36 in favor of the legislation, which, though non-specific and secular in its language, effectively banned the wearing of an Islamic headscarf, or any other conspicuous religious symbol, within French public schools. The bill passed the French Senate by a similar margin, 276 to 20. The text of the law stipulates that "[i]n

* *Wimberly, Lawson, Steckel, Schneider & Stine, PC*

public schools, the wearing of symbols or clothing by which students conspicuously ("*ostensiblement*") manifest a religious appearance is forbidden. Internal regulations state that the initiation of disciplinary proceedings must be preceded by a dialogue with the student."

Although couched in neutral language, this prohibition was widely—and accurately—perceived as directed against Islam and the hijab, although by its terms it prohibited all types of external displays of religious insignia and attire in public schools. Subsequently, invoking the authority of the Universal Declaration of the Rights of Man and the French Constitution of 1958, on October 7, 2010, France's Constitutional Court approved a law prohibiting covering the face in public places.[7] Though again presented in terms that were not specific to any particular religion, this law was plainly perceived as directed against the burqa, a head-to-toe covering identified with Islam that conceals the entire form, with only a rectangle of netting to allow navigation. Public security was particularly invoked in support of this legislation, since the comprehensive covering could easily conceal bombs or other weapons as well as inhibiting the ability of the authorities to identify an alleged perpetrator.

Critics of both laws point out that they contain an internal contradiction. In effect, both laws restrict the exercise of the fundamental right of freedom of conscience—the French principle of *liberté,* which in the U.S. we would describe as free exercise[8]—which erodes the notion of a secular state that is committed to a position of neutrality as regards all religious expression.

France's highest constitutional court gave the anti-burqa law its seal of approval on October 7, 2010.[9] The Conseil Constitutionnel reasoned that the state's obligation to maintain public order and security justified this limitation on a form of free exercise. Invoking Article 10 of the Declaration of the Rights of Man (1789), restated in the Preamble to France's 1946 Constitution, and Article 1 of France's current Constitution of October 4, 1958, the Conseil reasoned that free exercise is guaranteed by maintaining the secularity of the state. The limits of free exercise can be determined by judges in specific instances, but in a democratic society, a national law, universal in application, designed to promote public safety, is justified even if it imposes some limitations on free exercise.

United States

Title VII of the Civil Rights Act of 1964 is the principal federal law that prohibits discrimination of all types in the workplace. It reads, in relevant part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[10]

"Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that it is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[11] Read in conjunction with the Free Exercise Clause of the First Amendment to the U.S. Constitution,[12] Title VII prohibits an employer from treating an actual (or prospective) employee differently on the basis of the enumerated, prohibited factors, and requires employers to make reasonable allowances to accommodate an employee's religious convictions. "Reasonable accommodation" is the key phrase, and its inherent subjectivity paradoxically ensures both flexibility for both employer and employee and opportunities for litigation when one or the other is dissatisfied.

The Equal Employment Opportunity Commission (EEOC) is the federal agency created by Congress to enforce Title VII. No individual may sue an employer for discrimination or harassment prohibited by Title VII unless he or she first files a charge with the EEOC. The agency investigates all charges, and is authorized to sue on behalf of aggrieved individuals. Individuals also may sue, but only after the EEOC has issued a "notice of right to sue," generally upon concluding its investigation.

In FY 2010 the EEOC reported receiving 3790 charges from individuals alleging religious discrimination or harassment. Of these, the EEOC reported that 3782 were resolved. Following an investigation, the EEOC issued "no cause" determinations—a finding by the agency that there was no evidence from which they could conclude that discrimination or harassment had occurred—in 2309 cases. Seventy-three cases were successfully resolved through conciliation; there were 847 "merit resolutions," which means that the case was probably resolved through litigation, and more than $10 million in monetary benefits were paid to employees by employers.[13]

An unscientific review of reported cases in which plaintiffs have completed the EEOC process and filed lawsuits suggests that the vast majority of religious discrimination or harassment cases in recent years have been brought by, or on behalf of, Muslims: this is perhaps not too surprising when one considers that Muslims are a distinct religious minority in the United States, and Muslim religious practices do not enjoy the cultural pervasiveness of Christian or Jewish practices. Most of the recent religious discrimination in employment lawsuits brought by Muslims allege that the employer failed to reasonably accommodate their daily and weekly prayer requirements, or —in the case of Muslim women—the wearing of the headscarf or hijab; or a Muslim man's wearing of a beard.

In two cases the EEOC filed suit on behalf of female Muslim employees who claimed that their employers failed to accommodate their need to wear the hijab at work. One was in a prison; the other concerned a commercial printing company. In both cases, the court ruled against the EEOC, and for the employer, concluding that employer's refusal to allow those employees to wear Islamic headscarves at work did not violate Title VII.

In *EEOC v. GEO Group*,[14] the EEOC brought suit on behalf of a group of female Muslim prison guards employed by a company under contract to run a state prison. GEO had instituted a dress policy that provided that "[n]o hats or caps will be permitted to be worn in the facility unless issued with the uniform," and that "[s]carves and hooded jackets or sweatshirts will not be permitted past the Front Security Desk."[15] According to GEO, the no-headgear policy was adopted for safety and security reasons: to prevent the introduction of contraband into the prison facility, and to avoid misidentification. Some female guards employed by GEO at the prison wore the hijab, and protested the dress code as a prohibited restriction on religious expression, in violation of Title VII.

The EEOC sued GEO, asserting that its refusal to accommodate the guards' desire to wear the headscarf (khimar) violated Title VII. GEO moved for summary judgment, asserting that it would be an undue hardship for the prison to allow its Muslim employees a complete exception to the non-headgear policy because such an accommodation would compromise the prison's interest in safety and security and/or would result in more than *de minimis* cost. The EEOC opposed GEO's motion, relying heavily on the report of an expert which concluded that GEO's professed reasons for denying its female employees the ability to wear a khimar lacked merit and substance, the company had made no genuine attempt to identify an alternative method for accommodating the wearing of the khimar, and that there was no sound legitimate correctional reason for GEO to deny its female employees to wear a khimar within the secure perimeter of the facility.[16]

The district court granted GEO's motion and dismissed the EEOC's case, following a 2009 decision by the Third Circuit that had upheld a similar prohibition on headscarves as to police officers.[17] To rebut the EEOC's case, GEO had submitted evidence by prison wardens that caps and other headcoverings made it difficult to identify personnel, which can be critically important when disturbances or riots occur within an institution; and that such items also were frequently used to smuggle narcotics or other contraband into the prison. There was also the risk that a headscarf could be seized by a prisoner and used to choke a guard. On review, a majority of the court of appeals[18] concluded:

> The arguments presented by the parties make this a close case. The EEOC has an enviable history of taking steps to enforce the prohibition against religious discrimination in many forms and its sincerity in support of its arguments against the application of the no headgear policy to Muslim employees wearing khimars is evident. On the other hand, the prison has an overriding responsibility to ensure the safety of its prisoners, its staff, and the visitors. A prison is not a summer camp and prison officials have the unenviable task of preserving order in difficult circumstances.[19]

One of the three circuit court judges[20] dissented at length, restating the facts from the record and concluding that the majority had misapplied the law on summary judgment and that GEO had failed to make a case of undue hardship and inability to accommodate the prison guards' desire to wear headscarves.

In *EEOC v. Kelly Services*,[21] the EEOC brought suit against a temporary employment service that declined to place a Muslim employee who refused to give up her headscarf in an assignment with a commercial printing company. The printing company had a dress policy that applied to all workers, permanent and temporary. The policy prohibited headwear and loose-fitting clothing because such items can get caught in the printing machinery's moving parts, injuring workers. The printing company was a regular Kelly customer, and had previously sent non-Muslim Kelly workers home when they did not comply with the policy.

The worker filed a charge with the EEOC alleging religious discrimination. During the investigation, it emerged that the printing company had once allowed a Muslim temporary employee to work without removing her loose-fitting, head-covering religious attire. The EEOC then filed suit against Kelly, and Kelly moved for summary judgment, arguing that the EEOC could not prove a prima facie case of discrimination and that, in any event, it would have been an undue hardship to send the worker to the printing company because she could not meet the company's safety requirements.

The district court granted Kelly's motion for summary judgment on three grounds. First, the court found that the EEOC failed to establish a prima facie case of religious discrimination because it failed to show that the worker suffered an adverse employment action. The record reflected that Kelly offered this worker temporary employment at other establishments at least seven different times. Next, the court determined that even if the EEOC had proven a prima facie case of religious discrimination, Kelly reasonably accommodated the worker by offering her several other jobs. Finally, the court found that the record "clearly demonstrates that [the printing company's] dress policy prohibiting head coverings of any kind is safety-based and strictly enforced."[22]

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's judgment in favor of the employer, finding that the employer's refusal to refer an employee who refused to remove her headscarf to an employer who, for safety reasons, prohibited all headgear was a legitimate, non-discriminatory reason that the EEOC failed to prove to be pretextual. The court observed that "safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business."[23]

Observations

The headscarf controversy illustrates how two governments on opposite sides of the Atlantic, both committed to personal freedom, seek to accommodate society's needs with those of the individual. The means these two nations use to reconcile these competing values reflect their differences in history, society, and constitutional organization. France emphasizes equality, and has a more comprehensive social tradition, and more legislative tools at its disposal to prescribe rules and norms for society at large. In contrast, the U.S. Constitution values individual liberty more highly than equality. The federal government in the United States is more constrained, and its constitutional authority is more closely circumscribed.

It is ironic that in the U.S., it is the EEOC—an agency of the federal government—that has gone to bat on behalf of

the nonconforming minority invoking religious freedom. It is also revealing that U.S. employers are required to present specific, legitimate, non-discriminatory reasons when they wish to impose limits on an individual's freedom. Both countries tolerate individual preferences, up to a point: both also recognize that individual rights sometimes must bow to safety and security concerns.

The headscarf is intended as a "badge of otherness," signifying to the world that the wearer professes a particular faith. In that respect, it is not unlike a wedding band: it is symbolic attire that broadcasts that the wearer is already committed to one relationship and should not be approached as an uncommitted person might be. Wedding bands are far more common and familiar than the hijab: but both are symbolic attire that is well within the zone of tolerance that U.S. law permits, subject to reasonable practical and non-ideological limitations.

The consensus in France is that society is best served if outward signs of religious difference, such as the headscarf, are not on display in schools, and that public safety is improved if faces are unconcealed in the public square. In the U.S., prohibitions on religious attire are generally forbidden, and only permitted when there is a specific legitimate and non-discriminatory reason. This is not the simplistic duality of "everything is forbidden, except that which is permitted" versus "everything is permitted except that which is forbidden." Rather, France's policy reflects its emphasis on equality and neutrality of the State in religious matters, whereas in the U.S., the analysis begins with the liberty of the individual to express his or her beliefs. Some may view tolerance of headscarves and other Islamic practices or insignia in the workplace as early indicators of a move to impose Sharia in the U.S., but perhaps they are better understood as evidence of our commitment to religious tolerance and personal choice protected by the Constitution.

In the end, it is the Supremacy Clause of the U.S. Constitution that stands as a bulwark against Sharia displacing U.S. law. In *Reynolds v. United States*,[24] a conviction under a Utah territorial law prohibiting polygamy was challenged by a man who claimed his religious beliefs enjoining him to practice polygamy should have resulted in his acquittal on a bigamy charge. The Supreme Court said that "[t]o permit [a man to excuse his actions because of his religious belief] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[25] While the Free Exercise Clause absolutely protects opinions on matters of religion, when thoughts become action, the State has a right to protect civil order: thus was built "a wall of separation between church and State."[26] "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[27]

Sharia admits of no such separation, but the U.S. Constitution most emphatically does. So long as U.S. courts and the federal and state legislatures adhere to the Constitution as the supreme law of the land, Sharia's proscriptions and prohibitions cannot displace constitutionally-guaranteed rights in the United States.

Endnotes

1 *See, e.g.,* "Baggy pants ban to be signed into law in Georgia town," www.nationalpost.com (Sept. 7, 2010) (Dublin, Georgia).

2 The clearest verse on the requirement of the hijab is Surah 24:30–31, asking women to draw their khimar over their bosoms.

> And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their khimar over their bosoms and not display their beauty except to [. . .]

(Qur'an 24:31) (from en.wikipedia.org).

3 Sura 33:59 reads: "Those who harass believing men and believing women undeservedly, bear (on themselves) a calumny and a grievous sin. O Prophet! Enjoin your wives, your daughters, and the wives of true believers that they should cast their outer garments over their persons (when abroad): That is most convenient, that they may be distinguished and not be harassed. [...]" (Qur'an 33:58–59) (from en.wikipedia.org).

4 See "Hijab by Country," en.wikipedia.org. Of course, in the wake of the political turmoil that has ensued from the "Arab Spring" uprisings in early 2011, this could change.

5 *Id.*

6 Law of March 15, 2004, 2004-228, article L.141-5-1 of the Education Code, prohibits the wearing of overtly religious insignia and attire in public educational institutions.

7 Décision n° 2010-613 DC of October 7, 2010 of the French Constitutional Court.

8 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U. S. Const. amend. I.

9 Decision of October 7, 2010 (DC 2010-613), by the Conseil Constitionnel.

10 42 U.S.C. §2000e-2(a).

11 *Id.* § 2000e(j).

12 *See supra* note 6.

13 Source: www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

14 616 F.3d 265 (3d Cir. 2010).

15 616 F.3d at 267.

16 *Id.* at 270.

17 *See* Webb v. City of Phila., 562 F.3d 256, 258 (3d Cir. 2009).

18 Hon. Dolores K. Sloviter, Circuit Judge, wrote the majority opinion, joined by Hon. Jane Roth.

19 616 F.3d at 275.

20 Senior Circuit Judge A. Wallace Tashima, visiting from the Ninth Circuit.

21 598 F.3d 1022 (8th Cir. 2010).

22 *Id.* at 1029.

23 *Id.* at 1033 n.9, citing *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975) and *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (upholding grant of summary judgment to employer where plaintiff alleged employer discriminated against him on the basis of his religion by requiring all employees whose duties involved potential exposure to toxic gases to shave any facial hair that prevented them from achieving gastight face seal when wearing a respirator).

24 8 U.S. 145, 1878 WL 18416 (1878).

25 *Id.* at 167.

26 *Id.* at 164.

27 *Id.*

Eleventh Annual Barbara K. Olson Memorial Lecture

*By Michael B. Mukasey**

I thank Gene for that kind introduction, and of course the Federalist Society for the singular honor of delivering this lecture. This is actually the third time I have been invited to speak at a Federalist Society convention—I'm a little bit like the tenor called out for his second encore who is feeling pretty good about himself until he hears someone in the balcony shouting, "You'll keep singing it until you get it right."

And this time I had better get it right, both because of whom this lecture is named for and who has preceded me to this podium. Regrettably, I never got to meet Barbara Olson, and so have come to know her only through her writing, which sets as high a standard for candor and clarity as any writing I have ever seen. If it is possible for work to be both of its time and timeless, hers is.

Not long ago we commemorated the 10th anniversary of the 9/11 attack, and although the observance was certainly not short on solemnity, it was remarkable for the near absence of any discussion of who had perpetrated the attack, and what it is we were and are in fact dealing with. One might have mistaken what was being commemorated for some natural disaster like a flood or an earthquake.

That raises again a question that has been with us since long before 9/11, which is how a nation defined by a Constitution that sets strict metes and bounds on the government's relationship with religion can confront a totalitarian ideology based on a religion, and that regards the whole idea of self-government as a sacrilege.

Part of the reason why this question persists may be that hope persists in human affairs that bad things aren't going to happen, and if they do, they aren't going to happen again. Ever since Dr. Johnson described second marriage as the triumph of hope over experience, and likely for some time before that, people have scratched their heads over the persistence of unreasoned optimism in human affairs. And not only in private affairs.

On this very day, November 11, we mark the 93rd anniversary of the end of what was supposed to have been the war to end all wars.

In our own time, or at least in the time of some of us, a British prime minister was able to say with a straight face that a certain man with a trench coat and a toothbrush mustache was a person who could be reasoned with, and had given his assurance that he had no further territorial demands.

After the death of Joseph Stalin, we heard that each of a string of his successors gave us reason to hope that the new premier was a man of peace. Usually, that pronouncement came first from some U.S. politician returning from the funeral of the predecessor of whoever had come to power. They had spoken to the new guy, and he had convinced them that he was indeed a man of peace. Often that had at least in part something to do with the fact that the new guy drank scotch, or listened to jazz, or had some other highly significant life attribute. And then over time, the optimism faded.

And so it is now, with what I think has been too quickly called the Arab Spring, a phenomenon that I will get back to a little later on.

But right now I want to talk about how it is that ten years after 9/11, and in fact more than sixty years after one of the early Islamists declared that our society was incompatible with his religion, more than twenty years since the first act of violence in this country traceable to Islamism, and more than fifteen years after Osama Bin Laden made specific what was already apparent by declaring that he and others like-minded were at war with us, we still seem to grapple with what it is we are dealing with.

In a sense, we are constitutionally ill-equipped to deal with it. Perhaps because of bitter experience with the role of religion in public life in the 17th and 18th centuries, our Constitution in its very body—not just in the much-celebrated Bill of Rights—in Article VI, barred any religious test as a qualification for any public office. And then of course there is the Establishment Clause of the First Amendment, which as currently interpreted reads religion out of the public arena to the point where even a prayer at an official school function—be it a graduation or a football game—is forbidden. We tend to think of religion, if we think about it at all, as only one aspect of a person's life, and a private aspect at that.

So in a sense it is natural for people who live in such an atmosphere not to be on the lookout for attack from others to whom religion is not simply a part of life, but is life itself, and life in which religion has a heavy political component. But that is where the attack is coming from, and 9/11 certainly was not the beginning.

Actually, as a matter of history, Islamism, insofar as it holds this country in a weird combination of awe and contempt, has been incubating for about as long as we knew about the other two "isms" that we successfully beat back in the last century.

As a movement distinct from the religion of Islam itself, Islamism traces back to Egypt in the 1920s when the loosely organized Muslim Brotherhood was established by a man named Hassan al-Banna, a primary school teacher. Al-Banna founded the Muslim Brotherhood as a reaction to the modernizing influence of Kemal Ataturk, who had dismantled the shell of what was left of the Muslim caliphate in Turkey, banned fezzes and headscarves, and dragged his country by the lapels—and it had to be the lapels because he wanted men wearing suits, not robes—into the 20th century.

Al-Banna's principal disciple was also an educator—a bureaucrat in the Education Department of the Egyptian government named Sayyid Qutb, who caused enough trouble in Egypt to get himself awarded a traveling fellowship in 1948, the year al-Banna was killed in violence generated by the Muslim

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Brotherhood. That fellowship was intended to have the benign effect of getting him out of the country.

It did have that effect, but regrettably for us, he chose to travel to the United States, and in particular to Greeley, Colorado. Now I think it would be hard to imagine a more sedate place than post-World-War-II Greeley, Colorado, but for Sayyid Qutb it was Sodom and Gomorrah. He hated everything he saw—American haircuts, enthusiasm for sports, jazz, what he called the "animal-like mixing of the sexes," even in church. His conclusion was that Americans were, as he put it, "numb to faith in art, faith in religion, and faith in spiritual values altogether," and that Muslims must regard, as he put it, "the white man, whether European or American . . . [as] our first enemy." He said Muslims must make this "the cornerstone of our foreign policy and national education."

Qutb went back to Egypt, quit the civil service, and joined Hassan al-Banna's Muslim Brotherhood.

Qutb and the Muslim Brotherhood continued to agitate for a return to Fundamentalist Islam. They welcomed Nasser's coup against the corpulent and corrupt King Farouk in 1952, but then became disillusioned when Nasser failed to institute Sharia Law or even ban alcohol. Qutb opposed Nasser, and was arrested and tortured. However, he continued to write and agitate for Islam and against Western civilization, particularly against Jews, whom he blamed for atheistic materialism and said were to be considered the worst enemies of Muslims. He was released for a time, but eventually was re-arrested, tried for conspiracy against the government and hanged in 1966.

Many members of the Brotherhood fled to Saudi Arabia, where they found refuge and ideological sustenance. Qutb's brother was among those who fled and taught the doctrine in Saudi Arabia. Among his students were Ayman al-Zawahiri, an Egyptian who would become a leading Al Qaeda ideologist, and a then-obscure Osama Bin Laden, the pampered child of one of the richest construction families in the country. And the rest, as they say, is history.

That history did not come to these shores on September 11, 2001, or even on February 26, 1993, when a truck bomb went off in the basement of the World Trade Center, killing six people, wounding hundreds, and causing millions of dollars in damage in what would eventually come to be known as the first World Trade Center bombing. Rather, it came at the latest in the 1980s, when a couple of FBI agents spotted a group of men taking what looked like particularly aggressive target practice at a shooting range in Calverton, Long Island.

When the agents approached, they were accused of what we now call racial profiling and backed off. In November 1990, one of those men participating in the target practice, El-Sayid Nosair, would assassinate a right-wing Israeli politician named Meir Kahane after Kahane gave a speech in the ballroom of a Manhattan hotel. The shooting was treated by the Manhattan DA as the lone act of a lone gunman.

When the 1993 World Trade Center bombers demanded freeing Nosair from jail, it became apparent that the Kahane assassination was not the lone act of a lone gunman. In fact, when authorities reviewed the amateur video of Kahane's speech the night he was killed, they discovered that one of those 1993 bombers had been in the hall when Kahane was shot in 1990, and further investigation disclosed that another was driving what was supposed to be Nosair's get-away vehicle. And when they retrieved from a warehouse shelf materials that had been seized from Nosair's apartment but had gone unexamined, they saw that it included documents that called for the destruction of Western civilization by toppling tall buildings.

The man who served as the spiritual advisor to Nosair, and to the 1993 Trade Center bombers, and who had issued the fatwa that resulted in the assassination in 1981 of Anwar Sadat, Omar Abdel Rahman, the so-called Blind Sheikh—who later would issue from jail the fatwa that authorized the 9/11 attack—was tried before me, along with Nosair and several others, and convicted for participating in a conspiracy to conduct a war of urban terror against this country that included the Kahane murder, the first Trade Center bombing, and a plot to blow up other landmarks around New York, and to assassinate Hosni Mubarak when he visited the United Nations. The list of unindicted co-conspirators in that case included Osama Bin Laden, the pampered rich kid who had studied at the knee of Sayyid Qutb's brother in Saudi Arabia.

All of this was treated as a series of crimes—unconventional crimes, maybe, but merely crimes. In 1996 and again in 1998, Osama Bin Laden declared that he and his cohorts were at war with the United States, a declaration that got little serious attention.

In 1998, our embassies in Nairobi, Kenya, and Dar Es Salaam, Tanzania, were almost simultaneously bombed, and again the criminal law was invoked with the usual mantra of bring them to justice, this time in an indictment that actually named Bin Laden as a defendant.

Apparently he was unimpressed, or at least undeterred, because in 2000 his group, Al Qaeda, bombed the USS Cole in Aden, Yemen, killing sixteen U.S. sailors, and would have carried out the bombing of another naval vessel, the USS The Sullivans, but for the fact that the barge carrying the explosives was over-loaded and sank.

And then of course came September 11, 2001, and to the call bring them to justice was added the call bring justice to them, and we were told, finally, that we were at war—more than fifty years after Sayyid Qutb determined that Islamists would have to make war on us, about fifteen years after Islamists had made it clear that they were training for war with us, and five years after Osama Bin Laden made it official with a declaration of war.

If Islamism were simply about folks who want to blow up things and people, that would be bad enough, but it might be something we could deal with. After all, we have an intelligence network that sometimes, although not always, detects our enemies, and a robust military. But the violence is simply a means to an end. The end is the imposition of Sharia, which is a comprehensive framework that has spiritual aspects, to be sure, but is supposed to regulate all behavior—economic, social, legal, military, and political. Because it is all-encompassing, and lays claim to being divinely inspired, it regards the notion that people can determine the rules that govern any aspect of their lives, either themselves or through elected representatives, as anathema. Which is to say, Sharia is totalitarian, and profoundly anti-democratic.

Hints of this comprehensive framework come peeking through even in the episodes of violence and support for violence that have been the subject of prosecution in the civilian courts of this country. And so in the terrorism trial over which I presided, in which the defendants were charged with participating in a conspiracy that included bombing various landmarks in New York City—a conspiracy that was infiltrated by an informant, so we had tape-recorded discussions among the participants—there was one recorded conversation between the informant and one of the defendants as they shopped on Canal Street in New York for an electronic device that could be used as a detonator. The defendant commented that the society in this country was one in which anything was available—detonators, pornography, anything. He made the observation not out of admiration but out of contempt, and in the belief that such a society was rotten to the core and would collapse easily under pressure from militant Islam, which represented to him a source of purity.

And in the terrorist financing trial of an entity called the Holy Land Foundation in 2008, there was introduced in evidence a document entitled "Explanatory Memorandum: On the General Strategic Goal for the Group." The group apparently refers to the Muslim Brotherhood in America. The document was written in 1991 by Mohamed Akram, a senior Hamas leader in the United States, and explains that the Islamist movement is what the memo refers to as a "settlement process" to establish itself in the United States and, once established, to pursue a "civilization jihadist" mission led by the Muslim Brotherhood, what the author Robert Spencer has described, and I think aptly, as "stealth Jihad."

The document itself describes what it calls a "civilization-jihadist process" as a "kind of grand Jihad in eliminating and destroying the western civilization from within and 'sabotaging' its miserable house by their hands and the hands of the believers so that it is eliminated and god's religion is made victorious over all other religions."

A case study in how this works can be found in the career of a man named Abdurrahman Alamoudi, who came to this country in 1979 and became a naturalized American citizen in 1996. He eventually used his role in nearly two dozen Muslim organizations to gain access to the White House during the Clinton Administration, to help President Clinton and the ACLU develop a presidential guideline entitled "Religious Expression In Public School," to provide talking points to then-First Lady Hillary Clinton for a newspaper column, to help establish the Muslim Chaplain Program for the Department of Defense, and to set up one of two organizations that then were authorized to approve and endorse Muslim chaplains. He served on an unpaid basis for the Department of Defense from 1993 to 1998 screening Muslim chaplain candidates for the military. One of the chaplains he hired was James Yee, who was arrested in 2003 on charges he supported jihadists detained at Guantanamo. Those who worked with Yee at Guantanamo, uniformed and contract employees, were convicted on charges that included mishandling classified information and espionage.

Although Alamoudi would help place others in government, his own career flamed out beginning in October 2000, when he was videotaped at an anti-Israel rally outside the White House, where he noted that he had been labeled a supporter of Hamas and asked whether any in the crowd were supporters of Hamas; when he received an approving response, he added, "We are all supporters of Hamas; I wish they had added that I am also a supporter of Hezbollah."

In 2003, he was arrested at Heathrow Airport on his way back from Libya carrying more than $300,000 in cash he had gotten from the late Muammar Qaddafi to finance an Al Qaeda plot to assassinate then Crown Prince, now King, Abdullah of Saudi Arabia. He was extradited to the United States and pleaded guilty in the Eastern District of Virginia to terrorism-related charges. He turned out to be a senior Al Qaeda financier. He is now serving a twenty-three-year federal sentence.

How has the threat from people like Alamoudi been met? Not very well—and that applies to Administrations of both parties. After Alamoudi's fall, his responsibility for approving Muslim Chaplains was transferred to the Islamic Society of North America—ISNA—one of the largest Muslim Brotherhood fronts in this country, named as an unindicted co-conspirator in the terrorist funding case against The Holy Land Foundation. ISNA and its subsidiaries are the certifying authority for Muslim chaplains not only in the military but also in the U.S. Bureau of Prisons, whose institutions house, as I am sure you know, a large population of potential recruits who constitute, as it were, a captive audience.

ISNA's president, Ingrid Mattson, was invited to the White House to attend President Obama's Iftar dinner at the end of Ramadan in 2010. You may recall that event as the one where the President announced his support for construction of the mosque near Ground Zero in New York.

Another Muslim Brotherhood-affiliated organization, the Council on American Islamic Relations, or CAIR, which was also named as an unindicted co-conspirator in the Holy Land Foundation case, was until 2008 a target of outreach by the FBI, and has systematically tried to place interns on such sensitive congressional committees as Armed Services, Homeland Security, and Intelligence. The evidence from The Holy Land Foundation case established that CAIR is a Hamas front.

Obviously, there isn't time here for a detailed exegesis on the tenets of Islam. It is sufficient to this discussion to report that the totalitarian code of Sharia that imposes itself on all aspects of a person's life draws its legitimacy from four sources—the Quran, which Muslims believe to be direct divine revelation; the Sunna, believed to be indirect divine revelation manifested through acts and words of Mohammed; the Ijma, which are the consensus rulings of past clerics that, once they became the consensus, became part of the body of Islamic Law; and finally the use of analogy to apply an accepted principle or assumption in order to arrive at a legal ruling. According to Sharia, all of Islam is subsumed within this comprehensive code. Sharia is the law of the land within what is referred to as the Dar Al Islam, or the home or realm of Islam.

That is not, by the way, simply in Muslim countries; it is any place where Muslims can and do exercise control, or ever have. And so in some neighborhoods in European cities where Muslims exercise control, notably in France, somewhat in England, and even in Sweden, Sharia is practiced and enforced

in contravention and with the suppression of local law, with the result that some of those neighborhoods have become "no go" zones for police and fire fighters, unless they have secured the explicit permission of the local enforcers.

And Spain is regularly referred to as Andalus, a place to be reclaimed. Interestingly, the proposed mosque near Ground Zero in New York was to be named Cordoba House, after the site of a mosque built to commemorate a Muslim victory in the conquest of Spain.

The implementation of Sharia in the Dar Al Harb, which is the abode of war, or the places where Sharia is not fully implemented, is the goal of jihad. All of this is readily accessible, among other places, in a volume called "Reliance of the Traveler," which is actually endorsed for its accuracy by Al Azhar University in Cairo, a seat of learning founded in 975 A.D. that gave us Sheik Omar Abdel Rahman, the cleric tried before me who was the spiritual authority behind the Sadat and Kahane assassinations and both the first World Trade Center bombing and the 9/11 attack. Al Azhar University also happens to have been the place chosen by the President to deliver his famous Cairo speech in 2009, to which he invited members of the Muslim Brotherhood, much to the consternation of the government in Egypt, then headed by Hosni Mubarak.

Sharia itself contains the obligation to wage jihad against non-believers. Jihad is obligatory on every Muslim, and it is not, as some in the West would have it, simply a personal struggle for self-improvement. It is the obligatory struggle to impose Sharia world-wide. That doctrine regards truces and treaties as simply temporary pauses in the struggle until Muslims can resume the struggle; it permits, indeed urges dissembling for the sake of Islam; there is even a word for it—taqiyyah. Faisal Shahzad, the Times Square bomber, was challenged at his sentencing by the judge when he professed his hatred for and opposition to the United States. She asked, didn't you take an oath when you became a citizen of this country. His response was yes, but I didn't mean it.

Are there then no moderate Muslims, none who are willing to live in peace long term with their neighbors? Of course there are, and millions reside among us in the United States as loyal Americans, and millions more reside around the world. There are even places where they are in power—notably in Indonesia, which is the most populous Muslim country in the world. Most of them simply disregard the requirements of Sharia, and are to that extent not so much reformist as unobservant.

But a brave few are actually struggling to create within the religion a theoretical and doctrinal basis for combating supremacist Islam. They include in the United States Dr. Zuhdi Jasser, who heads the American Islamic Forum for Democracy. At Princeton's James Madison Program, an Australian academic, Abdullah Saeed, recently delivered a lecture arguing that there are ways in which one can use passages in the Quran and episodes in the life of Mohammed so as to oppose the classical Sharia. The lecture is published in the November issue of *First Things* under the title "The Islamic Case for Religious Liberty."[1] But the regrettable part of this is that *First Things*, as I am sure many of you know, is a Catholic, not a Muslim, publication.

There was also recently published a compendium by the late Islamic scholar Abdurrahman Wahid, who was once the president of Indonesia, who also led an organization called Nadlahtul Ulama, the world's largest Muslim organization, with 40 million members. That organization and other Indonesian moderates have clashed directly with the Muslim Brotherhood and argued that Islamic Scripture does not require the establishment of a world-wide Islamic caliphate or the imposition of Sharia jurisprudence, which they argue is a matter of private conscience.

But make no mistake, as numerous as they may be, among those who pronounce doctrine the moderates are the distinct and weaker minority. The majority view was stated succinctly by a political leader lately prominent on the world stage: He said that the term moderate Islam is "ugly and offensive." He said, "There is no moderate or immoderate Islam. Islam is Islam; that's it." That politician is Recep Tayyip Erdogan, prime minister of the increasingly powerful and influential Muslim nation of Turkey.

And what of the vaunted Arab Spring? What, indeed. As events unfolded in Tahrir Square, we in the United States saw lots of coverage of how the driving forces of the revolution relied on Twitter and Facebook, but not so much coverage of the public rape of a CBS journalist in Tahrir Square to shouts of "Allahu Akhbar," and even less coverage of the emergence of the Sinai Peninsula as a refuge for Hamas-trained terrorists who travel freely from Gaza and who in August launched an attack that killed seven Israelis.

There was, I think, virtually no coverage at all of the return to Egypt of Sheikh Yusuf Qaradawi, who had been exiled from the country by Hosni Mubarak and who delivered a triumphant sermon in Tahrir Square upon his return. Qaradawi is praised in many quarters in the West as a liberal and a reformer, who has among other things stood up for women's rights, and so he has—even to the point of issuing a fatwa that authorizes women to participate in suicide bombings.

In Tunisia, Islamists are in control. Their leader, Rashid Ghannouchi, like Qaradawi recently returned from exile to lead his party. Barely five years ago, he called for the public hanging of Raja Ben Slama, a defender of women's rights who taught at the University of Tunisia, and urged that she be joined on the gallows by another Tunisian free thinker, Lafif Lakhdar. But even a member of *The Wall Street Journal* editorial staff in a recent column in that paper assures us that Ghannouchi is a new breed of Islamist—with a sense of irony and of humor. Ghannouchi even assured the *Journal* editor that he would not seek to ban alcohol in Tunisia because it is well-known that alcohol is consumed privately, and he recalled that the United States had an unpleasant experience when it tried that experiment some decades ago. Quite an ironist and a humorist, and apparently the spiritual successor to those Soviets who, as we were told, must have been men of peace because they drank scotch and listened to jazz.

I would certainly concede that the Administration in which I served was hardly a model of clarity in confronting this phenomenon. We all recall that we were told immediately after 9/11 that Islam was a religion of peace—the Director of National Security and later Secretary of State, whose memoir came out last week, went so far as to say it was a religion of love and peace—that had been kidnapped by extremists. There

are reasons for that, including such diverse considerations as our experience with treatment of the Japanese during World War II, which we did not and do not want to repeat, and the relatively recent phenomenon of political correctness. But to understand how far we have come, imagine for a moment President Roosevelt telling Congress on December 8, 1941, that the peaceful Shinto religion had been kidnapped by militarists.

We have gone a whole lot further in that direction in the last nearly three years. The term War on Terror is out; in fact, terrorism itself is out, in favor of man-caused disaster. In August, the White House issued a strategy paper for dealing with what we used to call terrorism. It doesn't use the word terrorism in its title. It is called "Empowering Local Partners to Prevent Violent Extremism in the United States." What's wrong with that? What's wrong with it is every single element of it. It's not only or even principally violence that is dangerous. The source of it can hardly be called extremism when the motivating doctrines are in the mainstream of the religion from which they spring, and empowering local partners—if the local partners are organizations like CAIR and ISNA—is more likely to worsen than to improve our situation.

The paper opens by identifying the challenge as nothing new, and tells us that "throughout history, violent extremists—individuals who support or commit ideologically motivated violence to further political goals—have promoted messages of divisiveness and justified the killing of innocents." The response is to be a "community based approach" with outreach to local stakeholders.

To the extent a villain is identified, it is Al Qaeda, which comes off sounding like some sort of motorcycle gang; to the extent Islam or Muslims are referred to, it is principally as the targets of Al Qaeda's blandishments, although why Al Qaeda would want to focus its attention on Muslim communities is nowhere explained.

There is no reference at all to recruitment either in prisons or on campus, although those are both well-known and dangerous problems.

The document is intended to sound innocuous, and it does. Small wonder that it was applauded by CAIR and organizations similarly minded.

But what is the danger of such a document? Well, take a long look at the social change that has overtaken some countries in Europe—including France and England and even Sweden—where Muslim enclaves are tolerated and even encouraged, and where Sharia rules. That's what comes of dealing uncritically through local stakeholders.

What the document also overlooks is that from 9/11 onwards, and even before, participants in successful and unsuccessful plots have been radicalized not in Muslim countries but in the West. Ziad Jarrah, the terrorist at the controls of the plane that was taken over by brave passengers over Pennsylvania, was raised in Beirut, where it is said that he never missed a party, but then went to Hamburg, Germany, where it is said he never missed a prayer. Major Nidal Hasan, who murdered thirteen of his fellow soldiers at Fort Hood; Faisal Shahzad, the would-be Times Square Bomber; Daood Sayed Gilani, a Chicago native who changed his name to David Coleman Headley so he could pass for Christian and who pleaded guilty to conducting surveillance to help carry out the terrorist attack in Mumbai in November 2008—all of these, and many others, were radicalized in the West.

Obviously, there are limits to how a government like ours can defend itself and the society it governs. If the First Amendment's Establishment Clause means anything, it means that our government can't pick winners and losers in doctrinal disputes. That is something that Muslims will have to do on their own.

But it can take rational steps to defend itself, and avoid irrational steps that undermine its security.

First, those charged with protecting our security have a duty to understand and to teach others under their authority what the basic tenets are of the people who are trying to destroy our way of life. In past conflicts that may not always have been self-evident. Perhaps it was not necessary when we fought the Axis powers in Germany and Japan to understand all the ins and outs of Nazism and Fascism and the military culture of the Shinto religion. We could simply blast those countries to smithereens, as we did, because the evil had its home base there. But it was much more necessary to understand the enemy when we fought Communism, as Whittaker Chambers taught us, even when it was centered principally in the Soviet Union.

Also, those charged with protecting us have a responsibility to avoid strengthening the hand of those who are trying to undermine our way of life by relying on them as our principal interlocutors in the Muslim community. Again, CAIR, the Council on American Islamic Relations, is a branch of Hamas and of the Muslim Brotherhood. ISNA, the Islamic Society of North America, is another branch of the Muslim Brotherhood. The Muslim Brotherhood traces itself back to Hasan al-Banna and Sayyid Qutb; its motto, which has not changed to this day, is "Allah is our objective; the prophet is our leader; the Quran is our law; Jihad is our way; dying in the path of Allah is our highest hope." If those are the people we empower by relying on them and reaching out to them, we not only damage ourselves by giving them entry into the upper reaches of our political system, but we correspondingly strengthen them in the Islamic community, and weaken more moderate voices.

In addition, those charged with protecting us have a duty to avoid self-censorship and self-delusion that can wind up deluding others as well. For example, the after-action report on Major Nidal Hasan's massacre at Fort Hood, which he preceded by shouting "Allahu Akhbar," does not mention the word Islam. The Army Chief of Staff said on television after that massacre that the greatest tragedy would be if it had a negative effect on the Army's diversity program.

John Brennan, a principal national security advisor and counter-terrorism advisor to President Obama, told an audience at the Center for Strategic and International Studies—this is a deep thinker talking to other deep thinkers—that "violent extremists" attacking the United States are products of "political, economic and social forces" and should not be described "in religious terms" because to do so would create the mistaken impression that we are at war with Islam and thereby give credence to Al Qaeda propaganda.

"Products of political, economic and social forces"? Let's review the bidding. Osama Bin Laden was a millionaire many times over; his successor, and also coincidentally the folks who planned and carried out the 2007 attack on the Glasgow Airport, are physicians; the perpetrators of the 9/11 attack were university students; Umar Farouk Abdulmutallab, who tried to blow up himself and his fellow passengers aboard an airplane over Detroit on Christmas Day 2009 is the son of the former economics minister of Nigeria. "Products of political, economic and social forces"?

John Brennan added for good measure in another speech at an NYU Islamic Center that we should not speak ill of Jihad because it is simply a struggle to purify one's self or one's community, and referred to Jerusalem with the Arabic "Al Quds." Al Quds, as it happens, is Arabic for "The Holy," and is used as a rallying cry by Jihadists to liberate Jerusalem from the infidel Jews and Christians. Interestingly, the Iranian Revolutionary Guard Corps Unit that is assigned to perform foreign sabotage and subversion, and that is alleged to have planned the execution of the Saudi ambassador in Washington recently, is called the Al Quds Force.

In the same speech, Mr. Brennan, who had once been the CIA station chief in Saudi Arabia, said that he admired the way the Saudis fulfilled their duty as custodians of the two holy mosques at Mecca and Medina, and had "marveled at the majesty of the Haj," which he could not conceivably have done unless he is a Muslim because infidels are not permitted to set foot in either Mecca or Medina. Then he went on to add, "Whatever our differences in nationality, or race, or religion or language, there are certain aspirations that we all share. To get an education. To provide for our family. To practice our faith freely." Rather odd from the former head of CIA operations in Saudi Arabia, where Sharia adherents permit no other faith to be practiced, where no one may even wear a cross in public. He was introduced at that speech by the previously mentioned Ingrid Mattson, head of the previously mentioned Islamic Society of North America. He reciprocated by praising her as a "voice for the tolerance and diversity which defines Islam."

I linger on John Brennan not because he is unique, but because he is a perfect symbol of the soft-headed diffidence that has crept into public discussion of what this country stands for. Not that this is new to the point of being unprecedented. It isn't. The smart set in the 1920s ridiculed the values and lifestyle of what they called the Booboisie; Anti-anti-Communism was fashionable in some circles in the 1950's; a great liberal judge—Learned Hand—called proverbially the greatest appellate judge ever to sit, said in an address called "The Spirit of Liberty" that is quoted so often it has become shopworn, that the spirit of liberty is the spirit that is not too sure that it is right.

That may be if not exactly true, at least an affordable indulgence at times; it may even have been an affordable indulgence at the time he said it—in the late spring of 1944, when victory against the ism of that day was, if not exactly around the corner, at least pretty well certain. But today, when we are up against people who are sufficiently sure that they are right to fly airplanes into buildings, we had best make certain that the spirit of liberty is sure enough that it is right to keep itself—and us—alive.

I thank you again for the great honor of speaking to you.

Endnotes

1 Abdullah, Saeed, The Islamic Case for Religious Liberty, First Things, Nov. 2011, *available at* http://www.firstthings.com/article/2011/11/the-islamic-case-for-religious-liberty.

Book Reviews

Forgotten No More. A Review of Liberty's Refuge: The Forgotten Freedom of Assembly

By John D. Inazu

*Reviewed by Richard A. Epstein**

It is a commonplace of constitutional interpretation that the shorter the constitutional provision, the more difficult its interpretation. The truth of that maxim is confirmed in an informative fashion by reading John D. Inazu's careful and well-constructed book, *Liberty's Refuge, The Forgotten Freedom of Assembly*. Inazu's task is to resurrect the freedom of assembly from its relative neglect in First Amendment law. As diligent readers recall, the relevant text reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The question of interpretation that preoccupies Inazu asks just how much independent weight should properly be attached to the right of people peaceably to assemble, which is tucked among the First Amendment's more prominent guarantees. Two reasons contribute to its relative neglect. The first relates to the connection between the assembly right and to the right to petition government. The second, and ultimately weightier question, relates to the connection between assembly and the protected freedoms of religion and speech, with which it has been historically linked.

Textually, the Assembly Clause is separated by a stout semicolon from the protections of religion, speech, and the press that precede it. But only a modest comma divides it from the right to petition the government for a redress of grievances. One possible interpretation of the Assembly Clause, therefore, restricts the right peaceably to assemble to the exercise of the right to petition. Inazu makes the persuasive historical case against that contention by showing how this comma does some heavy lifting. (pp. 22-27). He rightly insists that it would be odd in the extreme to assume that assemblies could only be formed to support or oppose particular government policies for which some petition is issued. Assemblies are, after all, powerful ways to express general support or disapproval for government action, even when no particular demands are made. Nor is there any reason why the people cannot assemble to support or oppose the actions of private businesses or charities. Indeed, most assemblies have little to do with petitions to "the government," which in the context of the First Amendment seems restricted to the federal government. They have broader social objectives, including occupying Wall Street.

The harder question is the relationship between any more-generalized assembly right and the broader principle of freedom of association that has been read into the speech and religion clauses through such notable decisions as *NAACP v. Alabama*,[1] which unanimously denied the Alabama Attorney General access to the membership records of the NAACP. Inazu is deeply concerned that this original robust defense of the association freedom has in subsequent years been eroded by rising concern that private associations not be allowed to discriminate in the selection of their membership on grounds of race, sex, and other characteristics that the government from time to time regards as invidious.

There is no doubt that he is correct to raise the tension between associational freedoms on the one hand and the anti-discrimination norm on the other, but it is far from clear to me that switching attention from the speech or religion to assembly is a key step in that laudable agenda. In order to make out his case for this task, Inazu marshals a powerful array of historical records that explains, as the title of his book suggests, the role of the freedom of assembly in thinking about the core values of the American tradition as it relates to assembly, speech, religion, and the press. As late as 1939, he notes, public defenses of "the four freedoms" list the freedom of speech, religions, the press, and assembly. Indeed, in the run-up to the 1939 World's Fair (a big deal at the time, to say the least)[2], one Dorothy Thompson, the long-forgotten "First Lady of American journalism," (p. 56), put freedom of assembly first on the ground that the ability to assemble was necessary to allow for the protection of all other freedoms.

The assembly right was shunted aside, however, by President Franklin Delano Roosevelt, whose refurbished Four Freedoms in his famous 1941 State of the Union Address,[3] were freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. This rhetorical switch was in line with Roosevelt's broader New Deal agenda. Freedom from want suggests that the state now has an affirmative duty to provide minimum material support for all individuals. Freedom from fear for its part seems to have no clear focus at all, but addresses larger concerns with political and economic uneasiness of the sort that quickly plunged the United States into World War II. The revised Four Freedoms thus presaged Roosevelt's famous 1944 State of the Union Address,[4] which was rife with positive rights to decent homes, fine jobs, and high prices for farm goods, which led to ill-devised programs in housing, labor, and agriculture that still exert their baleful influence today.

For our purposes, however, the key point here is that these popular defenses of various freedoms were not tied explicitly to the constitutional text. Indeed, for a close textualist, Inazu's most significant maneuver is to transform the constitutional text, which refers to the right of the people to peaceably assemble, into the freedom of assembly, a phrase that, unlike freedom of speech, nowhere appears in the Constitution at all. I believe that this subtle transformation undercuts Inazu's

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determined effort to make the Assembly Clause the focal point of an expanded right of freedom of association. The two do not map well into each other.

At the beginning of his volume, Inazu notes that the traditional conception of the assembly right covers "the occasional, temporal gathering that often takes the form of a protest, parade, or demonstration." (p. 2). In my view, that description accurately catches the sense that I have of the clause when read in context. The right to assemble is given to the "people," but it is not a right of all people together to participate in one major assembly, but to form whatever groups they choose to speak in public for whatever positions they take. Inazu is right to insist that the people who assemble are not required to speak for the common good, writ large, but only for their conception of it. (pp. 21-22). But the use of the word "peaceably" before the words "to assemble" does suggest just that short-term focus on public assemblies. A more general right of freedom of association deals with the ability to decide on the membership of permanent organizations, which deal with activities like filing papers and setting up by-laws to which the adverb "peaceably" does not seem to apply at all. What is involved with "peaceably" is a quick effort to indicate that the right to assemble is not absolute, and to suggest further that the use of violent mobs to attack public or private buildings or individuals is indeed not part of the freedom of assembly. Inazu acknowledges these limitations in his own definition of assembly, which covers both "peaceful" and "noncommercial" assemblies. (p. 166).

A good deal of work, however, should be done to explicate the first term, which should cover not only outright forms of violence, but also any determined actions to block the use of public roads and highways, or, of especial relevance today, to occupy as trespassers the private property of other individuals against their will. At this point, the term peaceable assembly fits comfortably into the general classical liberal world view that drives Inazu's analysis. Indeed, with respect to public spaces, temporary use seems to be an important component of the right. The right to assemble in Central Park is the right to run a demonstration, not to camp out for weeks on end. These parks are common property, which precludes their permanent occupation by any one group, and which suggests that the government is under some obligation to fairly allocate protest time to rival groups in parades and parks, a subject that receives too little attention from Inazu. The narrower definition of assembly has the virtue of directing the inquiry to this important and distinctive set of issues within the general First Amendment framework, where it could supplement the discourse that otherwise takes place in connection with speech or religion.

The peculiar noncommercial limitation that Inazu builds into his definition has no clear textual support. It stems, however, from Inazu's huge internal struggle to define the relationship between freedom of association on the one hand and the various reasons to limit that freedom on the other. In my view, this issue arises quite naturally in relation to the free exercise of religion and the freedom of speech, both of which receive explicit textual guarantees in the First Amendment. The largest question is what kind of activities in general justify the limitation on these freedoms. In its broadest sense, this question is as a general matter of libertarian theory indistinguishable from the larger question of what limitations are permissible in dealing with any form of voluntary arrangements, including freedom of association and contract in various business and commercial contexts.

The two key limitations on these freedoms are, first, the use of force and fraud against innocent individuals and, second, the ability to use monopoly power to gain wealth at the expense of the public at large. Inazu, to his credit, organizes his discussion of the these rights in roughly this fashion when he speaks in Chapter 3 of "The Emergence of Association in the National Security Era," and in Chapter 4, when he addresses the discrimination question in his discussion of "The Transformation of Association in the Equality Era." It is worth looking at both in succession.

On the former, the concern with the use of force and fraud against the welfare of the nation did not begin with the threats to national security from fascist and communist groups. Yet the effort to mount a coherent attack against their activities did pose a major challenge to First Amendment theory in such cases spanning from *Schenk v. United States* (1919), and *Abrams v. United States* (1919), through *United States v. Dennis* (1951). No one questioned that direct and immediate threats of force could be actionable, whether done by one person or money. The hard question always concerned the actions prior to any such action, which might or might not result in the occurrence of some illegal act.

Answering that question requires importing into First Amendment law some account of how far back in the chain of activity the government could run before impeding too seriously in the exercise of protected freedom. A communist cell that was planning a bombing attack on a public building was always far game, but what about a group of Communists or Marxists studying the Communist Manifesto, which preaches the forcible overthrow of capitalism. The right response to that, which this nation eventually adopted, was to hold back on these government actions, given the many steps that had to be taken before some small fraction of these groups did any action that encouraged harm. Taking this view, of course, leads Inazu to condemn as overbroad the various loyalty programs of the Truman Administration and the witch hunts of the original House Un-American Activities Committee and its various successors. (pp. 65-72).

But there is no reason why these limitations cannot be grafted onto the general freedom of speech, where in fact they fit better because of the difficulty of thinking of a class membership preparing for their sessions as a kind of assembly. It is for exactly these reasons that the associational freedom protected in *NAACP v. Alabama* has such power. These organizations did not pose anything like an imminent threat of force or violence. Yet, as Inazu notes, even this rule is not absolute. When the issue was the oversight of the Ku Klux Klan in the 1920s, the Supreme Court in *Bryant v. Zimmerman*[5] upheld the New York statute that required the organization to file copies of its "constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year." *NAACP* did not overrule that case, but distinguished it on the ground that the known propensity for violence of the KKK, circa 1928, put it in a different category.

Imminence is, therefore, not the only test. But today, with the KKK a useless remnant of itself, that same statute should be struck down, at least on an as-applied challenge. The nature of these anticipatory remedies in the private law of tort always calls for some level of judicial discretion. That need does not disappear just because we have upped the ante in a constitutional setting.

In one sense, of course, this debate over the imminence of force and fraud takes as its implicit premise that there are indeed on constitutional grounds associational rights of speech and religion. But this point has to be a given. There the basic constitutional guarantee does use the term freedom of speech, without talking about who exercises it. It would be odd indeed if individuals could speak by themselves but could not hope to share the gains from trade that comes from their cooperation in speech activity. It makes no sense whatsoever to think that I am entitled to make my campaign posters and you can prepare your leaflets, but that we cannot join together to reduce our costs of supply and distribution. So long as our basic activities are protected, the associational freedom has to be protected as well. The standard rules of textualism have always allowed for these elaborations off the core case of correction, and corporations, for example, do not lose the protection afforded to their members because state law, for good and sufficient reason, limits their liability for tortious conduct to the assets committed to the corporation, which the many critics of *Citizens United v. FEC*,[6] never quite understand. We get these results whether we work through speech or assembly because the class of public justifications under the police power is largely invariant across the two areas.

Inazu's treatment of the nondiscrimination piece of this problem is more troublesome. As he rightly notes, the principles of freedom of association, no matter where housed, are in obvious tension with the nondiscrimination rules that are so often championed under the banner of equality, especially with respect to race, sex, age, and a wide range of other personal characteristics. But the hard question is how to locate these protections within the larger constitutional context. Inazu hints at the correct basis for analysis insofar as he ties this assertion of state power to the exercise of monopoly power. His definition of assembly picks this up when he notes that the protections afforded the freedom of assembly (or association) do not apply "as when the group prospers under monopolistic or near-monopolistic conditions." (p. 166).

The economic explanation for that lies in the ability of monopolists to engage in price discrimination that does not reflect the costs of supplying a given service to its various groups of customers. But that explanation does not apply to organizations like the Boy Scouts or a men's club that never has that kind of power given the number of private organizations ordinary individuals can join. At this point, outside the relatively narrow class of common carriers (which historically had that kind of power), there is no reason to impose any duty to deal with customers on fair, reasonable, and nondiscriminatory terms.

Under this view, there is no reason to distinguish among the various types of organizations that demand freedom from government intervention on whom they take in or keep out. Indeed, there is every reason to avoid the line-drawing problems that arise when the basic issue is the same across different types of associations. Ordinary businesses in competitive markets should be free to choose their customers and their employees by whatever test they see fit. The single most important application of this right today is for those institutions that wish to engage in affirmative action programs or provide single-sex forms of education or club memberships, to which the attitude should be "be my guest."

In dealing with this issue, Inazu is of two minds. He does not push the monopoly control line with any consistency because it would allow private firms and associations in competitive markets to discriminate on grounds of race, which he thinks is "just different" from other forms of discrimination. (p. 13). He is surely right historically to the extent that private institutions were so under the thumb of segregationist state governments that they had to toe the segregationist line or risk losing their electrical power. But once the public institutions no longer reflect that frightening abuse of power, the intellectual case now goes the other way, and all groups should be allowed to make their appropriate membership adjustments, including those that plump—which is the overwhelmingly popular choice—in favor of some affirmative action program that they should be free to devise in accordance with their own best institutional judgments.

Inazu is right to jump all over Professor Nancy Rosenblum for her argument that the "logic of congruence" requires that the internal structure and practices of private institutions mirror those nondiscrimination rules applicable to government. (p. 11). Here the obvious objection is that she is not likely to want to see the abolition of women's colleges or clubs. Nor do I. But the two-sided view with respect to men's colleges or clubs should give pause to everyone who believes in equal justice under law. The larger objection, however, is that we don't want any congruence between the public and private spheres. That principle applies for most activities in the public sphere, given the evident use of government monopoly power. But even here public universities that are in competition with private ones should, in my view, be able to engage in affirmative action programs without having to meet the strict colorblind standards that apply, say, to the application of the criminal law of burglary.

Yet once he blinks on the question of race, Inazu finds it hard to construct a consistent theory as to when the antidiscrimination principle trumps the freedom of association principle. He is rightly critical of Justice Brennan's effort in *Roberts v. United States Jaycees*,[7] for drawing the line between intimate associations (like marriage and maybe religion) and expressive organizations like the Boy Scouts, which have clear beliefs and broad memberships. I agree heartily with the conclusion that this line will not hold up. But by the same token, the effort to take a notion of assembly or association and assume that it cannot or should not apply to commercial institutions, broadly conceived, shows what I regard as the central deficit of modern constitutional theory: the willingness to divide constitutional rights into first and second class rights, depending on tests that have no grounding in first principles. We owe much to Inazu for his fastidious historical research and his effort to reach a grand synthesis across many constitutional rights. Nonetheless,

it is important to end on this note of warning. The move from association to assembly will not achieve the goals that Inazu wants so long as property and contract rights are forced to ride in the back of the bus.

Endnotes

1 357 U.S. 449 (1958).

2 See Russell B. Porter, *President Opens Fair as Symbol of Peace*, N.Y. Times, May 1, 1939, at 1, which covered five columns of the eight-column layout.

3 Franklin Roosevelt, President of the United States, Annual Address to Congress: The "Four Freedoms" (Jan. 6, 1941), *available at* http://docs.fdrlibrary.marist.edu/od4frees.html.

4 Franklin D. Roosevelt, President of the United States, State of the Union Message to Congress (Jan. 11, 1944), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=16518#axzz1oGC0rByP.

5 278 U.S. 63 (1928).

6 130 S.Ct. 876 (2010).

7 468 U.S. 609 (1984).

The Upside-Down Constitution

By Michael S. Greve

*Reviewed by Robert R. Gasaway**

> "*I must study politics and war, that my sons may have liberty to study mathematics and philosophy, geography, natural history and naval architecture, navigation, commerce, and agriculture, in order to give their children a right to study painting, poetry, music, architecture, statuary, tapestry, and porcelain.*"
>
> John Adams

BREAKING ADAMS' CURSE

O' toiling lawyer, for God's sake put down the brief. Set aside that contract. Review those documents later. And pick up or click into Michael Greve's *The Upside-Down Constitution*—a logically rigorous, practically relevant exploration of America's constitutional foundations, development, and discontents.

Mr. Greve's subject is the present condition of American constitutionalism. To get at the subject, he explores the Founding's first principles and traces their development to the present day. More specifically, the book is about constitutional logic. (By one count, some form of the word "logic" or phrase "constitutional logic" appears on average once every five pages.) It's about how, in Mr. Greve's view, our own Constitution's logic has been turned upside down over time by forgetfulness.

Mr. Greve studies the Constitution's current health by looking through a lens of 200-plus years of American federalism. It turns out that a federalism lens, in Mr. Greve's hands, can illuminate the Constitution's logic and its alleged inversion over the last 75 years. But *The Upside-Down Constitution* is about constitutionalism, not federalism, and it is about logic, not policy. *The Upside-Down Constitution* is about federalism and policy in the same way *Moby-Dick* is about a whaling voyage.

Readers familiar with Mr. Greve will be happy to find that his wit remains in evidence throughout. They may be bewildered to find that he betrays a decided ambivalence toward prevailing "conservative" modes of constitutional interpretation and even toward federalism itself.

Mr. Greve's sweeping thesis is that the Constitution's foundational principles have been forgotten—and inverted—by all sides to the current constitutional debates and, worse still, this forgetting and inversion are principal causes of "our current institutional dysfunctions, public discontents, and fiscal imbalances."

In fact, says Mr. Greve, we have lost our way in a sea of misguided and disconnected erudition. Our Supreme Court crafts magnificent decisions in some cases, but miscarries badly in others. One of our law professors, Bruce Ackerman, recently

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Michael S. Greve's The Upside-Down Constitution *is published by Harvard University Press.*

and "to his enormous credit" recovered "the Founders' idea of constitutional politics that differs from ordinary politics in kind and in normative force." But those "real achievements" were at the same time "clouded" by Professor Ackerman's "outlandish interpretation of the New Deal as a free-form constitutional convention and amendment process." Our economists profitably and systematically explore predictive models of the behavior of public officials. Our political scientists pursue an "academic boomlet" in studies of constitutional development. No one pulls all the pieces together, however, largely because no one has proved capable of explaining the full depth and extraordinary genius of the Founding.

While bench, bar, and ivory tower contentedly noodle away, real-world problems refuse to wait. Our politics has become a "shrill debate." Our opinion surveys find "record-low public confidence in our political institutions." It has begun "to dawn on members of the body politic that the cause of the present fiscal crisis" may be "structural," not "purely cyclical."

In the midst of this discouraging picture, Mr. Greve finds what solace there is to be had in the Founding itself. The Founders "knew that their bold effort to establish constitutional order for themselves *and their posterity* carried a risk, to the point of certainty, of an unintended turn—perhaps even an inversion." But they worked "in fulsome hope that future generations might remember what the Founders were getting at and perhaps, in light of experience and improved knowledge, understand the Constitution's genius in ways surpassing the understandings even of the Founders themselves."

To this day, says Mr. Greve, the Founders' own constitutional understandings go "far beyond" those of "modern-day jurists, political scientists, or economists." But we can no longer afford our ignorance. We are cursed today by John Adams' far-too-fully-granted wish—that we his grandsons might avoid hard studies in "politics and war" and take up fuzzy studies in "statuary, tapestry, and porcelain." "[W]e have forgotten an awful lot," says Mr. Greve. And we "find ourselves in dire need of remembering it."

America's Constitution and Its Discontents

If prophesy like this seems discordant, it may seem less so if one considers Mr. Greve's earlier work. *The Upside-Down Constitution* is Mr. Greve's second major book. His first, *Real Federalism: Why It Matters, How It Could Happen*, was by comparison full of sunshine and hopefulness. There, Mr. Greve described the advantages of a "real" and liberating "competitive" federalism, together with the contours of a political movement that, Mr. Greve had thought, might rally to its banner and help achieve its (partial at least) implementation. The hope was not fulfilled.

Mugged by reality, Mr. Greve thinks now that hopes for better federalism have not been fulfilled because under current conditions they cannot be fulfilled. Our Constitution has become hard-wired by misinterpretation to frustrate such efforts and entrench "Them the States and Factions" as against "We the People." We the People, for our part, wander aimlessly. We flail, and we fail in our attempts at reform. Cursed sons of Adams, we lack even a constitutional vocabulary to describe our predicament.

A Few Good Premises

The keys to these conundrums and the book as a whole lie hidden in plain sight in the book's eloquent, densely argued introduction. Those 17 pages merit careful reading and re–reading. Especially telling are the Introduction's opening citations to primary sources. They define *the* foundational ideas of American constitutionalism according to Mr. Greve.

These foundational ideas are, *first*, Alexander Hamilton's insistence in opening *The Federalist* that it has been "reserved" to Americans to "decide the important question" whether societies are "really" capable "of establishing good government from reflection and choice" and not "accident and force"; *second*, Chief Justice Marshall's *McCullough v. Maryland* statement that constitutions must be "adapted to the various crises in human affairs"; and, *third*, James Madison's "if men were angels" observation from *The Federalist*—the "great difficulty" in forming a government "which is to be administered by men over men" is that "you must first enable the government to control the governed; and in the next place oblige it to control itself."

Mr. Greve reads these sententious and very public statements primarily according to their centuries-old public meaning. But he reads them also and importantly according to how they (sometimes unwittingly) have been reflected and illuminated in the thought prisms of modern jurisprudence, economics, and political science of various ideological and disciplinary stripes—law professor Bruce Ackerman, Nobel economist James Buchanan, constitutional development theorist Ken I. Kersch, political scientist Keith E. Wittington, the Justices of the United States Supreme Court, and others.

These few bedrock constitutional principles, together with the essential further assumption of the Founders' genius and benevolence, become Mr. Greve's springboards to an extended set of *predictions* regarding the federalism elements we should and should not expect to find in the paper document we read today. And those predictions are in turn employed to revolutionize received theories of originalist constitutional construction, the New Deal constitutional revolution, and constitutional interpretation as a whole.

If your legal training or political interests have caused you concern about divisions in our political and legal culture, or if you are intrigued by a truly new approach to interpretation (rooted in the Founding, not someone's moralizing), you should invest the time and grapple with Mr. Greve's analysis.

The Founding Achievement

Mr. Greve emphasizes as an initial matter the paradoxical nature of any decision in favor of a *federal* constitution. "In the *United* States," Mr. Greve asks, "what good are the states?" This question, he finds, "turns out to be very close." Any decision to entrench multiple state governments necessarily means the entrenchment of multiple state political elites, and those local elites, sure as the sun shall rise, will be "prone" to abuse their citizens. Why would any sane, public-spirited person want that?

For two reasons, it turns out. For one, the "first-order choice (federalism yea or nay) is often foreclosed," as it was to the American Founders. If "there was to be a union at all"

in 1787, "some form of federalism was a forgone conclusion." For another, the signal advantage "of entrusting a second set of junior governments with authority over the same citizens and territory" is that this division of authority can be used "to oblige government to control itself."

Our Founders, says Mr. Greve, made Madisonian virtue of historical necessity. They did so by deeply embedding structural (as opposed to expressly textual) "competitive" federalism principles into the Constitution. Those principles aim to "oblige" government at all levels "to control itself." They function, in the first place, by largely limiting "the central government to procuring public goods that can be provided only at that level" and, in the second place, by enabling mobile citizens "to choose among varying bundles of public services and the taxes that come with them," thus forcing "the junior governments to compete for productive citizens and firms." Our federalism is, properly speaking, a federalism for disciplining governments, both state and federal. It is a federalism *for* the people and *against* the political elites—including most especially state political elites.

So far, so simple, so vaguely familiar. All we need to do today, it could appear, would be to revere our Founders, read what they wrote into the Constitution, follow instructions, and parade-step our way to good government. This is the fatal mistake of those who adhere to what Mr. Greve calls "academic originalism."

It turns out that the academic originalists' parade, by wise constitutional design, has no leader—or at least none visible to the naked eye. "Famously," says Mr. Greve, federalism "is not 'in' our Constitution (although it is 'in' many others)." Our Constitution, it turns out, is not "just any old constitution, but a deliberately minimalist constitution that makes politics possible but confidently leaves its shapes and outcomes to future generations." To be properly adapted, in John Marshall's words, to "various crises in human affairs," a constitution must be "minimalist" in this sense. Our Constitution is thus, for Mr. Greve, "a *common law* constitution," and it could not be otherwise without straightjacketing future generations.

To understand such a minimalist constitution, we cannot simply read it. We cannot understand individual clauses without first understanding the whole. And before we can do that, we must tarry long over what the instrument is and what it is intended to do. Above all, and strange as it may seem, we must *classify* it. We must understand the answers it gives to the enduring questions it must necessarily confront—above all, the perennial men-are-not-angels dilemma.

Mr. Greve insists that, in confronting the obstacles to good government found at all times and in all places, our Founders embraced a nearly pure instance of what Mr. Greve, following modern social science, calls "competitive" constitutionalism. For Mr. Greve, the Constitution is therefore not a contract (although it has "contractual elements") but a "coordination device." It enshrines "decision rules" not "distributive consequences." It reflects a "constitutional choice by a single, sovereign people" looking ahead centuries to a very distant time horizon. It is emphatically *not* "a mere bargain among interests, states or elites."

It happens, says Mr. Greve, that our Constitution's individual clauses (together, importantly, with the "great" constitutional "silences") cohere into an elegant, workable, nearly miraculous whole. And it follows that true constitutional advances may be achieved only with great difficulty and only intermittently at "constitutional moments" when the whole people, as opposed to a majority "faction," has achieved consensus on needed improvements—moments likely to arrive only via some recent unmasking and dearly bought defeat of a pervasive and seemingly plausible constitutional heresy.

Indeed, if people's "loyalties to some other collective entity—a tribe, an organized religion, a preexisting state—run too deep," constitutional lawmaking in the American sense becomes impossible. Because loyalties to the Constitution, *qua* Constitution, are likely to become magnified and assume primacy only when the Constitution itself is threatened, constitutional peril becomes almost a precondition for meaningful constitutional advance.

The upshots are that ours is a "competitive" constitution, and it may be importantly advanced only expressly, open-endedly, and intermittently. Proper constitutional change, as opposed to deeper understandings of pre-existing provisions and structures, may occur only through express textual amendments, lest the Constitution be buffeted by "accident and force" not "reflection and choice." Proper constitutional texts, as opposed to ill-conceived attempts to impinge prerogatives of future generations, must remain open-ended, lest the Constitution become a straightjacket. And proper constitutional lawmaking, as opposed to textual clarifications, extensions, and mid-course corrections, may occur only intermittently—at centuries-long intervals when those rare "constitutional moments" arrive.

All History at a Glance

As if all the above were not quite enough for one volume, it turns out there is much, much more. *The Upside-Down Constitution* is laid out in five parts that traverse all constitutional history in dialectical fashion. The initial thesis (Part One) is the Founding. It is for Mr. Greve—as advertised by its admirers—an achievement to the fullest extent practically possible at the time, a *novus ordo seclorum*, a true, qualitative advance in the theory and practice of good government. Beginning immediately thereafter comes the Founding's elaboration, largely by the Supreme Court and from the Republic's earliest days up to the New Deal, in the form of the concrete legal doctrines of a "Competitive Federalism" (Part Two).

Next come the New Deal's antithetical "Transformation" (Part Three) and its extensions and elaboration into what the Supreme Court has called "Our Federalism" (Part Four). As a result of these transformations, the Founders' federalism is upended. Thesis becomes antithesis, and what had been government for the People becomes government for the governing elites. Directly contrary to the Founders' intentions, the New Deal Constitution is "solicitous" of the interests "of the political class in accumulating surplus." It "unleashes factions (now more charitably called 'interest groups') to clamor for

a share of the surplus." "In pursuit of those objectives," it "celebrates political instability."

Mr. Greve, as you likely guessed, makes "no bones" about his own "normative priors." The New Deal's "cartel federalism," says Mr. Greve, dangerously "empowers government at all levels." It is not only "pathological," but "quite probably worse than wholesale nationalization." "A federalism of 'Them the States and Factions' is coherent in its own warped way. But constitutionally plausible it is not."

Finally, comes Mr. Greve's partial synthesis—his analysis of the "State of Our Federalism" (Part Five). This turns out to be both better and worse than what one might expect. On one hand, the picture is meaningfully hopeful. The Supreme Court in the Rehnquist and Roberts eras has learned from history. Unlike the New Deal Court, those Courts have taken the Founders seriously. Unlike the pre-New Deal "Old Court," those Courts have consciously eschewed empty "formalisms." Special praise here is offered for specific Rehnquist and Roberts Court decisions, including (for example) the seemingly run-of-the-mill decision in *Polar Tankers v. City of Valdez* (2009).

Writing on the clean slate of a constitutional provision not recently adjudicated, Mr. Greve finds *Polar Tankers* avoiding the types of errors characteristic of both the Court's New Deal and pre-New Deal decisionmaking. Unlike New Deal opinions, Justice Breyer's *Polar Tankers* opinion recognizes what's really going on; namely, the state of Alaska's thinly disguised attempt to tax interstate commerce for Alaska's own benefit. But in contrast to many pre-New Deal opinions, the basis for invalidating Alaska's law is not some indefensible "formalistic" distinction. It is, rather, a frank and open application of a "principle against circumvention" of express constitutional texts—a logical principle that has operated "from time immemorial" in a wide variety of legal cultures and settings.

On the other hand, says Mr. Greve, even the Roberts Court is not going far enough or moving fast enough. The Court continues to permit state raids on the commerce of the United States by failing to rectify past mistakes made under comparatively obscure doctrinal headings such as diversity jurisdiction, federal abstention, personal jurisdiction, conflict of laws, federal common law, federal preemption, and the Contract Clause, among others. The Court continues to permit (or even to lead) federal raids into local concerns of manners and morals. And, says Mr. Greve, the Court largely throws up its hands at the urgent fiscal crisis brought about by "cooperative" spending programs—programs that have brought both states and the federal government to the point of a fiscal precipice.

A Revolution in Constitutional Thinking

To follow Mr. Greve's example and declare "normative priors," I should say here that I believe this book, together with the variations and elaborations on its themes I expect to see in coming years, will prove over time to be the best and most influential academic treatment of American constitutionalism, by far, ever. (I should say also that, according to the book's acknowledgements, I am one of a trio owed "a particular debt of gratitude," along with Chris DeMuth, who hired Mr. Greve as a scholar at the American Enterprise Institute and sponsored the project in multiple ways, and Professor Richard Epstein, who has co-edited scholarly books with Mr. Greve. I reviewed and extensively commented on drafts of the book while it was in composition.)

To be sure, I have important disagreements with Mr. Greve's analysis and recognize that there can never be a last word on American constitutionalism. Judges who read it may well ask whether the book's multiple criticisms of retail-level legal doctrines in the wake of the New Deal shouldn't have come coupled with more thoroughgoing improvement suggestions. Lawyers like me will wonder whether the book's most innovative doctrinal proposal, its suggestion for new grounds for the old "dormant Commerce Clause," is any better than the familiar, old grounds that have been proposed and debated for two hundred years.

More fundamentally, even general-interest readers may ask whether Mr. Greve's anti-New Deal rhetoric isn't a tad excessive. Mr. Greve agrees with many prominent and crucial features of New Deal constitutionalism. He specifically agrees with the New Deal's confirmation of expansive federal commerce and spending powers and the demise of exacting and direct judicial scrutiny of state social and economic laws. Indeed, one of the book's signal merits is that, by moving to a structural but nonetheless solid plane of argument, it defends the New Deal's most essential achievements more effectively than the New Deal Court at the time and the New Deal's ardent admirers in succeeding decades. The great hope here is that Mr. Greve's book will definitively resolve any simmering constitutional doubts about the New Deal's essential core in the same way that, decades later, academic researches by Professor Michael McConnell provided a definitive defense of *Brown v. Board of Education*. In both cases, it turns out, the Supreme Court was righter than it knew at the time.

In fact, Mr. Greve's pointed, anti-New Deal rhetoric is all the more open to question given his acknowledgment that the Old Court's "formalism" had run its course and his extensive reliance on political economy literature unknown (because not yet written) in the late 1930s and early 1940s. Add in the flawed historical scholarship of those times, plus recondite logics Mr. Greve knows well but the New Deal Justices found impenetrable, and the New Deal's failure to proceed directly to structural constitutional understandings in line with Mr. Greve's seems understandable and (dare we say) excusable.

Constitutional Interpretation 2.0

All that said, it remains true, I believe, that *The Upside-Down Constitution* will prove over time to be a preeminently influential treatment of American constitutionalism. Read as intended, it has no lineal ancestors but does have a striking analogue in Richard Posner's *Economic Analysis of Law*.

In our own day, Judge Posner read common law in the shadow of Holmes but by the light of Nobel economics laureate Ronald Coase and found logical coherence of a type last fully asserted in the eighteenth century by William Blackstone. So Mr. Greve now reads constitutional law in the shadow of Professor Ackerman but by the light of Nobel laureate James Buchanan to assert a logical constitutional coherence last fully appreciated by the Founders.

The book's audacious argument is that we can and must train our minds to *derive* the basic elements of our Constitution from a handful of foundational premises. We need to be able to predict what *should* appear there in order to interpret what *does* appear there.

As noted, Mr. Greve insists on but few premises. Our Founders worked against a backdrop that made "some form of federalism" a "forgone conclusion." They knew that men are not angels. They crafted "auxiliary" constitutional "precautions" to protect We the People from Them the States and Factions. They opted wisely for constitutional minimalism. They established decision rules, while leaving future politics to future generations. Favored as they were by circumstance, they were able to compose and enact a document based on "reflection and choice"—and for this reason their document legitimately may be read as a logically coherent whole.

Those few, spare assumptions—without much more than further assumptions of the Founders' genius and benevolence—gets us, according to Mr. Greve, to where we can place ourselves behind a false veil of ignorance and then use recent breakthroughs in political economy to *predict* the federalism elements we will and won't see when the veil is drawn back. We must ask ourselves, by modern lights, what we would *predict* men of such genius, driven by such benevolence, facing such circumstances, would ordain and establish for themselves and their posterity. And voila, what we have just predicted in false ignorance appears before our eyes—right down to the Tonnage, Compact, and Port Preference Clauses. Now, and only now, the real work of interpretation can begin.

Originalism 2.0

If Mr. Greve's thesis proves true, an early casualty on the intellectual battlefield will be what is sometimes called "academic" or clause-bound constitutional originalism—the idea that legal texts, including and especially the Constitution, should be interpreted largely or solely according to public understandings of the words at the time they were written. The classic formulation of this strand of interpretive thought may be Judge Bork's:

> The search for the intent of the lawmaker is the everyday procedure of lawyers and judges when they must apply a statute, a contract, a will, or the opinion of a court. To be sure, there are differences in the way we deal with different legal materials, which was the point of John Marshall's observation in *McCulloch v. Maryland* that "we must never forget, that it is a constitution we are expounding." By that he meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a document that could not, by its nature and uses, "partake of the prolixity of a legal code." . . . Thus, questions of breadth of approach or of room for play in the joints aside, lawyers and judges should seek in the Constitution what they seek in other legal texts: the original meaning of the words.

The fallacy of this thinking, according to Mr. Greve, is that it acknowledges but still underestimates the vital importance of Chief Justice Marshall's command that we must never forget it is a *constitution* we are interpreting. The point of the Great Chief Justices's pronouncement is not just that constitutions contain "broad provisions" that preclude "narrow, legalistic reasoning." The actual point, Mr. Greve insists, is that before reading a particular legal text, we must understand the class of document that contains the text. Hence, we also must never forget that it is a *statute*, or a *contract*, or a *will* that we are interpreting, when occasion calls for interpreting those kinds of documents—just as we must never forget, when occasion demands, that it is a *constitution* we are interpreting. The whole point is that written, binding, legal instruments differ in kind from one another.

The consequence is that, if Step One of constitutional interpretation is (as the Supreme Court likes to say) careful reading of text, then a necessary and logically prior step—call it interpretive Step Zero—is a critical examination of the oft-overlooked fact that the text appears in a constitution, not some other kind of legal document.

According to Mr. Greve, we must know at Step Zero what constitutions are and what they do, generally speaking. We must examine the particular constitution in question as a whole—including, importantly, what it omits. And we must know a lot about that constitution's history of interpretation and application. Only in this fashion do we know the function each constitutional element is intended to perform, and only by knowing those individual functions can we discern those elements' proper scope of application—and unmask attempted circumventions of them as in the *Polar Tankers* case. We cannot know anything until we see the logical coherence of everything.

The academic originalists' great mistake lies, therefore, in trying to shortcut the interpretive process by skipping over the hard work of wrestling with the Constitution as a whole before getting down to the brass tacks of its individual clauses. They short-circuit or avoid Step Zero. They short-change the highest-level questions that preoccupied our Founders: What is a written constitution? What should go into and be left out of such a document? What are the "great difficulties" in framing such a document? What relationship is there between the constitutional enactments of a particular time and their application to "posterity"? How can such governance from beyond the grave be legitimate?

Mr. Greve contends that it is only by studying politics from the Framers' vantage, with such high-level questions in mind, that today's Americans can correct their constitutional course and right their ship of state. It is against this backdrop that John Adams' well-meaning benediction—that his sons and grandsons might avoid studies of "politics and war" and enjoy a quiet life studying everything from "mathematics and philosophy" to "statuary, tapestry, and porcelain"—becomes for Mr. Greve a nation-threatening curse. There is, of course, plenty of political studying still going on. Indeed, judging from *The Upside-Down Constitution*'s endless endnotes, Mr. Greve has read all of it. But notwithstanding our brimming academic journals, Mr. Greve insists, "we have forgotten an awful lot" that is crucially important.

The New Deal 2.0

If Mr. Greve's analysis is sound, a second intellectual casualty will be our received wisdoms, both positive and

negative, about New Deal constitutionalism. In Mr. Greve's telling, the twentieth-century law's empire of the New Deal resembles the British Empire of olden times—justified as benevolence, impelled by profit ("rent seeking"), acquired in an absence of mind. Mr. Greve asserts in a revealing passage that the New Deal "never even aspired" to "reasoned engagement" in a constitutionally "honorific" sense. This is why, according to Mr. Greve, there is no "New Deal equivalent of the Declaration of Independence, the *Federalist Papers*, or the Gettysburg address."

Mr. Greve's views are thus ironically parallel to those of New Deal historians (like Arthur Schlesinger, Jr.) who see in the political clash over the New Deal a struggle between forces of enlightened benevolence and benighted self-interestedness. But in Mr. Greve's telling (unlike Professor Schlesinger's), it is the New Deal, not its opponents, that embodies self-interestedness and reaction.

In this revisionist telling, just as a sovereign monarch used to be duty-bound to protect the People's rights against invasions by local dukes and earls, so the sovereign United States Constitution assigns this same function to the federal government—and especially to the United States Supreme Court as the Constitution's first ambassador to future generations. Not surprisingly, under republican government as under monarchial government, the dukes and earls chafe at their yoke, long to be rid of it, and conspire continuously against the sovereign's defense of the People's rights. And in the New Deal era, says Mr. Greve, the local chieftains at last prevailed in a constitutional overthrow, abetted by unique political conditions; informed by practical wisdom acquired over decades of constitutional experience; and enabled by an intellectually shallow or (sorry to say) intellectually corrupt Supreme Court. This narrative is novel, well-defended, and pointedly expressed. It makes for compelling reading. It will infuriate some of the New Deal's admirers.

On the other hand, Mr. Greve takes further, albeit less-impassioned, aim at New Deal constitutionalism's most ardent detractors. What about the expansion of federal spending powers beyond the bounds of the enumeration of other federal powers by the Constitution? Perfectly legitimate, says Mr. Greve, relying on Alexander Hamilton. What about the expansion of federal authority over interstate commerce to the point of allowing wheat-market cartelization and prohibiting farmers from feeding their own homegrown wheat to their own home-bred cattle? Perfectly legitimate, says Mr. Greve, relying on Chief Justice Marshall. Those results, he says, follow necessarily not only from the public meaning of the relevant texts but also from the structural fact that ours is a "minimalist" constitution.

Concededly, these last propositions may surprise those who've read about Mr. Greve in the national newspapers. The *New York Times Magazine* did a feature article on Mr. Greve and others a few years back, the thesis of which was that Mr. Greve (and these others) were part of a movement to overturn the New Deal and bring back an old version of the Constitution from "exile" in order to achieve a great triumph of constitutionalized libertarian economics. *The Upside-Down Constitution* dispels such notions. It clarifies Mr. Greve's belief that Washington can cartelize, regulate, or prohibit practically every economic activity—putting aside the wisdom of doing so.

Less obviously, but equally important, Mr. Greve and the New Deal Justices agree that "the Old Court's justices"—that is, the pre-New Deal Supreme Court—"failed to realize that the formalism that once had been their strength was rapidly turning into a liability." On an intellectual plane, then, Mr. Greve sees the New Deal Court's failing, not in its disavowal of "formalism" or its quest for a new "functional" jurisprudence, but in its inability to attain a functional jurisprudence he finds "constitutionally plausible."

The bottom line for Mr. Greve is a New Deal Court that could recognize problems but was too inept (or intellectually misguided) to craft solutions. Upon sensing the impossibility of sustaining doctrine based on formalistic distinctions, the New Deal Court could have, for example, shifted the doctrines delimiting the federal government's enumerated powers from the old "formalisms" to what might be called a "serviceable functionalism"—perhaps by stressing that not everything that happens in the world can be deemed "commerce" subject to federal regulation, but nonetheless interpreting "commerce" meaningfully, functionally, and capaciously to encompass all non-fraudulent, voluntary transactions for value. This is, of course, very close to what the Supreme Court has said and done in the Rehnquist and Roberts eras. Mr. Greve wonders why it could not have happened sooner.

The New Deal is for Mr. Greve a legal sandwich of nourishing meats between moldy bread slices. The nourishing meats are the center of the New Deal, the New Deal constitutional reforms that non-specialists know about—those having to do with expanding federal authority to regulate economic activity; letting loose Social Security-scale federal spending initiatives; letting states run their local monopolies free of direct judicial supervision and correction. Those cases, says Mr. Greve, were correctly decided. Indeed, not only were they correctly decided, they embody a goodly degree of correct (if hazy) constitutional insight.

But this healthy constitutional center comes, according to Mr. Greve, at an intolerably high cost of top-level confusion (or downright ignorance) about constitutionalism as such, plus, its inevitable consequence, near-total disarray in ground-level doctrine. If there are more than a few oddball instances of New Deal Justices penning decisions that can pass Mr. Greve's exacting muster in the handling of commonplace constitutional doctrines, Mr. Greve can't think what those could be. Moreover, Mr. Greve sees all the most characteristic New Deal flaws—ignorance of constitutionalism, doctrinal disarray, persistent confusion—converging, discouragingly, in the New Deal Court's signature opinion in *Erie Railroad v. Tompkins*.

For Mr. Greve, *Erie* is one of "the most central decisions" in "the entire history and architecture of American constitutional law" and represents "the general sense of an entire generation of judges and legal scholars." Although greatly and importantly qualified by "new" strands of federal common law, *Erie*, unlike other Supreme Court decisions of like consequence, has avoided serious challenges to its fundamental legitimacy for 75

years now. What could appear more legitimate, after all, than the Supreme Court exercising common-law decisionmaking powers to yield common-law decisionmaking primacy to state governments, as *Erie* professes to do?

And yet, according to Mr. Greve, *Erie*'s supposedly irreproachable, once-for-all-times dismantling of the Constitution's common-law substructure constitutes the New Deal's preeminent and irredeemable theoretical and practical mistake. On a theoretical level, *Erie* rests on premises of "rank" legal "positivism" that are inconsistent, all at once, with eighteenth-century, nineteenth-century, and modern understandings of common law. On a practical level, *Erie* leaves in disarray the ground-level doctrines implementing the People's vital interest in protecting their interstate and international commerce from expropriation by state and local governing elites. With the substructure of common law gone, Mr. Greve insists, the Court finds it difficult or impossible, theoretically and practically, to craft workable conflict-of-laws and federal-preemption doctrines. It finds it difficult rhetorically to justify a properly expansive jurisdiction for the federal courts.

And with these doctrines neutered and the federal courts' jurisdiction restricted, says Mr. Greve, our streams of commerce have come to resemble the rivers of Germany before the *Zollverein*. Our economic enterprises, in this brave New Deal world, are liable to being taxed or looted without definable limit by every self-interested "interest group" that can win friends and influence people in any state legislature, administrative agency, or attorney general's office throughout the country.

Mr. Greve's New Deal is, therefore, truly new. In his telling, nearly all of the New Deal's supposed doctrinal crimes were legitimate. But nearly all of its supposedly legitimate doctrinal developments were crimes. The New Deal in this telling is every bit as bad as its worst critics had feared. But it is bad for reasons that have lain almost entirely overlooked—until now.

The Promethean Cassandra

Mr. Greve's new New Deal is as central to his work as is his Founding. Indeed, absent this central figure, one might wonder whence cometh his distinct undertones of controlled outrage and pervasive pessimism. Why such gloomy undertones in a book so redolent with heady overtones of Promethean breakthroughs?

There is of course the prior question of whether those breakthroughs are real. At the end of the day, can it really be that a scholar might return in thought to Liberty Hall; listen intently to what was said and done there; insert those sparkling insights into the context of what has since been said, and done, and learned; and then descend the Liberty Hall steps several years later with tablets etched with the long-forgotten but newly revalidated principles of '87—and in the process synthesize swaths of economics, jurisprudence, and political science and resolve the raging debate between partisans of an original Constitution and those of its living doctrinal embodiments? (As Mr. Greve himself says, "I recognize the presumptuousness, and perhaps the implausibility, of my intellectual enterprise.")

But even (and especially) for readers like me who are inclined to grant the accomplishment of some such feats, a striking fact is the absence of tones of triumphalism from this time-travelogue. It is remarkable that our intrepid Prometheus, having returned from 1787 free of Adams' curse, delivers himself of Cassandra's prophesy.

Mr. Greve frets himself by having the courage of his convictions and insisting on the powerful gravitational force of even an inverted constitutional logic. He frets because he believes, deeply, that the Constitution's structure remains coherent but becomes pernicious when interpreted according to the interests of "Them the States and Factions." Just as the Constitution's authentic logic was the great invisible hand benevolently guiding judicial decisions for the good of We the People, back when the Constitution stood upright, so now the inverted constitutional logic forms *the* present-day stumbling block to decisions being made for our benefit.

When precisely did this inversion from government for the People to government for governing elites become entrenched? According to Mr. Greve, on the morning of April 25, 1938, when *Erie* was decided. And when, according to Mr. Greve, shall We the People overcome? Some day, surely, but only when the *Erie* doctrine (albeit probably not the *Erie* holding) surrenders unconditionally to higher constitutional principle. It is the remote distance of that future day—together with the constitutional toil and torment he predicts for the interim—that so troubles my dear friend, Mike Greve.

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